



SELECT COMMITTEE ON THE BRIBERY ACT 2010

COLLATED ORAL EVIDENCE VOLUME

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Nicola Hewer and Michelle Crotty – Oral evidence (QQ 1-25)

Tuesday 3 July 2018

10.35 am

[Watch the meeting](#)

Members present: Lord Hodgson of Astley Abbotts (Chairman); Lord Empey; Lord Grabiner; Lord Haskel; Lord Hutton of Furness; Baroness Primarolo; Lord Stunell; Lord Thomas of Gresford.

Evidence Session No. 1

Heard in Public

Questions 1 - 25

Examination of witnesses

Nicola Hewer and Michelle Crotty.

The Chairman: Thank you both very much for coming along this morning. As you will have gathered, I am not Lord Saville of Newdigate, but he is away and I am standing in for him. I have to read the formal words to you. A list of interests of Members relevant to the inquiry has been sent to you and is available. Since this is the first public meeting of the Committee, Members will declare interests on the record when they first speak. The session is open to the public, is being broadcast live and is subsequently accessible via the parliamentary website. A verbatim transcript will be taken of the evidence and will be put on the parliamentary website. A few days after this session, you will be sent a copy of the transcript to check its accuracy. It will be helpful if you could advise us of any corrections as quickly as possible. If, after this evidence session, you wish to clarify or amplify any points made during your evidence or have additional points you would like to make, you are welcome to submit supplementary evidence to us then.

Finally, we are grateful to you for the Government's memorandum to the Committee on post-legislative scrutiny of the Bribery Act 2010. Could I ask you briefly to introduce yourselves, and then we will go to the questions? Ms Hewer, would you like to go first?

Nicola Hewer: I am Nicola Hewer; I am Director of Family and Criminal Justice Policy at the Ministry of Justice, so it was one of my teams that led on the Bribery Act and will have produced the post-legislative memorandum for you.

Michelle Crotty: I am Michelle Crotty; I am Director at the Attorney-General's Office. We superintend the prosecutors. The Attorney has accountability to Parliament on behalf of both the prosecutors—the Serious Fraud Office and the Crown Prosecution Service.

The Chairman: I will open with the first question, which is about why the number of criminal proceedings under the Bribery Act is consistently so low. What

does this signify? Why have there been no prosecutions under Section 6 of the Act?

Michelle Crotty: Can I start with a point on prosecutions? If we go back to the purpose of the Act initially, it was twofold: to consolidate and also to modernise the law. It was not anticipated that there would be a significant increase in corruption or bribery prosecutions. The other thing to bear in mind is that it only applies to offences from when the Act came into force. There are still prosecutions ongoing under the old Prevention of Corruption Act. In the four-year period from 2014 to now, there have been 107 prosecutions under the Prevention of Corruption Act, as well as the convictions under the Bribery Act.

The other thing is that fraud offences are sometimes used by prosecutors instead, when they look at the evidence. Fraud by abuse of position, for example, can sometimes be used. It is quite difficult to get underneath the statistics on that, because of the way they are kept, but prosecutors are confident that prosecutions are being brought in relation to bribery and corruption.

What does it signify? There is an increase. There have been 10 charges brought by the Serious Fraud Office in that period and 26 by the Crown Prosecution Service, and that has been increasing. There were 13 in 2016 and 13 in 2017 by the CPS. Some of those cases are still working their way through the system. The Attorney does not have concerns that there are fewer prosecutions than he would have imagined. The other aspect of this is also the deferred prosecution agreements, but I know we are going to come on to those separately.

Nicola Hewer: There is nothing to add from our perspective.

The Chairman: Will we in future bring prosecutions under the Prevention of Corruption Act, or has that now died away?

Michelle Crotty: It depends on when the offences are committed. The prosecutors are still investigating some quite historic offences. The Rolls-Royce DPA, for example, covered a period both before and after the introduction of the Bribery Act. I am loath to say at what point, but there will be a point at which the Prevention of Corruption Act offences will cease.

Lord Haskel: Why does it take so long?

Michelle Crotty: That is a good question and it does not just relate to bribery offences. The reason for bribery offences is they are often multijurisdictional; they are not just based in the UK. They are quite complicated in obtaining evidence from other jurisdictions and going through those legal processes. Where companies are involved, trying to work through the corporate structures and those sorts of issues takes quite a long time. We regularly challenge the Serious Fraud Office and the CPS on the length of investigations in particular. Once they get to a charge point and they are in the court system, there is a reasonable pace on them, but there is a genuine issue around complexity.

Lord Haskel: Do you have a cut-off date—after 10 years or something?

Michelle Crotty: No, we have not gone down that route and I do not anticipate that we will. On average, SFO cases, which are at the more complex end, can take up to four or five years. There is certainly an increased push for efficiency and for them to identify what their case is likely to be as early as possible. I think imposing a fixed cut-off date could cause some difficulties, but I see the point.

Lord Thomas of Gresford: We have statistics in front of us from the Government's memorandum. I wonder if you can clarify them for me. The statistics are of defendants proceeded against at magistrates' courts and found guilty and sentenced at all courts. What exactly does that mean? Presumably all proceedings start in the magistrates' court and go to the Crown Court. How many of these are dealt with by magistrates?

Nicola Hewer: Unfortunately, splitting figures between the magistrates' courts and the Crown Court has been problematic, which is why the statistics are presented in this way. As you say, all of the cases start in the magistrates' courts. We would expect, given the nature of the offending, that most of them are sent to the Crown Court and dealt with there, but the way in which the Courts Service captures the information means that is the one split that we have unfortunately not been able to do yet.

Lord Thomas of Gresford: You appreciate that does not give us very much of an idea of how many serious cases are prosecuted or whether they are simply slipping money to some minor official. Are you doing any work to clarify the statistics for the future?

Nicola Hewer: We are not at the moment, no. The outcome gives some sense of the seriousness. As you will see, most of them are getting immediate custody and the magistrates' sentencing powers are limited, so it is likely that most of those immediate custody cases are more serious. No, I am afraid we do not at the moment have plans to split those out in that way.

Lord Thomas of Gresford: Would you agree that there is a huge difference between a magistrates' court conviction and, for example, the sort of scale of bribery that we are concerned with when it comes to deferred prosecution agreements?

Nicola Hewer: Yes, we would agree.

The Chairman: Since the numbers are not very great, would it be possible for someone to scan the file and produce some supplementary evidence to answer Lord Thomas's question?

Nicola Hewer: We can certainly see if we can provide more, but these go back many years. You will appreciate that finding said file, let alone working out which case it was and what the outcome was, may be difficult. Let us write to you and see if there is any more that we can do in this regard.

The Chairman: The Committee is not asking you to answer now.

Michelle Crotty: The prosecutors may be able to help. The Serious Fraud Office cases, for example, would all go to the Crown Court. That will take some of them out already, and we will speak to the CPS about identifying those that were dealt with in the magistrates' court. It may be that they were committed for sentence even if they pleaded in the magistrates' court, even if they were at the lower level.

Lord Thomas of Gresford: What follows from that is that we have no concept of how trivial some of these offences may be and what your level of prosecution is. Even the sentences would help. If someone gets three months, it would be different in seriousness from someone who gets five years.

The Chairman: The prosecutions under the old Act are carried out by whom?

Michelle Crotty: The prosecutions are all carried out independently by the prosecutors. The difference between the Prevention of Corruption Act 1906 and the Bribery Act is that the old offences require consent from the Attorney-General to prosecute. Those 107 will have been given consent from the Attorney. Under the Bribery Act offences, consent is internal to the organisation, so it will be either the Director of the Serious Fraud Office who agrees to the prosecution or the DPP.

Lord Empey: May I just ask Michelle Crotty a supplementary? You mentioned 107 under the old legislation. Is that current or covering the same period since the introduction of the Act?

Michelle Crotty: I would need to double check, but my understanding is that it is all old offending, so pre-2010 offending.

Lord Empey: Is it still in the system?

Michelle Crotty: To use the example of Rolls-Royce, it may be that the period of offending covers either side of the 2010 Act, so you would essentially need offences that cover both timespans.

Lord Hutton of Furness: In his first question, the Chairman noted that there had not been any prosecutions under Section 6 of the Act, which deals with bribery of foreign public officials. Have there been any investigations involving Section 6 of the Act conducted by either the Serious Fraud Office or the Crown Prosecution Service?

Michelle Crotty: As far as the Serious Fraud Office is concerned, I do not think there have been as yet. Obviously when it receives a referral, either from a member of the public or whoever, it will look at the range of offences, but I would need to check whether there has been a formal investigation into a Section 6.

Lord Hutton of Furness: That would be the SFO.

Michelle Crotty: That would be the SFO. It is more difficult with the CPS, because it is essentially a receiving organisation. If the police or National Crime Agency had investigated and concluded that there is not sufficient evidence of a Section 6 offence, it would not even get as far as the CPS. I can certainly make inquiries with the Serious Fraud Office about investigations for Section 6.

The Chairman: If the section is not used at all, we may be wondering why it is there.

Lord Haskel: The Bribery Act 2010 makes no specific exemption for facilitation payments. In some countries, such as the United States, they make specific allowances for this. Why do we not do that in the UK and is it being considered?

Nicola Hewer: I would start by pointing out that, as we have said, the Bribery Act was in the main a consolidation and systemisation of existing legislation. Under the legislation that we were revising and modernising, facilitation payments were not a concept and were not excluded so, in many ways, the Bribery Act has continued the UK position by not exempting facilitation payments, so it is not a change.

It is fair to say that we are far from an outlier from other OECD countries. There are many other OECD countries that do not make a provision to exclude facilitation payments. Even in the United States, there are some limitations around the extent to which they are exempted. The UK Government position across departments is that it is right to take that hard line and to say that all payments are a form of bribery. There is emerging evidence that facilitation payments for companies that are involved in bribery, in the long term, cause detrimental impact to their overall efficiency and performance. We recognise that that is a tension where there is not an entirely level playing field, but there are currently no plans to look at the issue of facilitation payments.

Lord Haskel: You do not differentiate between a single payment and a run of payments or regular payments. I seem to remember that, in the United States, the test was that if you could persuade the auditors to put it down as a business expense, you could do it.

Nicola Hewer: Their exception is relatively restrictively interpreted. They exclude very low-value payments that are relatively one-off, but if there was a pattern they would catch those. The legal position and the guidance are clear that we consider facilitation payments to be bribery. This is a very difficult and nuanced area, but there is no evidence that either SFO or CPS prosecutors are expending vast amounts of time or energy pursuing companies for that sort of activity. The evidence that we have and what we hear from across government and in engagement with companies, particularly larger multinationals but also SMEs that have a presence in some markets, is that they recognise that engaging in a race to the bottom around dirty money is not helpful. We have not received pushback that they would like us to change that position. It is difficult but, in the main, the OECD is very clear and it considers there should be zero tolerance of

facilitation payments. We are not an exception, by any means; we are with the majority in our approach to facilitation payments.

Baroness Primarolo: Good morning. You talk about not receiving any pushback on facilitation, but you also talk about a level playing field. In your view, is the lack of a special allowance for facilitation payments unfairly penalising UK companies or limiting UK business opportunities abroad? I understood the point about this not being a race to the bottom, but would we be having this conversation if New Zealand, which does very well in the international comparisons, prohibits these payments, which it does not? I am trying to get an understanding about how businesses see it, and whether they think it is unfair and that it is not a level playing field with best practice in other very high-standard countries.

Nicola Hewer: Direct engagement with business is not necessarily an area that the Ministry of Justice leads on in relation to some of these provisions. The Department for Business, Energy and Industrial Strategy, the Department for International Trade and, to some extent, DfID are much closer to this issue, so I am fairly limited in how much further I can go. For example, DfID recently led an engagement process with over 80 companies to establish the scope and nature of demand and whether they are satisfied with the support from HMG to help UK companies prevent bribery in frontier markets. The feedback we received from the engagement with those officials is that, broadly speaking, companies understood our position. They did not expect and were not requesting a change, but I confess it is not an area in which my department directly engages with business regularly.

Baroness Primarolo: It would be an area that your department should be aware of in seeing whether or not this Act is behaving in a way that is expected, so you must be actively considering what is being said.

Nicola Hewer: Yes.

Lord Haskel: Following on from what Lady Primarolo was saying, how many outstanding cases are there where facilitation payments are the reason that firms are being prosecuted?

Michelle Crotty: The Committee is due to hear evidence from the prosecutors directly. As the Attorney's office, we do not have the details of all the cases, because there is this operational independence point. I come back to Nicola's point that there is almost a threshold around payments. If it is a single payment of a relatively low value, I am not saying that it would not be investigated or prosecuted but, even if there was evidence, it would be quite difficult to justify the prosecutor's decision to prosecute under public interest. In terms of how many cases are outstanding on the basis of investigations, I am unable to assist. That would need to be addressed to the prosecutors directly. It would only apply to the Serious Fraud Office, because it investigates and prosecutes, whereas the CPS only deals with what it is given by the police and the National Crime Agency.

The Chairman: Lord Thomas, the clerk has just reminded me that you have an interest to declare, which you are supposed to put on the record the first time you speak.

Lord Thomas of Gresford: My interest is as a former member of the previous committee on the Bribery Bill, but also as a Queen’s Counsel specialising in criminal advocacy including fraud. I am just interested in whether you are aware of any investigating authority—the police, customs or anybody—sending a file to the CPS for facilitation payments.

Michelle Crotty: I am not and I would not expect to be, if I am being frank, because those are operational decisions. It would only come to the Attorney if it was under the Prevention of Corruption Act. If it was a facilitation payment under the Bribery Act, it is entirely a matter for them as independent prosecutors. There would be no reason for them to advise the Attorney of that, but it is a question you could legitimately put to the prosecutors.

Lord Thomas of Gresford: Yes, we can pursue it. Deferred prosecution agreements are an innovation that started in 2014. Are they working effectively under the Bribery Act?

Michelle Crotty: From the prosecutors’ perspective, they would say that they are working effectively. There have been four deferred agreements, three involving the Bribery Act and one, Tesco, involving Fraud Act offences. They have brought in a new relationship between the Serious Fraud Office and business in particular, in terms of encouraging early referrals and self-referrals from business when they uncover behaviour that is not acceptable. Apart from the prosecution side of things, there is also some emerging evidence that they are encouraging business to proactively put in their own compliance regimes and so achieve the aim of the Act, which was partly to encourage good governance and consideration of bribery as part of that. It is too early to give detailed figures, but certainly the SFO’s perception is that it now engages in a different relationship with business.

Lord Thomas of Gresford: Do you think it was helpful for the first large deferred prosecution agreement to be negotiated with Rolls-Royce where there was no self-reporting? Does that not undermine the policy behind the institution of those agreements?

Michelle Crotty: Certainly self-referral is one of the key factors that the prosecutors consider.

Lord Thomas of Gresford: It did not happen. Did you give them a message about that?

Michelle Crotty: It did not happen in Rolls. There is a range of situations in which DPAs could be deployed. Lord Justice Leveson, in dealing with the judgment on Rolls-Royce, went through in some length what he described as the “extraordinary co-operation” that was given by Rolls-Royce once the referral had been made. There are cases when, even if the company does

not self-refer, once the investigation begins the level of their co-operation is such that it meets the other criteria in the public interest and does not undermine.

It would be fair to say that self-referral would generally be the starting point and the expectation of prosecutors, but the safety valve in all of this is that the DPAs are not simply negotiated by the prosecutors, so any concern that they might be attempting to carve things up should be allayed by the fact that there is complete judicial oversight of the process. It was Lord Justice Leveson, President of the Queen's Bench Division, who dealt with that case and has in fact dealt with the other three DPAs to date. There is an emerging line of judicial authority, as you are aware, on how the negotiations should be conducted, what the penalties should be and what the preconditions should be on the prosecutors opening a negotiation on a deferred prosecution.

Lord Thomas of Gresford: There is another large company that seems to be subject to an investigation starting in 2016. Does the negotiation of the deferred prosecution agreement depend on the size of the business or can it be with any business?

Michelle Crotty: It could be with any business. There is nothing in either the legislation or any of the codes or guidance that restricts it in any way. One of the four has been a smaller company. Obviously the headline-grabbing ones are Rolls-Royce and Tesco, but there is no threshold below which a company will not get a DPA. It depends on early co-operation and engagement with the prosecutor, even if it is not a self-referral and, once the investigators are engaged, the extent of co-operation from the company.

Lord Grabiner: Good morning. I am interested in the mechanics of the DPA machinery, in this respect. Is it the practice of the prosecutor only to be prepared to participate in a DPA or to give one if satisfied that the party with which they are having this negotiation is guilty of the offence? In other words, is the approach one of negotiation without necessarily having regard to whether or not this will result in a conviction?

Michelle Crotty: No.

Lord Grabiner: You got the gist of my question, although I have not expressed it very clearly. The impression I have is that the precondition applied by the prosecutor is that he or she has to be satisfied that the case should be prosecuted, and indeed is prosecuted, before an investigation is conducted.

Michelle Crotty: Yes, they will apply the Code for Crown Prosecutors and the test, of which there are two elements. They have to satisfy themselves that the case would meet the evidential test, so they have to do a reasonably thorough investigation. It is not just a question of opening negotiations with a company without having satisfied themselves that there is evidence of offending there. Once they have got to that, when they would normally move to the second stage, which is the public interest

stage, as part of that they then consider whether a DPA negotiation should at that point be opened with the company under investigation. There is a requirement for them to satisfy themselves.

Lord Grabiner: That requirement is devised by the prosecutor. It is not a statutory requirement, is it?

Michelle Crotty: It applies from the Code for Crown Prosecutors, which applies to every offence on which they look to make a charging decision. That itself is drawn from statute, but there is no requirement in the Bribery Act itself.

Lord Grabiner: In a way it makes it more difficult—I will be crude about it—to do a deal. It might be a lot more effective if it were made clear to the other party, “We are satisfied in principle that there was some serious wrongdoing here. We are not going to go to the expense and difficulty of investigating, beyond reaching a prima facie conclusion that there was some serious misdeed here, but we are interested in doing a DPA with you, because we think that you will have learned the lesson”, which at the end of the day is quite an important point. That would be a cheaper way of going about it, and I suspect it would improve the quality of legality among the people on the other side of the story. Maybe it would do the job quite efficiently. I do not know what you think about that.

Michelle Crotty: There may be something about PACE. The prosecutors will have to speak to this in detail but, from a principle perspective, there is the idea of a cursory investigation having been done and prosecutors then making a pretty extraordinary decision not to prosecute a company where there is evidence of serious wrongdoing, without having satisfied themselves that there was not anything else in the background. I think there is something about PACE and how quickly they can get to those decisions.

The DPA code and the guidance for prosecutors set out the mechanics in detail. I appreciate that they are not necessarily the easiest documents to read. To be fair to the prosecutors and the SFO, they have been working their way through this and finding their feet a little. The DPA system is very new. They have been wary of being criticised by the courts and the public about cutting deals for serious criminality. As the DPAs bed into the system more, we could expect to see everybody involved in them becoming more confident about how they are negotiated. I certainly think PACE is something that we all need to keep an eye on.

The Chairman: Lord Empey, the clerk has nudged my elbow that you have an interest to declare too.

Lord Empey: I am a vice-president of the Institute of Export and International Trade. With regard to the DPA, large organisations seem to have monopolised it so far. Is there a risk that for a sophisticated and large organisation with significant resources, both legal and other advice, there is a temptation perhaps to gravitate towards a DPA? For a smaller organisation without that level of sophistication, there might be simpler,

more direct ways just to prosecute and be done with it. In other words, even if it is not deliberate, is there institutional bias against a small organisation?

Michelle Crotty: I do not think there is. It is quite difficult to unpick that, though, because the SFO is the organisation that has led the way on this. There is something about the nature of the offences and the organisations that it investigates and prosecutes that might tend to suggest that at present, but I do not think there is institutional bias in that. It is just a feature of it dealing with the top end of serious fraud and bribery. The test will be as and when the CPS looks to negotiate a DPA, because it will deal with a different layer of corporates. I do not think there is anything inherent in the system that means it is easier to deal with a big corporate rather than a small company.

Lord Thomas of Gresford: It is not a question of it being easier. It is a question of inequality of arms; you would not take on a big corporation with resources, as opposed to a smaller institution that does not have those resources.

Michelle Crotty: The evidence is that, of the four that the Serious Fraud Office has negotiated, there has been one medium-sized company and the other three have been very large international companies. I do not think there is evidence that it is reluctant to engage with big companies. It is more complicated, but it is willing to work its way through that and has shown that it can and will work its way through that.

Lord Hutton of Furness: When a prosecutor decides to bring a case against an individual or company under the Bribery Act, it is because, in his or her view, there has been evidence of wrongdoing and it is in the public interest to test that in a court. The purpose of doing that is very simple: to send a clear message that certain sorts of behaviour are clearly unacceptable and need to be dealt with and treated as criminal. In the case of a deferred prosecution agreement, there must be a different set of criteria at work, because there is evidence of criminality but the prosecutor decides it is not in the public interest to prosecute, but to seek a DPA instead. Could you summarise to the Committee the benefit of a DPA? What culture or business practice is it trying to encourage? Is it self-reporting? Is it encouraging companies to bring out their dirty linen? What is it?

I must say that the Rolls-Royce case has confused me, because it was not a self-reporting case, as Lord Thomas has said. I am struggling to understand what public policy goals are being pursued in those cases where a prosecutor decides to bring a DPA, if it is not self-reporting and encouraging companies to be more open. What is it we are trying to do with these DPAs?

Michelle Crotty: It is still about co-operation and bringing out their dirty laundry. Even with Rolls, once the investigators at the SFO were engaged, the level of co-operation that the company showed, including its commitment to putting in compliance regimes, looking at how it structured its business and all of that, is a message not only to the company itself,

but a broader message that this type of behaviour is not acceptable and will be dealt with.

The thing to remember is that a DPA is a suspended prosecution, so there is an ongoing threat to the company essentially. A series of conditions are imposed through the court; if those are not complied with, the prosecution can be recommenced. We have not had that to date and it does not look like there is any indication that we will but, at some point—and it is very clear through the judicial commentary that the conditions are carefully tailored to each company—if there is a breach of any of those conditions there will be a prosecution.

It is an ongoing message to the company, in the form of its directors and shareholders, that this is something that they need to take seriously. It is not just to put a quick plea in and move on. There is an ongoing obligation and that then then sends a broader message across the corporate world.

Lord Hutton of Furness: This point about self-reporting is being blurred in evolving practice of DPAs, because it is quite clear that a company could end up in a position where the prosecution is effectively dropped, even though the organisation has not brought that potentially corrupt practice to the attention of prosecutors.

Michelle Crotty: Rolls-Royce is very unusual in that, as the other three DPAs that have been agreed were all self-reporting cases. As I said earlier, Lord Justice Leveson took great care, in his judgment, in setting out the judicial thinking about why, in that particular case without self-reporting, imposing a deferred prosecution agreement on the company was still justified. There is no minimum or expectation but, generally in the way the guidance is structured in the code and the guidance for prosecutors, you would ordinarily expect there to be a self-referral. Certainly the messaging that has come out from the Serious Fraud Office through its directors, subsequent to Rolls-Royce, continues to make it very clear that the starting point is that there should be a self-referral but, if there is exceptional co-operation as there was with Rolls-Royce, looking at the wider picture, there is the possibility of a deferred prosecution agreement.

The Chairman: Is it deferred for ever or does the DPA have an end date to it?

Michelle Crotty: It is when the conditions are met, essentially, depending on what they are. Some will be about payment of compensation and some will be about the imposition of compliance regimes. To date, the DPAs have not looked at monitoring on an ongoing basis, so there will be an end date.

The Chairman: That is built in to them anyway.

Michelle Crotty: That is built in to the individual agreements.

Lord Grabiner: On Lord Hutton's point, you would also say that one of the objects of the exercise is that, if an agreement can be achieved, it avoids the need

for a very expensive trial, much of which would be borne by the state. It also means that, when you do a DPA, there will be a good deal of public ignominy in respect of that entity. In a corporate case, it will be all over the front page of the *FT* and the business sections of the proper newspapers. That must be a source of great embarrassment to the board, the shareholders and all the rest of it, so there are other aspects to this. When deciding whether to prosecute or to do a DPA, would I be right in assuming that the prosecutor would demand a good degree of co-operation from the party with whom he is negotiating? Absent that co-operation, he might simply say, "Well, you have messed me about. You did not self-report, for example. Not only that but you put hurdles in the way of my investigation. It took me two years to get to this point and I am not prepared to do a DPA". Is that a fair summary of what might happen?

Michelle Crotty: It is a fair summary. The fact that a negotiation on a DPA is opened is not a guarantee that a DPA will be agreed. It very much depends on the level of co-operation from the corporate during the course of the negotiation, as well as whether there has been a self-referral or not.

Lord Grabiner: Self-reporting is just one aspect of that co-operation and that would all go into the mix.

Michelle Crotty: Yes, it would.

Lord Thomas of Gresford: Can I dig into the decision-making? Are decisions made by the Director of Public Prosecutions or the Director of the Serious Fraud Office? If it is at the top, who does the negotiating and who makes the final decision as to whether the agreement should go through?

Michelle Crotty: On the detail of who does what where in the organisations, you will need to speak to the prosecutors. For the DPAs to date, I can say that the Director of the Serious Fraud Office has made the final decision about whether a DPA is to be offered or not. There are structures within the organisation, but clearly he or she will not be doing the detailed working. They will have teams within the office that will work on those negotiations.

Baroness Primarolo: Could I just quickly follow up this point about public policy goals? One is clearly measurable; it self-reports or it does not. On the question of exceptional co-operation and then the decision being taken as to whether one would be offered, how is consistency to be measured in those discussions? Exceptional co-operation could be quite subjective.

Michelle Crotty: It could. The reassurance that the Committee can take is that these decisions are not solely taken by even the Directors of the Serious Fraud Office or the DPP. They are subject to judicial oversight and very close oversight. There are private hearings when a DPA is brought before a judge and a discussion goes on at that point. The consistency relies to some extent on the oversight of the judiciary. At the moment, they are all being dealt with by one judge, Lord Justice Leveson, one of the most senior criminal judges in the country, partly to ensure that consistency and to act as a check on the prosecutors' decision-making. These are very unusual, and certainly at the introduction of the Act there

were concerns about how they would be used and whether it would be viewed as companies buying their way out of prosecutions. Both prosecutions and the judiciary are very alive to that.

It is probably too early to say, with only four DPAs to date, how the consistency would be measured going forward, but even as they bed in no one anticipates that there will be huge numbers of deferred prosecution agreements. They are still seen as exceptional tools for the prosecutors.

Baroness Primarolo: It goes to the heart of public confidence in the Act that people are being treated fairly across the board, and transparency will be important.

Michelle Crotty: I know that, following each judgment, the prosecutors will review the judicial commentary and make sure they reflect that in how they are considering their decision-making.

Lord Stunell: We have the statistics for how many cases went to court and how many DPAs there are. What we do not have is the statistics for how many went to court and were considered for DPAs but, in fact, the conditions were not met in the view of the prosecutors. Therefore, there was a prosecution in court. My feelings about this relate to whether there is a done deal before you start, so could you just explore that point for us?

Michelle Crotty: Again not being the person negotiating any of these and observing the constitutional boundaries with their independence, the SFO has to approach this as a confidential discussion with the corporate in order to try to break through what would normally be the position if you were looking to prosecute, which is very adversarial. It is moving into a different domain, so you are asking a corporate, without a guarantee of what the outcome will be, to engage in telling you what they have been doing and exposing their criminality. It is a very delicate negotiation. As a matter of policy, the SFO and the CPS have taken a decision that, if the negotiations fail, they will not expose that publicly, because it would discourage others in terms of having the negotiations in the first place.

Lord Stunell: If I was giving some PR advice to a large corporate facing you, I would say a DPA is a much softer option than being dragged through the courts and a few people going to prison. I presume people ask for DPAs, rather than being offered them.

Michelle Crotty: There is a mix. Actually, I am not sure some of the companies that have been through DPAs would agree that they are easier or softer. They are difficult negotiations and, as your colleague has said, there is some very public commentary about their behaviour, which on occasion hits their share prices and essentially their reputation. There is a mix of people asking for deferred prosecution agreements. It is fair to say that they enter into fewer negotiations than are asked for. Again, it is about driving a change in corporate culture so, if corporations have behaved and self-reported or, even in the absence of a self-report, have co-operated fully once the investigation is underway, they are much more

likely to receive a positive response from a prosecutor than if they have not.

Lord Stunell: Who would be the appropriate person for us to ask the question, not for names but the existence of DPA discussions that did not lead to a DPA?

Michelle Crotty: That would be the prosecutors. You would need to ask them directly. As I say, they have adopted a policy not to reveal details. Again because the SFO's caseload is so small, even revealing the numbers might reveal or lead to speculation about who may or may not have entered into discussions with the Serious Fraud Office about DPAs. You would need to ask them.

Lord Haskel: Are you under pressure to recover your costs and to what extent would this be a consideration?

Michelle Crotty: The SFO is certainly not under pressure to recover its costs. Every prosecutor is conscious of costs. They are all publicly funded. Some of the DPAs that have been agreed have included payments of prosecutor costs, but that is not a primary factor in whether they seek to enter a negotiation or offer a DPA.

The Chairman: You have been most patient with us on this. Can I ask a final question, which takes us back to the differential treatment for small and large companies? It is about the Skansen Interiors case, where I understand a self-report was made. It is quite a small company, but a decision to prosecute was proceeded with. Does this underline or indicate either that small companies get hit hard or, alternatively, that different prosecuting authorities take different decisions in different cases?

Michelle Crotty: There were some facts in that case that, although there was a self-report, related to the behaviour of the company once the self-report had been made and how it conducted itself during that period, which meant that a DPA was not on offer. It did not demonstrate full co-operation. A self-referral in itself is not sufficient to get a deferred prosecution agreement. I do not believe it was related to the size of the organisation; it was more about the conduct once the referral had been made.

Lord Stunell: Have you observed any consequences from the Bribery Act that were not anticipated when it came into force, perhaps leaving aside the discussion we have just had?

Nicola Hewer: We broadly set out our position in the post-legislative memorandum that we sent, but we have not observed or necessarily been made aware of any unintended consequences arising out of its introduction. The Act was, as we have set out, the culmination of a necessary, quite lengthy and considered law reform exercise that was implemented to bring consistency. The reform was undertaken to consolidate and modernise the law and, particularly through the introduction of the Section 7 failure to prevent, to promote bribery prevention as an integral part of good governance. Our experience to date would suggest that both of those

policy aims have been met, both the modernisation and consolidation and, as the previous discussion ranged widely on, the general promotion of a different culture and awareness. There is evidence that that is starting to bear fruit.

As we have again covered through the statistics, we think the Act is being successfully used to prosecute cases and proceedings so far do not suggest a particular problem with any of the provisions. Increasingly, we feel that the Act is recognised internationally as a relatively good model. There is evidence that other countries are moving towards similar sorts of legislation and are particularly interested in some of the innovative elements around Section 7. The UK legislative framework received a very positive assessment following the OECD Anti-Bribery Convention review. In conclusion, the Act is broadly operating as we intended and we are not aware of significant adverse or unintended consequences.

Lord Stunell: One of the suggestions made is that it is frightening companies off activities like sports sponsorship and so on. Have you had any representations about that or observed any of that?

Nicola Hewer: No, we have not had any representations about that.

Lord Hutton of Furness: If there were such concerns, are they likely to be addressed to the Ministry of Justice or would they be directed to some other government department, maybe the business department? You make the point that you do not interface directly with business and employers organisations.

Nicola Hewer: I think they would mainly be directed to government departments more directly involved with business.

Lord Hutton of Furness: You would hope they might be reflected back to you.

Nicola Hewer: You would hope so, would you not? As I say, we have tried to engage with those departments before today and their indication is that, in the main, they do not have a head of steam building from business for a change.

Michelle Crotty: There are a number of inter-ministerial groups on anti-corruption, where all those departments are represented. Nothing has been raised at any of those indicating that they are receiving any feedback that is causing difficulties.

Lord Hutton of Furness: Most legislation usually comes down to resources: what resources are behind it, how it is going to be enforced and what resources are available for the prosecuting authorities to do that. Are the CPS and the Serious Fraud Office properly resourced to investigate and prosecute offences under the Bribery Act?

Michelle Crotty: If I deal with them separately, the CPS certainly has a large budget and a serious fraud division. There are 280 prosecutors and support staff dealing with fraud offences into which the bribery work fits.

As I said earlier, they are reliant on investigators referring cases through to them, but they have not raised any concerns to the Attorney-General's Office, as their sponsoring department, about their resourcing for bribery work.

As far as the Serious Fraud Office is concerned, the Committee will be aware that there was a change to the organisation's funding earlier this year. There has been an increase to its core funding from £34 million to £52 million to reflect the slightly odd position in relation to blockbuster funding, so claims on the reserve for cases that were going to exceed 5% of their core budget. That caused some difficult operational issues for it, although it is right to say that, whenever it applied for blockbuster funding, there was never any difficulty in obtaining it. The way in which the money was allocated under government accounting rules caused operational difficulties with allocating the money internally. It was felt to be better for them operationally to have an increased core budget to maintain the 5% threshold for a claim on a reserve. The SFO is satisfied, whatever the combination is, that it is adequately resourced to carry out bribery investigations and prosecutions.

Lord Hutton of Furness: Is any of the extra money that you referred to being specifically earmarked to prosecute offences under the Bribery Act?

Michelle Crotty: About half of their current caseload is bribery and corruption offences. Again, at the moment it will be a mix of old Prevention of Corruption Act 1906 offences and Bribery Act offences. There is no internal earmarking; the change in the funding allows them to allocate it throughout the organisation more evenly. Under blockbuster funding, it had to be reserved for the particular case that it was applied for.

Lord Hutton of Furness: Are Ministers still giving consideration to merging the SFO with the National Crime Agency?

Michelle Crotty: No, an announcement was made in December that there is no further consideration of merging the Serious Fraud Office with any other organisation, and the Attorney is clear it is an independent organisation and will remain so. As you will be aware, we have just recruited a new Director of the Serious Fraud Office, Lisa Osofsky, who will take up post in September. We would not have been recruiting a new Director to undertake a merger. We are very clear that the future of the SFO is as an independent organisation.

Baroness Primarolo: You might say I am asking you the wrong question, but what about investigators? You gave the clear answer about how many prosecutors and what is referred to you, but what about resourcing for the investigators, so not for the SFO?

Michelle Crotty: For police investigators, I am afraid that is a matter for the Home Office rather than the Attorney's Office, so I am not in a position to assist on that.

Lord Grabiner: Could I just ask a theoretical question? Suppose additional

blockbuster finance was being required or requested, and the reason was some very serious bribery case involving a foreign friendly state. When seeking the blockbuster finance, would the detail of the case be identified to the Treasury when making the request?

Michelle Crotty: At the moment, the requests go directly from the Serious Fraud Office to the Treasury. They do not formally come through the Attorney's Office, so I am not aware of the level of detail that is disclosed in the application to the Treasury. Again, that is something that you would need to speak to the Serious Fraud Office about.

Lord Grabiner: I am just interested to know whether Government, outside of the prosecuting authority, have a notion of who the money is for, for what case and how that might impact on international relations.

Michelle Crotty: I am unclear about the level of detail. What I can say is that no application for blockbuster funding has been refused by the Treasury. Even if that level of detail is being disclosed, it is not a political decision being taken about whether the funding is granted.

Lord Grabiner: We will have to find a suitable person to whom to put that question.

The Chairman: Where is that person likely to be?

Michelle Crotty: They would either be at the Treasury or the Serious Fraud Office itself, which will be able to tell you what level of detail it applies when making an application and what type of information it provides.

The Chairman: Since you will undoubtedly have greater pull than we would, would you like to ask the Treasury on our behalf? Say you were questioned by the Committee and could it provide us with an answer.

Michelle Crotty: I will do my best. Your suggestion that I have more pull than you might be misguided, but I will do my very best.

Baroness Primarolo: Chairman, I think we should follow up specifically asking the Treasury what the procedures are, where it goes and whether it comes anywhere near a Minister.

The Chairman: Triangulation is always useful.

Lord Hutton of Furness: Chairman, I just have one small additional question. The National Crime Agency has an International Corruption Unit, which is currently investigating a number of foreign bribery cases. Can you explain to the Committee why the National Crime Agency is conducting those investigations, rather than the Serious Fraud Office?

Michelle Crotty: I am afraid that I cannot, because it does not come within our purview. I am unsighted about how those operational decisions are made. Those would need to be questions for the Home Office, I am afraid.

Lord Grabiner: This is about whistleblowing. The question is: is UK whistleblowing legislation, in particular the Public Interest Disclosure Act

1998, providing adequate protection for employees who report bribery within their organisation?

Nicola Hewer: Responsibility for the Public Interest Disclosure Act rests with the Department for Business, Energy and Industrial Strategy. I apologise; I feel I start every answer with something like that. It has provided us with some written information, which I can share or, subsequent to this, you can ask if there is something you want us to provide. Its view is that the Employment Rights Act 1996, as amended by the Public Interest Disclosure Act, should provide adequate protection for workers in all sectors who have blown the whistle. They should be able to report malpractice in the workplace without fear of reprisal and the legislation is intended to build openness and trust.

It points us to a number of statutory and non-statutory improvements that the Government have made over recent years to the whistleblowing framework aiming to support a cultural change, including guidance for whistleblowers on how to make disclosures while preserving their employment protections. The Government have fulfilled commitments to keep the prescribed persons list, to which whistleblowers can report, up to date and to undertake annual reviews. They now have guidance in place for prescribed persons. They are also ensuring that there is reporting by prescribed persons about how many reports they get from whistleblowers each year to try to produce some transparency, but that is the limit of the information that we have.

Lord Grabiner: I am also interested in looking at it the other way round. Are you aware of any evidence that there is a good deal of inappropriate whistleblowing, if I can put it that way, or malicious whistleblowing from people who are using the mechanism for the purposes of making unjustified attacks on other people against whom they have a personal grudge or whatever it may be? Have you come across any material to that effect?

Nicola Hewer: I am not personally sighted on that area, so I do not have any evidence of that. That is probably a question to point to the Department for Business, Energy and Industrial Strategy, which operates that legislation and scheme, as to whether it has any evidence on that. My not being sighted is not necessarily a full answer as to whether it is happening.

Lord Grabiner: In principle, your point is that you are not aware that any substantive criticisms have been made of the current legislation encouraging whistleblowing, without any associated bad treatment of the whistleblower.

Nicola Hewer: There is certainly none that I am aware of personally but, as I say, given my responsibilities, I would not necessarily expect to have awareness of how that is operating.

Lord Grabiner: Who would have?

Nicola Hewer: I would say the Department for Business, Energy and Industrial Strategy, which owns that legislation and scheme.

Lord Haskel: A lot of whistleblowing now takes place on the internet and on social media. Of course that is anonymous. Do you follow that up or do you just say, unless somebody puts a name to it, you are not interested?

Michelle Crotty: For the prosecutor, even the Serious Fraud Office with their investigators, trying to police the internet is an enormous and thankless task. It would wait for a formal referral into the organisation. I am not necessarily sure it needs a name, but that may add to the weight given to the referral when it is assessing priorities and what should be taken forward. Again, I am not sighted on how they would deal with the intelligence that comes into it, but there is very little proactive identification of whistleblowers. It requires somebody to formally come to the Serious Fraud Office or another investigator for the investigation to be commenced.

Lord Thomas of Gresford: We are told in the document in front of us that two organisations, Public Concern at Work and Whistleblowers UK, have expressed concern about the way that whistleblowers have been treated. That has not come to the Ministry of Justice's attention, as I understand it.

Nicola Hewer: No, it has not.

Lord Thomas of Gresford: It has obviously not come to the Attorney-General's Office.

Michelle Crotty: It has not come to the Attorney-General.

Lord Thomas of Gresford: We will have to question them separately.

Lord Hutton of Furness: The Government's own research from a few years ago suggested that small and medium-sized companies are not sufficiently aware of the Bribery Act, and only a quarter of them had heard about the MoJ's guidance on the legislation. What do the Government plan to do to improve awareness of the Act and the guidance?

Nicola Hewer: You are right that we undertook specific research back in 2015. Some 66% of SMEs surveyed then had heard of the Bribery Act or were aware of their corporate liability for failure to prevent bribery, so there is some degree of awareness. The guidance was the subject of a lot of awareness-raising, both directly but also, particularly in the years immediately after the Act, we undertook a range of activities in conjunction with both the SFO and trade organisations in various countries. We have set some of that out in the memorandum.

It is fair to say that we always expected that the government guidance would be one part of the architecture going forward and that it is an area in which we would expect businesses and business organisations begin to bring forward their own guidance and for there to be a more plural approach to the sources from which companies draw their advice. That was also borne out in our research at the time. SMEs and other companies were not just using our guidance as the only source of information.

We do not have particular plans, it is fair to say, to do further specific awareness-raising on the MoJ guidance at this time. There is wider work going on across government, between departments such as the Department for Business, Energy and Industrial Strategy, the Department for International Trade and others more generally about how they support businesses in all aspects of export, moving into markets and making sure that awareness of the guidance and bribery is fed into those initiatives. It is not a standalone awareness-raising campaign that we have under way or plan at the moment.

Baroness Primarolo: Could I just go a bit further into a post-Brexit world for small and medium-sized enterprises? We had a previous seminar about the role of small and medium-sized companies leading exports in other countries. It seems strange that you are saying that there is not a government view that they need to do more work here, because these companies may not have been exporting before, but will be reaching out to new markets. You are saying that no work has been done.

Nicola Hewer: No, I am sorry; I was saying that there is no specific work from the MoJ further promulgating the specific guidance that we brought forward under the Act. There is quite a lot of work being led by other departments on initiatives, exactly as you say, to support companies to enter into other markets and to help give them much broader advice, not just on the Bribery Act but on a range of things. There is a lot of work that other departments do around trying to tackle what you might describe as the demand side of bribery as well, around the role that government can play in other countries to help tackle that demand side. Companies tell us that that is just as valuable to them as any sense that we should change our position about how they help raise standards abroad, so there is much wider government work on that.

Baroness Primarolo: We would need to ask elsewhere if we want a feel for that.

Nicola Hewer: Yes, I am afraid you would.

The Chairman: Thank you very much indeed. You have been most generous with your time. Before we fling open the prison doors, is there anything else you would like to tell us? In particular, are there any questions you think we ought to ask that we have not?

Nicola Hewer: No, I think you have been very thorough.

Michelle Crotty: No, there is nothing from my perspective.

The Chairman: In that case, thank you both very much for your time.

John Penrose MP – Oral evidence (QQ 26-36)

Tuesday 10 July 2018

10.30 am

[Watch the meeting](#)

Members present: Lord Saville of Newdigate (Chairman); Lord Empey; Baroness Fookes; Lord Grabiner; Lord Haskel; Lord Hodgson of Astley Abbots; Lord Hutton of Furness; Lord Plant of Highfield; Baroness Primarolo; Lord Thomas of Gresford.

Evidence Session No. 2

Heard in Public

Questions 26 - 36

Examination of witness

John Penrose MP.

Q26 The Chairman: Mr Penrose, on behalf of the Committee, a very warm welcome to you. There are one or two matters of administration.

I hope that you have been sent a list of the members who have interests that they have declared relating to the inquiry. If any one of us asks you a question and has not yet declared his or her interest, they will do so before asking the question.

The session, as you are no doubt aware, is open to the public and is being broadcast live. There will be a transcript of the evidence on the parliamentary website. I do not know whether you have ever given evidence to a committee before; if you have, you will know that you will be sent a copy of the transcript. If there is anything that you regard as inaccurate, could you advise us of any corrections to be made as soon as possible? Similarly, if there is anything that you wish to clarify or amplify in your evidence when you have read through the transcript, could you please submit supplementary evidence to us? Again, may I ask that you do it as soon as possible?

We all know who you are and the position that you have taken up as champion, but it would be helpful to have on the transcript a description from you of your function in government.

John Penrose MP: I am very happy to do so. Thank you for inviting me. I have indeed seen the list of declarations of interest, as I think you called it. It looked like an extremely impressive set of CVs of the various Committee Members around the table, so I am conscious that many people here have been involved with the Bribery Act right from its inception. There is a wealth of experience far deeper than mine, but I will try to help the Committee as much as I can.

In terms of my role, you have at least one, if not more, former anticorruption champions in the House of Lords—I think that Eric Pickles either will join or has just joined. If I can put it politely, I think that I am

probably half the man that he is, but he is a former occupant of this role as well so he will be able to give you some perspective as well.

Broadly speaking, at a very high level, my role is to support and challenge the Government's efforts in this area. I put equal weight on those two elements. Roughly speaking, it means that I spend quite a lot of time with the Joint Anti-Corruption Unit—which used to be in the Cabinet Office and is now in the Home Office—going through the 130 or so action points and deliverables in the UK anti-corruption strategy. I hope that many of you have seen that and are aware of it. It was published to reasonably widespread acclaim at the back end of last year. There are a lot of different action points in it—as I said, over 130—which go right the way across government. Somebody somewhere has to track progress and where we are, either ahead of or behind the due dates for the deliverables, and chase people if that is not happening. That needs to happen to co-ordinate this across government. That is what at least half of this role is, with people in the Joint Anti-Corruption Unit.

I guess that the other part of the role is the challenge that this field does not stand still. The fight against corruption does not stand still because the corruptors are a creative and light-footed bunch. If we try to catch up with whatever they were doing last year, they will invent new ways of being corrupt or corrupting other people, so we need to remain light on our feet. Therefore, part of the job is simply to look upwind and say, "This is changing. We may be in danger of becoming out of date here or there. Should we be doing more in the other areas?" There is a breadth of things.

The other point that I want to make is that anti-corruption, broadly phrased, obviously includes bribery but spreads more widely than that. When we get to pieces of specifics, they may well fit inside anti-corruption, but if I start to stray more widely from the bribery field into anti-corruption, my Lord Chairman, I am sure that you will pull me up.

My final point is that I am not an investigator or a prosecutor. I do not take up individual cases. Obviously, that needs to be left, quite rightly, to independent prosecutors and investigating agencies. If we start to get into the details of individual cases or particular prosecution rates and that sort of stuff, I may need to defer to their independent expertise. I think that covers it, but let me know if I have missed anything out.

Q27 The Chairman: Thank you. You have received a list of questions. What does your role entail in relation to tackling bribery? Are there any difficulties in both supporting and challenging the Government's anticorruption agenda?

John Penrose MP: I think that I have probably answered the first part of that about what the role is, but I am happy to expand on it if anybody has any follow-up questions. The difficulties are those of being attached to government—any government, probably—which is that you have to try to make sure that you are co-ordinating across a wide variety of different government departments. I know that it will come as a shock to everybody

around the table to understand that sometimes government departments do not work perfectly hand in glove with other departments. Therefore, we have to make sure that that knitting together happens, where necessary.

On occasion, because Ministers always have very full in-trays, we have Brexit blotting out the sun at the moment and everything else is going on, just getting share of mind to say, "Hang on a second, there is more to life than Brexit. The following things are happening too. We cannot avoid them or ignore them and it would be wrong to do so", is difficult. I think that it is part of the warp and weft of being part of any Government and getting attention from busy Ministers at any point, but I suppose that they count equally well at the moment too.

The Chairman: How do you set about making sure, or trying to make sure, that departments and agencies are coming up to the mark as far as anti-corruption strategies are concerned?

John Penrose MP: Part of it is actually rather anally retentive. This is one page of a 20-page RAG—red, amber, green—report, which has got every single one of the 130-something action points in the strategy. We go through it pretty much every week, certainly every other week, to check progress and where there are problems. Inevitably with that many things, deadlines will be at risk or missed; it is a question of when, not if, such things happen. My officials say, "We are working on it; we are rattling cages", in whichever department or departments it may be. On occasion, they say that we need a political push because this is not moving and we need to get something to happen. We need a Minister with a red box to push it or be persuaded. At that point, I end up tapping colleagues on the shoulders in the way with which many people around the table will be very familiar.

Lord Grabiner: Good morning, Mr Penrose. I should disclose the fact that I was a member of the pre-legislative committee on the Bribery Bill, so before the 2010 Act was passed. Could I give you a scenario just to see what your reaction is to it, in terms of the bribery legislation, and whether you think it does, or should, qualify?

A major export contract is being negotiated directly between a UK manufacturer and a nation state. The nation state explains that the gobetween at the other end—the nation state end—of the story is the person who is fully authorised to negotiate on its behalf. When they get a little bit more detail in the negotiation, the authorised representative of the nation state says, "Actually, £100 million must now be paid to this bank account in Zurich. This is part of the deal. This is a multi-billion pound deal. We want that money paid". I suppose that the representative of the vendor or selling business might say, "This is a little bit odd. Why do I have to do that?" to which he or she is told, "That's how we do business here and that's the only basis upon which the deal can be done". What is your reaction to that in terms of what we are interested in?

John Penrose MP: As somebody who worked on the early stages of the Bill, you will be more deeply versed in the ins and outs of it than me, but I have a couple of reactions. To a politician, rather than a prosecuting lawyer, I would say that it sounds quite likely that that might contravene several different offences and sections of the Bill. Ultimately, the decision on whether the facts fit this offence or that offence in the Bribery Act needs to be taken by either the Serious Fraud Office or the National Crime Agency. Rightly, whether something qualifies should be an independent decision, not taken by a politician.

From the outline that you have just described, it sounds quite likely that it would qualify, but I ought to leave that decision to professional prosecutors and investigators. One of the questions that I suspect they might want to ask is whether it is written down in the law of the country that you mentioned—Mauritania, or wherever—that such things are the way business is done, as opposed to just an assertion that it is done that way. Again, such decisions on whether it is this or that offence ought to be taken by prosecuting authorities to give them the best chance of a successful conviction.

Lord Grabiner: I understand your answer and where you are coming from, but let us assume that it is permissible under local law, and if that payment is not made, UK plc will not get that transaction. Do you think that that should be a criminal offence under English law?

John Penrose MP: Are you saying that this is something for which there would be case law or a statute in the country concerned, saying that it is okay to pay money into a numbered Swiss bank account under such circumstances?

Lord Grabiner: Yes. It is an assumption. Let us assume that the local law would permit that payment to be made.

John Penrose MP: Forgive me. I find it easier to deal in realities rather than hypotheticals. I would be surprised if we found very many countries where it is explicitly written down like that. At that stage, I would probably want to know why the country had written that law down. I am not the lawyer here—there are many fine legal brains round the table—but as I understand it, one of the criteria that will be looked at is whether it is explicitly part of that nation's law as to whether it is acceptable. It is not a question just of how we do it—of just custom and practice. Those justifications are not sufficient, but if it is part of a statute and there is proper legal precedent, that would weigh very heavily. I would hesitate until I knew more about the particular country and why it passed that law. If it is not part of the law, it is of course already illegal under the Act, as I understand it.

Lord Grabiner: So if all that was demonstrated was, "This is the way we do it" and there was some credible evidence of that, you think that it should be regarded as a bribery offence in English law. But if it were expressly

legislated for locally and you were satisfied, you would find it a bit odd but perhaps see more force in the argument that it should not be treated as bribery here? Is that your point?

John Penrose MP: I am trying to endeavour not to be led too far into legal interpretation.

Lord Grabiner: I am trying to avoid that. I appreciate that.

John Penrose MP: As I understand it, the first half of what you said would probably be an offence anyway, so that it beside the point. You are asking me to speculate on whether the law should be broader. At that point, I would want to understand why countries—perhaps more than one—were passing these kinds of laws. It feels to me as though we would need to understand what the mechanism is, why it is there and why it is explicitly written, particularly if a democratic country has said that it thinks that this is an acceptable way forward. You would want to know why it was happening. I think that everybody round the table would be extremely concerned, but we would want to make sure that we were not just making assumptions about other countries' rules and judging them accordingly. We would have to be very careful and I am afraid that I would need to see specifics rather than theoreticals.

Lord Thomas of Gresford: Suppose that the company concerned said that it would consult the anti-corruption champion. Would you give any advice?

John Penrose MP: I would not. That is not part of my role. The available advice would be based on the current law as it stands, which was not part of what Lord Grabiner was asking, I think. He was asking whether the law ought to be broader, if I understood his question correctly. As the law stands, the available advice would reflect what the current Bribery Act says.

Lord Thomas of Gresford: We are looking at your role, which is not to say to the company in circumstances like this, "Don't do it".

John Penrose MP: I am not resourced. I do not have a team that does that, but other parts of government do. Guidance was published just before the Act came into effect, which I hope is clear. It seems to be functioning reasonably well with corporates. There have been outreach programmes for smaller companies since then; there have also been such programmes for foreign countries wishing to do business in the UK in their interaction with us. There is quite a lot of guidance out there, which gives people explanations about what the law would be. If Lord Grabiner was asking about whether there is sufficient advice and guidance for people about whether they are on one side of the law or another, then that is there. It does not come from me personally but it is there and has been since before the Act came into force—rightly so—so that people can get answers to precisely the kind of questions that you are asking. I seem to be exciting people by this, which was not my intention.

Lord Haskel: You said that part of your role covers new ways of corruption and bribery. Have you uncovered any new ways?

John Penrose MP: At the moment, the people doing investigations tend to be the ones to uncover them. They then say, "Look, we're starting to spot a pattern here". There are a number of things here. I will talk in more detail later about where we may need to move things forward. For example, we are about to publish draft legislation to create a far more transparent register of real-estate property in the UK and who owns it, making sure that it is harder to hide the beneficial owners of bricks and mortar in the UK. The draft legislation is due to come out in the next few weeks, as I understand it, and any implementation of it is some time down the road. In fact, I think that your Lordships debated the timetable for that and managed to move it forward a little bit.

A number of people are still saying, "We think that this is still a bit slow. Can it be done any faster?" Part of this is about trying to maintain or build up levels of transparency so that it becomes far easier to spot new kinds of transparency. There is a whole series of things where people are saying, "There may be an issue here". Sometimes I agree with them, sometimes I do not, but that is an example of where I believe we should be trying to move faster. I salute your Lordships; one or two of you around the table were involved in trying to make the thing move faster when it came through your House.

Lord Hutton of Furness: I need to declare that 10 years ago I was the anti-corruption champion myself.

John Penrose MP: I am sorry. I should have given you credit alongside Eric Pickles.

Lord Hutton of Furness: I will get over that disappointment. In one of your answers to, I think, Lord Thomas, you mentioned resources. What resources do you have at your disposal in your role as anti-corruption champion?

John Penrose MP: The Joint Anti-Corruption Unit—I do not know whether it existed under that name or a previous name when you held the role—is a squad that was in the Cabinet Office and has now been moved across to the Home Office. They help you go through these sorts of things and make sure that the action points are happening. In particular, where interaction is required with the OECD, the UN or UNCAC, it will assist with that too. It is the co-ordinating unit but, as I am sure you will have faced, quite a lot of the role is trying to cajole, harass or generally persuade different parts of government. You are working through people to make sure that other parts of government actually do things as promised and on time.

Lord Hutton of Furness: Does the unit report to you or to Ministers?

John Penrose MP: Day to day, it reports to me; officially, for pay and rations, it goes to Ben Wallace, who is the Security Minister. I have weekly

update meetings with the unit and we jointly and collectively agree on the day-to-day activity of it.

Lord Hutton of Furness: You mentioned your interaction with Ministers and described a process of tapping a Minister on the shoulder. Is that really how it works or is there a more formal interaction or regular meetings between you and the key Secretaries of State involved?

John Penrose MP: You are quite right; I was being a little glib. You will understand, however, that tapping people on the shoulder can have a very great effect on occasion, but much more formal mechanisms are required. For example, we have reconstituted the inter-ministerial group, which pulls together the relevant Ministers from all the different departments that are on the hook for delivering on this.

Lord Hutton of Furness: Do you sit on that?

John Penrose MP: I am co-chair, with Ben Wallace. The aim of that group is, when these things go from green or amber to red, partly to focus on trying to head things off, understand why they are happening and stop deadlines being missed. Where we think that there may be an emerging trend—new types of corruption or existing types of corruption that are becoming more numerous—the group discusses how we might co-ordinate a response.

Lord Hutton of Furness: How often does the inter-ministerial group meet?

John Penrose MP: It has only just been reformed and has met once so far, about 10 days ago. We aim to meet four times a year but, and this is part of the terms of reference, I expect that we will probably have more frequent meetings of much smaller sub-groups to work on particular action points where necessary—on the ground that life is short and meetings tend to be too long. Two or three of us will convene to try to make sure that we are focusing on one thing, which will lead quickly and, I hope, informally, to dealing with something for half an hour to nail it down, rather than having to wait for the next meeting in three months' time.

Lord Hodgson of Astley Abbotts: I want to go back to Lord Thomas's question. He asked you, if somebody came to you with a problem, whether wearing your hat as anti-corruption tsar you would give them advice. I think you said that you would not or could not, I am not quite sure which. Would it not be helpful, particularly for smaller companies, if there was a system for clearance?

John Penrose MP: It is not that I would say, "There are no answers here, leave me alone". I would refer them to the existing guidance, which I mentioned. That would be my normal reaction. Your question was on—

Lord Hodgson of Astley Abbotts: We can all read the guidance. But the devil is always in the detail with these things. We are concerned that small

and medium-sized companies faced with the realities do not necessarily find the guidance to be clear enough. They want to be able to go to somebody and say, "We are faced with this real problem. Does it cross the line?" Should there be some facility to help small companies in particular to get that sort of security?

John Penrose MP: One of the action points in the strategy is about strengthening the support that is available to companies—it is aimed mainly at the small ones—in dealing with the service and guidance already offered. I do not think that it would involve free advice being provided on the specifics of individual cases. Given the number of small businesses—I am presuming it is mainly small businesses that would be in need—that could very rapidly escalate into something that is very expensive.

Lord Hodgson of Astley Abbotts: But would it be available?

John Penrose MP: Is it always good to have more help available for free? Yes, that would of course be wonderful. But is it practical and pragmatic as a solution, given that there are people already providing it for a fee? That is a separate question.

Lord Hodgson of Astley Abbotts: It is not a question of the fee. We are trying to be clearer about bribery and corruption. If somebody can say, "I've got a problem", as opposed to saying, "I made a decision which now proves not to be the right one", would it not be helpful if there was a greater degree of transparency around the whole situation?

John Penrose MP: Forgive me, but I will try to push you on the specifics. If you end up with 1,001 individual cases from worried SMEs that start flocking to the equivalent of the citizens advice bureaux, that could rapidly escalate. It would have to take its chances in government budgeting and spending reviews and so forth.

You are right that clear guidance and clarification is always good, as is making sure that help is available online. If you would like to suggest specific proportional ways of doing it without exploding a budget or two, by all means do. I am very interested in hearing recommendations from this Committee as to how we might improve what is already there.

Lord Plant of Highfield: I want to go back to your initial characterisation of your role. You said that you did not have any direct involvement in individual cases, and I can understand entirely why. But if you do not have exposure to the detail of individual cases, and so do not know the sorts of things that are going on and attracting the attention of investigators and ultimately prosecutors, how are you able to make policy about, say, the balance between prosecution and deferred prosecution? It seems to me that you need some kind of aggregate view of where the action is at the moment for bribery and corruption. Surely you can only know that by being exposed to particular cases.

John Penrose MP: Here we have a plea for evidence-based policymaking. I am completely with you.

You are right that there is a distinction. Me getting involved in investigating, prosecuting and pursuing individual cases would, I think, be improper. You do not want politicians getting involved in a process that ought to be independent and at arm's length from political pressures and processes. But after those investigations are complete, and due process has happened and they have been through court, then we can start to look at where those prosecutions succeeded and failed and draw conclusions. At that point, you are looking not just at one individual case but at the much broader basis. I have periodic and regular conversations with the SFO and the NCA and so forth, and with NGOs as well. I routinely ask, "What's working and what's not? What frustrations are you encountering? What works best? If we were to change anything, what would we absolutely not want to touch?" They normally tell me what they find good and what they find bad, but my usual follow-up question is: "Have you got evidence to show why?" To pick up the question from Lord Hutton, if I come to an inter-ministerial group, for example, and say that we should do x or y because we are getting it wrong in an area, I would expect the Ministers round the table to demand evidence and facts to support that.

Baroness Primarolo: Good morning. I just want to be clear about where the policy responsibility lies for the Act and your interaction with that. You say that you do not have any responsibility for the policy and how it develops. You are there as an enforcer.

John Penrose MP: A champion is not a Minister. That is exactly right. I can harry Ministers and persuade, but the decision-making is ministerial.

Baroness Primarolo: But that is for how their departments discharge their responsibility under the Act. Given your interaction with external stakeholders, which we will come to later, and what you have said so far, you have information and experience. Which department do you interact with to make sure that it understands that there is a need to revisit some of the policy enshrined in the Act? Is it almost like a flow chart, with information collected? You said policy-led legislation; yes, that is always good. In theory, where is all this experience and interaction that you undertake going to?

John Penrose MP: It would depend on which area was causing concern. In many cases, it is not necessarily policy; it may be just to do with the fact that we are missing some deadlines in the existing anti-corruption strategy and therefore need to make a particular effort to avoid missing a particular date. In either case, it would end up being a conversation with the department concerned. If it was something to do with the Home Office or the Foreign Office, I would go to them initially. Where it is something bigger and broader, there is the advantage of being the Prime Minister's anti-corruption champion—you can go No. 10 if you have to do, but, obviously, you do not want to do it very often.

Baroness Primarolo: Are you saying that the home department responsible for the total policy is No. 10? There must be a department that ultimately, regardless of the implementation, is responsible for saying, “We need to amend the Bribery Act” and therefore initiates that discussion.

John Penrose MP: I take your point. I probably need to start by questioning your starting assumption. The point about anti-corruption is that it is so broad and covers so many departments that it is not conducive to there being a single home department for it. That is one reason why the champion’s role exists. Ultimately, in that respect, I suppose that it must be No. 10 because it pulls together the strings of any cross-government initiative. But because it breaks down into so many different bits and hits so many different departments, that is why the champion’s role exists in the first place. Some of it will legitimately be Foreign Office or DfID as opposed to Home Office.

Baroness Primarolo: But if the legislation is amended, a government department has to take it through. Which one would it be?

John Penrose MP: This may be where anti-corruption law is broader than just the Bribery Act, so, you are right: individual legislation will always have a home department, but anti-corruption is more than just one piece of legislation. That is where the difference lies—or am I still not answering your question?

Baroness Primarolo: I do not think I understand. Forgive me; it may be me. You are the champion; you are doing everything across government and feeding in. I want to know the structure of decision-taking. Who would take the decision with all these departments fitting in? Departments will be consulted through ministerial groups and pre-legislative scrutiny, but it is a bit like saying, “Well, the Treasury is the home department for taxation”. Which is the home department with responsibility for this Bill?

John Penrose MP: The Bribery Act guidelines are issued by the Ministry of Justice, but my back-up point that is anti-corruption is broader than just bribery.

Q28 Lord Hodgson of Astley Abbotts: You have now been in the post for six or seven months. You will probably have formed some impression about how widespread bribery and/or corruption are in the UK. It would be helpful if you could give the Committee your views on that, and on the extent to which attitudes towards these topics and issues may have changed in the period since the Act was introduced.

John Penrose MP: As I understand it—those of you who were involved in the early stages of the Act will be able to correct me if I have a wrong historical perspective—when the Act was originally conceived and developed, it was not because bribery was felt to be a high-volume offence in the UK. Instead, it was because it was disparate and across three or four different Acts that used rather old-fashioned language and probably did not conceive of bribery in an entirely modern way. It was never felt originally

to be a very high-volume problem in the UK; rather, it was felt that we had to get our shop in order.

There are always two questions here. First, any criminologist would start by saying, "Yes, but is that just because we have a particular offence that is underreported and therefore nobody knows how very serious it is, and, in fact, it is 10 times larger?" We can all think of things like domestic violence and other awful crimes such as that, where under-reporting has been a big problem. This is anecdotal, but most people do not think that bribery in its original read-out, by officials—policemen asking for a bribe in the street in the UK—has ever been a high-volume offence; it is not very common. Therefore, it is probably not so much a problem with underreporting, but you can never be absolutely certain.

Secondly, you were right to ask a broader question that was not just about small-scale bribery but wider corruption. There, we have a historical and current problem in the UK, which is that we tend to be a little complacent—not the current Government or previous Governments, but just as a society. We tend to think we are relatively free of such things. We may be free compared to some other countries around the world, but we are far from perfect and there are some serious problems of corruption more broadly and, in some cases, high-level bribery where we need to be very careful and where it is clear that some issues need to be addressed. We cannot afford to take this lightly; we have some potentially serious issues. Some of the measures I have mentioned already relate to transparency. Greater transparency will serve to uncover what we do not know. At the moment—without getting too Rumsfeldian—we do not know what we do not know, but one suspects that there is a great deal more out there which nobody is able to spot. Transparency will be a vital tool in uncovering that and seeing whether there has been any under-reporting, particularly of high-end and larger-scale corruption.

Lord Hodgson of Astley Abbotts: Does your team's phone ring and someone says, "Have you heard about this?"

John Penrose MP: Heard about what?

Lord Hodgson of Astley Abbotts: Well, somebody says, "I've heard, guvnor, you are the anti-corruption tsar. Have you heard about this?" Are there people who telephone in and say, "I think this is outrageous"?

John Penrose MP: Occasionally, they do. Some may have a point, but it is a small point in a very long email and I am the seventy-eighth person they have contacted, but, among those, there may be some important cases. Therefore, the point about transparency is that it will allow us to distinguish wheat from chaff and genuine cases from those with an axe to grind. It is very hard, by definition, to prove a negative. That is where transparency will allow us to uncover what we fear may be out there but no one can prove.

On the second part of your question about how attitudes are changing, I think it was a combination of the Bribery Act and the iterative process it went through, because it was attempted first and then sent back—Lord Hutton will know more about its history than me. The draft was improved severally and seriously. Also, the international work undertaken by the OECD and many other international organisations, and by David Cameron’s anti-corruption conference in London, has meant that there has been a sea change, not just internationally but in Britain, in attitudes to bribery, in the level of tolerance of it, and in the understanding of its down sides and its negative effects, which are much more broadly felt than they used to be.

Is that job finished? No, absolutely not, but probably I have a slightly easier task in persuading people of the problems of corruption and the fact that it is not something which is tolerable or to which one can turn a blind eye than one or two of my predecessors, simply because of the work that has been done over time as attitudes have changed.

Lord Thomas of Gresford: I was a member of the pre-legislative committee and I recall that our concern was that corporations and the guiding minds of corporations had easy defences against the older legislation. Therefore, one of the main purposes of the Bribery Act was to fix corporate responsibility and find methods by which procedures could be introduced into firms that would prevent corruption. It was all about encouraging procedural changes within firms so that they were conscious of the necessity for that and realised that, if they did not institute proper procedures, they were liable themselves to be guilty of an offence. I think that that was the purpose. Has that succeeded?

John Penrose MP: If you do not mind me turning that around, I rather hope that this Committee will provide evidence-based conclusions for that, because I get two different sets of arguments. Some people say that it has succeeded brilliantly and is making prosecutions a great deal simpler and achieving the ends that you have just laid out and that were originally envisaged. I also get a number of NGOs, for example, telling me that it is working so well that they would like the principle extended to other areas of law where the guiding mind makes prosecutions difficult. So there is that constituency that says, “This is wonderful and has worked terribly well and we should waste no more time and move on”. There is, however, quite a lot of concern as well among some business organisations that there may be some kind of chilling effect. They are worried that people may be either unfairly investigated and, potentially, prosecuted, or may feel unable to take legitimate business decisions because they are worried about this.

Clearly, in this area—and, I am sure, in many other areas of law—false negatives or false positives are not good and are very serious problems. But at the moment, when I follow up the comments that I get from investigators, NGOs and business organisations with, “Have you got any evidence to prove whether or not there is a false negative or a false positive going on?”, so far there is precious little evidence. I am not the only person asking this; a number of other Ministers in different departments are

saying, “If we are going to make decisions on potentially broadening this, we need proper evidence”. So my plea to this Committee is that if you can, as part of your report, show whether either side’s concerns are right or wrong, you would be doing everybody a huge favour that would allow us to make a proper, evidence-based decision. At the moment all I am getting is anecdotes, I am afraid, and it is very frustrating.

Lord Thomas of Gresford: Which side do you champion?

John Penrose MP: I am afraid I am very old-fashioned: I will champion whichever side the evidence shows to be right. If it is working as intended and we do not have false positives, it could be argued that you can extend it and, given the benefits to the prosecutors, you should extend it. If, on the other hand, you are getting false positives, we need to think again. But I will be led by the evidence, as I am sure everybody else around the table will be.

Lord Grabiner: Do you collect statistics on bribery as part of your job?

John Penrose MP: I do not, but there are lists of successful prosecutions and that sort of thing.

Lord Grabiner: Are they provided to you? Do you call for that information as part of your job?

John Penrose MP: Not regularly, but I get to see them periodically, yes.

Lord Grabiner: This may be an unfair question, although I am trying to make a point in your favour. The first part of the question that we are currently looking at is: how prevalent do you think bribery is across the UK? The truthful answer to that may be that you do not have the faintest idea. It is not like murder or robbery or other crimes where there is statistical evidence available and where there is an incentive to report.

John Penrose MP: I see. I think I covered this in my answer to an earlier question, to an extent at least. It is very hard to prove a negative and you are right that with a bribe you do not have a dead body which tells you how many murders have been committed. A dead body is something of a giveaway that a crime has probably been committed. So there may be systematic underreporting, but nobody knows. Most people’s domestic experience of smaller-scale corruption in Britain is pretty low, but that does not mean that there are not examples of it at a higher level and in corporate cases, et cetera, which may be going unnoticed. That is why I was saying that we cannot relax on this or on other parts of corruption, and why transparency is probably the antidote to the question about whether or not we have a large, underreported, dark figure of bribery. At the moment, again, if you have accurate figures, by all means tell me—but I cannot find anything beyond what you are saying.

Lord Grabiner: If you do not know, we certainly do not.

John Penrose MP: Prosecutors and investigators are the people who provide them for me, and they do not know.

Lord Hutton of Furness: On the question of evidence, I was encouraged to hear you say a minute ago that you thought there had been a sea change in attitudes towards corruption and bribery in the UK. Can you point the Committee in the direction of that evidence? Why do you say that there has been a sea change?

John Penrose MP: We probably can provide you with some evidence on this. There has certainly been feedback from businesses saying that they find that the Bribery Act can be very helpful in a number of different ways. They say that it provides them with a straightforward defence if they are asked for a bribe. They can just say, "Legally, I cannot do that. I'm terribly sorry. Don't ask me again". That gives them a solid base on which to stand without making it personal. They also say that they would far prefer to export to countries—or do business anywhere in the world, including the UK—where they know that they are competing on a level playing field. If we do not have them to hand, I can certainly provide you with the surveys and reports that show that that is the kind of thing people say. The Bribery Act is not the only thing that has created that sea change—I think you acknowledge that it was developing before that—but it is certainly something that businesses in the UK appreciate. I think that the OECD would also point to a broader change in attitude in more countries as more countries have signed up to the convention over time.

Q29 **Lord Haskel:** Following on from that, as you have explained, your role includes engagement with external stakeholders to ensure that their concerns are taken into consideration in the development of government anti-corruption policy. I imagine it is things like shareholders or employees who want a higher degree of moral standards, or overseas business owners who own businesses in the UK having different ideas. Have you had any feedback from business to date about this sort of thing?

John Penrose MP: Yes, it is not just business. You are right to refer more widely to external stakeholders. I meet fairly regularly, either formally or informally, with NGOs, businesses and law enforcement bodies of one kind or another. So far, the feedback on the Bribery Act is pretty positive. The OECD, for example, rather rates our Bribery Act. It reckons that it is one of the better ones in the world. It is very complimentary about it. I gave a quick summary earlier of some of the reactions that businesses have been recording.

So, yes, I do. Broadly speaking, the Bribery Act stuff is relatively positive and people are happy with it. I occasionally hear concerns, usually indirectly, from business representatives, particularly people representing small businesses, about ensuring that the advice is clear, which we have already talked about. I suspect you will find that that is a plea from smaller businesses on any kind of government regulation because they do not have

the same scale of resources to deal with that sort of thing, so you always have to try to guard against that. I do not think that is peculiar to the Bribery Act; it is a more broad-based concern.

In general, it has been pretty positive and people seem to be casting admiring glances the UK's way, although while we may be pretty well off here, I do not think the planet as a whole is particularly good at fighting corruption. We are probably one of the better ones in a global project that has a long way further to run.

Lord Haskel: You have had no difficulties, for instance, with people or Governments from overseas who own and operate businesses here in the UK? Do they come with their different ideas?

John Penrose MP: They may regard me as a lost cause and impossible to persuade; I do not know. No, I have not had that experience, except in so far as I meet businesses, some foreign-owned and some UK-owned, that are doing business here of one kind or another.

The Chairman: Can you identify any specific concerns that have been raised with you?

John Penrose MP: I have already mentioned the concern about ensuring that the guidance is as clear as possible, particularly for smaller companies. NGOs have raised with me the question of transparency. I have already raised the point about real estate transparency, and they have been very strong advocates for that. People on all sides have raised with me the question of whether the "duty to prevent" clause is working as intended. As I said, there is very little evidence to back that up at the moment, but I have had views from all sides arguing both sides of that particular argument. Those are three or four examples, if they are helpful.

The Chairman: We move on to the next question.

John Penrose MP: We may have strayed into covering some of these, so I hope you do not mind if I repeat myself on some of these issues if we cover some of the same answers.

Q30 **Lord Hutton of Furness:** Why do you think the number of proceedings under the Act has been so consistently low? What do you think that signifies?

John Penrose MP: I think this goes to the point that we were talking about before about whether there is a large amount of underreported or unknown bribery going on, which we have already discussed so I will not go over it again. There are a couple of points to make about the process first. Cases get investigated and prosecuted again, rightly, not by me or by other politicians but by independent prosecutorial agencies. I am sure that everyone here will understand that that is the right way to do it. The decisions that they are taking are not something that any of us can say, "Well, this is too many or too few"; those are the decisions that they regard as right in those particular cases.

It then falls to us to draw some sort of conclusions from that. At this stage, I am not sure of the answer to your question for a couple of reasons. First, some of the cases that have been prosecuted have been enormous and very complicated and the investigations have taken years, and if you have very complicated cases with that kind of lead time, you may end up with a pipeline that is yet to bear an awful lot of fruit. There could be dozens of other cases like it but because the investigation is ongoing we do not know yet, and it would be inappropriate for us to know. That is one possible angle that might mean that the numbers will continue to accelerate, but we cannot yet prove it one way or another.

It could be that in fact there is not much bribery going on and that the unknown unknown we were talking about before turns out to be a small number. We would all be delighted if that were the case, but I do not think any of us can rest on our laurels. Alternatively, it could just be that the prosecuting authorities are prosecuting other cases of corruption and finding that Acts other than the Bribery Act are more appropriate in those cases. That is a long way of saying that no one really knows yet, but we should bear in mind that this was not supposed to be a high-volume crime when the original Act was first conceived. We need to watch very carefully as the pipeline of existing investigations comes through. If the volume continues to be very low, we need to go back and ask whether we have got this right, but at the moment no one is saying that the Act is wrong so there may be a question about whether we are enforcing it correctly or it may just be that there are not that many cases that suit the Act's particular provisions.

Lord Hutton of Furness: We are talking about a very slow pipeline of cases. There have not been any prosecutions at all under Section 6, which deals with the bribery of foreign public officials. On the basis of your previous answer, when you said that if there had been few or no prosecutions, we ought to look again at things, what conclusion do you reach in relation to Section 6 and the use of those provisions?

John Penrose MP: That is a specific example of a more general set of possible reasons that I was just talking about. It could be, although I doubt this is the answer, that because we passed the Bribery Act everyone around the planet knows that you are not allowed to ask British businesses for a bribe of any kind, and because we spent a lot of time via the Foreign and Commonwealth Office doing outreach sessions in foreign countries to ensure that everyone knew that was the new norm for British businesses and anyone doing business in the UK, everyone stopped asking. That would be delightful.

There may be an element of that going on; I doubt anyone could believe that it was all the answer but it would be wonderful if it was at least part of the answer. However, it could also be that we are not getting it reported or that it is harder to investigate those things, given that they are abroad and therefore, presumably, harder to gather evidence about. I am afraid this is a specific example of my more general answer, which is that I do

not think that anyone yet knows categorically. Again, if the Committee can come up with evidence to throw genuine light on whether the different possible explanations that I have just offered are right or wrong and which ones matter most, that would bear on whether we could improve the Act or the way that we do investigations or prosecutions in future.

Lord Haskel: Do you have a number for those investigated but not prosecuted?

John Penrose MP: I do not, I am afraid, but that is the sort of thing that would be a relevant fact.

Lord Hutton of Furness: One possible explanation is that prosecutions under Section 6 of the Act are the most diplomatically and therefore politically fraught cases to bring because they imply—in fact, they involve—the corrupt practices of foreign Governments. Is that something that we should be looking at?

John Penrose MP: You should absolutely ask the question. I think you have already had witnesses from the Serious Fraud Office in to give evidence.

Lord Hutton of Furness: They could not answer that question either.

John Penrose MP: I have asked the SFO whether it feels itself under any pressure, and it has said no. There are a couple of possible explanations. One is that if political pressure were being brought, this Committee and many other people would take a pretty dim view of that—that is why I asked the question. If, on the other hand, it is harder to gather the evidence if you have a non-compliant local criminal justice system in the country in question, then it may just be a genuine, not very pleasant or acceptable but none the less real and practical obstacle to bringing a proper prosecution. So I have asked whether it ever felt pressured and it said no, but I encourage this Committee to keep digging.

Lord Empey: Regarding prosecutions brought under the former legislation, the prosecutors have indicated that we have a parallel track at the moment because of the length of time that cases took to investigate. There are still some cases based on the old legislation coming along. Do you have a sense of when that particular part of the pipeline will dry up? Is that distorting or underestimating the actual number of prosecutions?

John Penrose MP: I am afraid that I cannot tell you that, simply because they will not tell politicians, rightly, what the ongoing investigations are. They need to be independent of that sort of thing, so I cannot tell you what the tail of those old prosecutions is. That is part of my answer to Lord Hutton, which is that you would expect to see that group of cases dropping off and the cases under the new Act ramping up over time.

Q31 **Baroness Fookes:** Before I ask my question, I need to point out that I have no interests to declare relevant to the Bribery Act.

John Penrose MP: A helpful clarification.

Baroness Fookes: I am interested in what I regard as the grey area of facilitation payments, which I take to mean payments made to petty officials to induce them to carry out duties which they should be carrying out anyway. I believe that some countries, such as the United States, make exemptions for these, but we do not. Why not?

John Penrose MP: I suspect that this will have been debated at great length when the original Act was being put together, but it comes up periodically now. I cannot speak to the lawyer's answer to this, but politically speaking—

Baroness Fookes: I do not want a lawyer's answer; I want some common sense.

John Penrose MP: I will endeavour to provide it. I have two reactions, politically and morally. One is that I worry that "facilitation payments" is a nice middle-class euphemism for small-scale bribes, and that in using middle-class euphemisms we may just end up trying to argue that they are in some way tolerable. A bribe is still a bribe, whether it is large or small. It is just a question of the scale of the harm that is being inflicted.

It is hard to make the moral argument that we should move back to a situation where we would tolerate small bribes but not big ones. It would also look really peculiar, both domestically and internationally, and it would be hard to explain if, having taken this decision, we stepped back from it and said that we thought it was all right to do it a bit. We took a clear position. I do not fancy being the politician, whether a Minister, a BackBencher or a Member of the Lords, who stands up and says, "I'm going to argue that we should legalise some kinds of bribery again", which is effectively what we would be doing.

You are right that other countries do not necessarily take the same view as us, but given where we started from it is probably a door that is shut for this country, and morally that is probably the right place to be.

Baroness Fookes: If I may play devil's advocate, is there not a distinction between a bribe to induce somebody to give you an unfair advantage over some other company or person and one where you are simply asking someone to carry out certain arrangements, such as issuing a licence or something, that they would not otherwise do?

Is there not a problem in some countries, perhaps in the Far East or elsewhere, where officials are paid so little that they have to supplement their income by bribes? You could even call it a tip on the lines of the old waiters who got very little basic pay and relied on tips.

John Penrose MP: The difficulty is that if a country denies basic public services to people who are not willing to pay a bribe—some people might call it a facilitation payment—that again is morally hard to justify, because

broadly speaking it means that those basic public services are not available to the poor, which, particularly in less developed countries, means that they are not available to a very large proportion of the population.

You are absolutely right to say that the corruption is creating a different kind of damage in that case, but it is still damage, it is still very serious and it still affects a very large number of people, particularly those who are most vulnerable and least able to do something about it. Yes, it is a different kind, but I am not sure that morally that difference of kind is enough to justify saying that it is okay to do those things.

Tips, of course, are a different thing entirely, and I think the Act is quite carefully phrased to avoid capturing tips. If you tip a waiter, it is not bribery at all. That is a very different kettle of fish, as you will appreciate.

Baroness Fookes: If one looks more broadly, should we look to a foreign policy that tries to encourage countries that do not pay their public officials properly so they are susceptible to bribes? Should we not try to take steps to remedy that situation?

John Penrose MP: Absolutely. The international anti-bribery convention has—I forget how many signatories. Some 40 countries, plus or minus, are signed up to the thing. It is a pretty powerful weapon and is starting to gain international traction. Its establishment was part of the sea change in attitudes that I talked about earlier with Lord Hutton. That kind of thing is essential—it is probably the pre-eminent example, but I am sure there are others, and good work is being done by the UN and all sorts of other regional bodies—and this country should back it through the Foreign Office and in other ways to drive that kind of change.

Whether the answer in each country is purely to pay public sector workers more will obviously depend on that country's particular local problem. It may not just be a question of public sector pay in one area. It may be a combination of public sector pay and local enforcement, local societal attitudes or all sorts of other bits and pieces.

That could be part of the answer, but pushing and encouraging countries to sign up to the anti-bribery convention is the kind of thing that will help them to get down the road towards working out the particular tailored answer for that country's existing problems and solving them.

Baroness Fookes: Do you have any evidence of British companies being put off by the possibility of falling foul of the law through the payment of this kind of facilitation payment—bribes, as you wish to call them?

John Penrose MP: Put off what?

Baroness Fookes: Put off exporting to countries where they might have to engage in such activities that are frowned upon and regarded as illegal by the law in this country.

John Penrose MP: I have already mentioned the business surveys. We will try to get them to the Committee if we can. I think they show that most British firms find it easier and safer to be able to export on the basis of a level playing field. They prefer not to export to countries where they risk being disadvantaged by a well-connected local company that may not be providing nearly such a good product or service but is connected in some corrupt fashion so that the British company finds it harder to get the contract in the first place and to do business.

Most British companies say that it is just easier, lower cost, and more consistent and predictable, quite apart from being fairer, to do business in a way that they recognise is the norm here at home, and that is what they are geared up to do. That does not mean that they are disqualified or discouraged from doing business in countries where that is not purely the case, but it means that they then have to jump through several hoops to set themselves up in a way that makes them and their staff safe from contravening the Bribery Act.

When they get involved with that, the duty to prevent and all the other bits and pieces mean that they have to educate their staff properly and have proper policies in place. It does not stop them doing business in those countries, but it is more of a faff, it is more difficult for them, so many of them prefer to steer clear and go where the money is easier, if possible.

Lord Thomas of Gresford: Do any ministerial departments give advice on the dangers of corruption in a particular country?

John Penrose MP: I am not aware of that, no.

Lord Thomas of Gresford: Would it be a good thing?

John Penrose MP: I am reminded of the overheard comment from David Cameron before the London anti-corruption conference and the fuss made and the damage done by a long-distance camera picking up the fact that he labelled one country or two as “fantastically corrupt”. If we were to do such things, it would have to be done incredibly carefully. The danger is that, first, because corruptors are very light on their feet, as we said right at the start, whatever today’s threat might be could be very different in six months’ time.

Secondly, it varies so much by sector and by company that it would be difficult to come up with something helpful for every company doing business in that country. I am not saying that it is a completely impossible idea, just that it would be difficult. If the Committee investigated further and concluded that it would be helpful and could be done in a way that was practically useful and avoid creating too many diplomatic ructions, we would want to look at that very carefully. If the Committee comes up with some recommendations in that area, I would be very interested.

Lord Thomas of Gresford: The Foreign Office gives advice on safety in foreign countries. Could it be known that a particular British diplomat in a

foreign country will give informal advice on a confidential basis? Perhaps they do.

John Penrose MP: This is the other end of the question that Lord Hodgson asked about providing advice to small businesses, and it is another example of that. Quite a lot of advice is already out there. If it can be improved in a way that will be practical and helpful without creating an enormous industry free at the point of delivery and funded by the taxpayer, let us have a look at it, but we would need to be careful about the industry that we might create as a result, particularly when some people out there already try to provide that on a professional basis.

Lord Grabiner: Have you been approached by any businesses, small or big, saying that if they were permitted to make a facilitation payment they would get some business that otherwise they would not get? Has anybody ever come to you with that request for information or support?

John Penrose MP: They have not. It would not surprise me if they did, because facilitation payments are routinely asked for around the world, but nobody has.

Lord Grabiner: Would you have expected to have received inquiries of that kind?

John Penrose MP: Not necessarily, because anybody who cares to look up what the role involves knows that I am not supposed to be dealing with individual cases. If they tried, we would direct them elsewhere.

Lord Grabiner: Would you tell them to see a lawyer?

John Penrose MP: In that case probably yes, or to read the guidance.

Lord Grabiner: Do you think that is good enough?

John Penrose MP: Which bit?

Lord Grabiner: To say, "It's not for me. You've got to make your own judgment. Go and see a lawyer"? Would you not like to have the power or the ability to be a little more approachable and a little more helpful to deal with such inquiries, rather than having a black-and-white legal analysis?

John Penrose MP: I suspect that my instinct and that of everybody in the room is that we are here because of public service, so of course we would all like to be helpful if we could, but there is a question of finite taxpayer resources. The question is how we provide the most effective, practical and useful advice to as many people, organisations and companies as possible in the most cost-effective way. We will probably not be able to provide individual, tailored advice to everybody who comes, but we can do quite a lot for most people most of the time in a rather more cost-effective fashion than that, at least.

Lord Haskel: There is an alternative to seeing a lawyer, which is to see the auditor and ask whether it would be allowed as a business expense.

John Penrose MP: It is not just that, although that is one possibility. Quite a lot of trade associations will provide advice—people such as the FSB and all the others—and an awful lot of help in these areas too. It is not something for which you should just go to see a lawyer; there are plenty of other people out there who will also help.

Lord Hodgson of Astley Abbotts: Could we run through the practicalities for a small or medium-sized business? It has concerns about this. It cannot go to the Government, because they say, “It’s nothing to do with us, guv, you make up your own mind”. The company’s lawyer says to go to the guidance, because that is the only place.

There is a section on hospitality, promotion and other business expenditure at paragraphs 26 to 32, which is “on the one hand, on the other” throughout. It concludes with this really helpful statement: “It is, however, for individual organisations or business representative bodies to establish and disseminate appropriate standards for hospitality and promotion or other similar expenditure”. What does that tell me? What is that in the way of guidance? It tells me absolutely nothing.

John Penrose MP: What are you quoting from? There are two bits of guidance. Yours has a black-and-white cover.

Lord Hodgson of Astley Abbotts: At paragraph 32 there is guidance from the Ministry of Justice about proceedings for relevant commercial organisations. It seems that a lot of this stuff is waffle. I could have written it in five minutes. It does not tell me anything.

Lord Thomas of Gresford: It is a take-your-chance approach, is it not?

John Penrose MP: There are two bits of guidance and I am not sure which one you are quoting. One is more detailed than the other. If the Committee’s conclusion is that the Government’s guidance is insufficiently detailed or insufficiently clear, that is important, and it would be very useful to go back and say, “How do we improve on this?” We will not be able to do this for everybody, as I said, but if it needs some work, that is very helpful and we will take that away. But I do not want to pre-judge your conclusions.

The Chairman: I do not think you are doing that, but are you satisfied with the guidance that is presently available?

John Penrose MP: I have not had people come to me and tell me that it is awful at all.

Lord Hutton of Furness: On this point, though, there have been no prosecutions for alleged facilitation payments in the UK, have there?

John Penrose MP: As I understand it, no.

Baroness Primarolo: You will be familiar with the work of Transparency International and the fact that it compares countries. New Zealand comes out as the very best in that index, yet New Zealand allows facilitation payments. It defines them and they may be limited. Have you looked at New Zealand's legislation or practice to see whether the line that you have clearly explained to the Committee—that there is a moral case that all of them should be excluded—is the best way forward?

John Penrose MP: Not in the six months that I have been doing the job. That is a very fair point.

The Chairman: We move on to deferred prosecution agreements.

Q32 **Lord Grabiner:** Mr Penrose, are you familiar with the deferred prosecution agreement?

John Penrose MP: In outline, although, not being an investigator or a prosecutor, I do not apply it.

Lord Grabiner: But you are familiar with the concept and essentially how it works. It might be an agreement made in respect of all sorts of different crimes, but we are interested to know whether you believe or understand DPAs to be working. Are they working effectively in relation to the Bribery Act specifically?

John Penrose MP: At the moment, the evidence base for saying that they are or are not looks quite thin. There are lots of guidelines on how it should work, and people who operate and use those guidelines are telling me that they are perfectly content that they are fair in principle. The question would have to be that the SFO has reached four DPAs with UK companies, so the number of examples is small so far. My instinct thus far has been that we should watch carefully to see if an evidence base emerges that these things are being applied fairly or unfairly.

The guidance should be kept under review to make sure that it remains fair, but so far people are not saying—to me, at least—that they think it is wrong in principle. You may have evidence to your inquiry that gives you a different picture. If so, that would be interesting. Given the limited number of DPAs where it has been applied so far, it seems a small number of cases on which to start concluding that it is right or wrong, beyond the basics of the guidelines themselves. Unless the Committee has a different view already.

Lord Grabiner: I am not suggesting for a moment that you do, or indeed that it would be appropriate for you to discuss the detail of any DPA agreement or negotiation, but leaving that aside, do you have regular meetings, for example with the Serious Fraud Office, to discuss in big picture terms—in statistical terms, for example—the current state of play in relation to DPAs?

John Penrose MP: I do not have regular meetings to discuss that with them, no. I will ask them about it periodically, but given that they have done only four so far, I think a regular meeting would be overegging it a bit.

However, I come back to the point that they would obviously not tell me what they are doing in current investigations because that would be inappropriate. As things have gone through due process, at that point, yes, I would want and expect committees such as this one to look at whether the guidelines are being applied in a way that comes out as fair, rather than just being fair in theory.

Lord Grabiner: Do you think it would be helpful to have a regular meeting date in the diary, even if they are not very frequent, to see what the current state of play is?

John Penrose MP: I did not mean to say that I am not asking the question; I have periodic conversations with people from the SFO. We will ask about those kinds of things in any case, and not just DPAs but things more broadly.

All I meant was that I do not think it would be sensible to have a regular, diarised meeting to talk about DPAs, given the very small number. In many cases, there would be nothing on the agenda to discuss. That was the slightly trite point I was making.

Lord Grabiner: Do you have any sense that DPAs might be regarded as an easy way out, and that a much more serious solution to a particular problem might be to go ahead and prosecute, and get a conviction, with all the associated publicity? Might that sometimes be necessary, and the DPA be seen as a soft option?

John Penrose MP: That question is probably rightly addressed to the prosecuting decision-makers.

Lord Grabiner: Is that fair? After all, your job is to be concerned about bribery, enforcing the law and so on—not in terms of prosecuting it, but making sure that the law is effective. I would have thought that you would be very interested indeed in making sure that the mechanisms available under the legislation are effective.

John Penrose MP: Yes, sorry. What I was trying to drive at there, and I did not make the point particularly elegantly, is that the guidelines, as I understand them, are designed in principle to avoid the kind of criticism that you are describing, among other things. DPAs are not supposed to be a soft option, and the guidelines are set up to avoid that being the case.

Once the SFO has more of a track record on them—as I said, there are only four so far—if we discover that in practice the decisions that are being made, and the way the guidelines are being applied in practice, are not in accordance with the original intention, then, yes, we will have to ask

whether the guidelines need to be changed or whether we need to have some other kind of discussion with the prosecutors about how they are applying them, in order to ensure that that criticism, if fair, cannot be made in future. The guidelines are designed to avoid that kind of thing, and rightly so, I think.

Lord Thomas of Gresford: I am sure you would agree that if the DPA were a soft option, it would weaken the disciplines upon business under the Bribery Act.

John Penrose MP: Yes. That goes to the point that we were just discussing.

Lord Hutton of Furness: Do you think that DPAs should be confined to cases that are self-reported?

John Penrose MP: Self-reporting is one of the conditions. It is not the only one, and it is certainly not enough on its own, obviously. Do you have a particular thought about why it would be better? Can you think of an example of something that was not self-reported where a DPA might not be appropriate?

Lord Hutton of Furness: If the premise of the DPA is to encourage better corporate practice in relation to corruption, one could see why you would want to encourage companies to bring such evidence or such cases forward without fear of criminal prosecution. But if these DPAs are more widely available, and this is only one factor that a prosecutor will take into account, it might have the effect that Lord Thomas indicated: it might somehow weaken the effectiveness of the Act.

John Penrose MP: You are suggesting that it should be available only to people who self-report.

Lord Hutton of Furness: I am just asking if you have an opinion about that. I know there are a number of factors, but I just wanted to establish that.

John Penrose MP: The question that all of us would then have to address is what would happen if somebody outside an organisation came forward and reported something that the organisation, with the best will in the world, was not aware of. Had they known about it, they would have all sorts of mechanisms to prevent it, but they just did not know that it was happening, and this person did not go to them first but went to a Sunday newspaper, or whatever it might be, and all of a sudden the story broke.

At that point, it might be perfectly legitimate to use a DPA if the organisation is horrified and is trying to react promptly and take all sorts of good steps to respond in the right way. But you would also want to be sure that the person had not gone to the Sunday newspapers or wherever because they had tried to raise it internally and been fobbed off and ignored. So I can see a couple of examples where there might be a

legitimate explanation, but I can also see that you would need to tread very carefully, because one of the points about self-reporting is that it is evidence that the particular organisation or company knows that it has done wrong, recognises that and wants to reform and do better. But it is not the only way.

Lord Hutton of Furness: So we should not change the current approach.

John Penrose MP: I would want to ask anyone suggesting that how they avoid the problem of the well-intentioned company that wants to do the right thing and has all these other things in place but genuinely did not know that something was going on and could not have known that it was going on. Is that likely? If it is, how would this constriction treat that company?

Lord Plant of Highfield: May I ask a very naive question? It is about the publicity associated, or not associated, with DPAs. A prosecutor or prosecuting authority decides to prosecute, the corporate body is charged with an offence, and that offence is immediately suspended while the DPA is negotiated, if it can be negotiated. Then the arrangements so negotiated have to be approved by the judge.

Is any of this process known to the general public, and if not, why not? Here you have a judge making a judgment about a case, you have a prosecutor making a judgment about the need to prosecute, and it seems a bit bizarre, to be honest, if DPAs are not part of the public realm so that they can be looked at, commented on and so forth by those who are interested in doing so.

John Penrose MP: Let me check the answer. I will offer it with a caveat until I have checked it, but I think that, because this happens in a court, these things are made public, subject to reporting restrictions if the judge feels they are appropriate. There may be an ongoing investigation into it, or that sort of thing. There are other people around the table who are involved in the Act, so they may be able to correct me on that.

Lord Grabiner: The negotiation is a without-prejudice negotiation that is done in private, but if the decision is ultimately proved by the judge sitting, his judgment is published.

John Penrose MP: In that case I think I am right in saying that it would not be published only if there were additional reporting restrictions because there is an ongoing case, which would be temporary, but that, again, would be decided by the judge.

Lord Grabiner: Or if the judge rejected the proposal that there should be an agreement, I suspect that would be the end of it. That would be kept in confidence.

John Penrose MP: Yes, that would be in the negotiation, but the conclusion would be as you describe.

Q33 **Lord Hodgson of Astley Abbotts:** This question is about your role in promoting the UK's response to corruption internationally. Could you give us your view of how the Bribery Act compares with equivalent legislation in other countries?

John Penrose MP: We touched on this before, and the answer is that it has been well received, I think. Most international bodies, commentators and so on think that the Bribery Act is one of the leading examples around the world. That Act and the US Foreign Corrupt Practices Act are two of the leading examples. They are not the only ones out there—we have already heard that New Zealand does well, on its overall transparency score at least—but the Act is pretty well regarded. It seems to have achieved the original Bill's intention, which was to take a rather scrappy and out-of-date area of law, update it and extend it in a couple of very narrow areas that we have already covered.

Broadly speaking, the response has been positive and not just from government cheerleaders, either for previous Governments or the current one. Internationally, people seem to be reasonably responsive and respectful.

Q34 **Lord Empey:** Like every piece of legislation that this place passes, have you observed any consequences from the Bribery Act 2010 that were not anticipated when it went into force?

John Penrose MP: The main example I would cite would be the conversation that we have already had about the anecdotal concerns about the Section 7 offence and whether it is creating false positives or false negatives. There is concern out there about that, but, as I also said, I cannot get anyone to provide me with any firm evidence about that. I am rather hoping that the Committee might help uncover some. That is pretty much the only example of that.

Beyond that, no, broadly speaking. People have been reasonably constructive about it. There will be follow-up questions about facilitation payments and the DPA's application, but those are not unintended consequences.

Lord Empey: I suppose there will always be argument as to when you review a piece of legislation. Are we coming to it too soon after its inception? To follow up Baroness Fookes's point, do you get any sense that it is creating a barrier or disincentive, particularly to smaller companies, to take up the cudgels of exporting?

John Penrose MP: There are many different potential barriers to companies exporting. I have no doubt that the perception of the risk of encountering corruption in an export market will be a factor that businesses will take into account. I was a businessman myself before I fell among thieves and came to this place. Yes, it will absolutely be something that people take into account.

I do not think that is an unintended consequence. That is something that the Bill wanted to achieve; it wanted to make people think about whether they were conducting business honestly and ethically, no matter whether it was in the UK or in foreign countries. It was also intended to be part of an international movement to make it easier for people to export in an ethical, fair, level-playing-field environment. We have made some strides on that, but I would be the last person to argue that that has been achieved globally. Those, I would argue, are intended consequences.

Another intended consequence is that many of those companies have therefore found themselves getting clued up about how you deal with this when, not if, you are asked for a bribe and how you cope with it.

Lord Empey: Finally, and following points that Lord Hodgson and others made, surely a small, relatively unsophisticated business would benefit greatly from, first, transparency and, secondly, good advice. Albeit that I see that you would not want to get involved a broad swathe of telling people, “You can do this, but you can’t do that”, would you not agree that for a small business that does not have sophisticated resources or access to highly qualified legal advice, the guidance given and the transparency associated with how the Act operates is a more important matter, and that we would not want an unintended consequence of the Act to be to deter people unnecessarily from participating in exporting?

John Penrose MP: That is absolutely right. Done right—not a trivial thing to achieve, I hasten to add—this ought to equip people to manage more effectively what is one of many risks to business. It is not easy, but there is not just government advice, there is advice from all sorts of other bodies. I mentioned the FSB, but you will find books out there about how to pay bribes properly—in other words, not pay them and deal with requests for corruption.

There is a small industry out there, and we are all still learning about this. You are right that there will be people who are deterred by that, but with any luck and some encouragement we can get them to the point where they will overcome their fears, and there are many things other than bribery that they are more likely to be afraid of when deciding whether to export.

Lord Thomas of Gresford: I understand your reluctance not to set up a bureaucratic and expensive licensing system for ticketing, giving permission to a company, but would it be possible for a small company to disclose a proposal that it has received to the department and use it as a defence to any action that might subsequently be brought under the Bribery Act? Could it say, “We did not ask for advice, but we told you what the position was”?

John Penrose MP: Are you thinking of the pre-trial period?

Lord Thomas of Gresford: No, just before it happens, saying, “We want to do business in this country. We are told that we have to pay into a Swiss

bank account and our advisers say that we can do that, but we are disclosing it to you". Could that not be a defence?

John Penrose MP: I would be leery of this for a couple of reasons. One is that if you end up with thousands of these things turning up every day on a precautionary principle, you pretty much guarantee that you create precisely the sort of bureaucracy that you described beforehand.

If it created a general defence, no matter how egregious the thing that you were disclosing, that would not necessarily be just or safe for us to provide. We do not offer this on government time and the taxpayer's dollar for many other areas of law. This is relatively new, although not that new anymore—it is seven years since the Act was in place. We do not do this for all legislation. Any new law needs to be widely understood and accepted and become part of your instincts, if you like, if it can.

I offer that caution, because I think we may be in danger of overstating the level of problems here, because this is new and therefore people have had to get used to it. Once they have got used to it, we ought to find that this is part of the normal warp and weft of the way people do business in this country.

Lord Grabiner: I am trying to identify what seems to be an unstated premise in a number of your answers, which is a strong dependence on prosecutorial discretion. I do not want to put words in your mouth, but I would like your reaction. Is it your hope and expectation that the prosecutor will exercise sensible discretion so that a lot of theoretical matters fall away and hopefully he or she will nail the correct ones? Is that your thinking? If it is, to what extent is that a satisfactory way of having legal rules in place, especially those that carry a criminal penalty?

John Penrose MP: I am not trying to say that this is in any way special or different from any other area of prosecutorial or investigatory activity. Whenever you have the National Crime Agency, the SFO or anybody else investigating Bribery Act-related offences or anything else, they have to decide all the time whether this case is more likely than that one to lead to a result, and where they put their resources and so forth. They also have to decide which are the most appropriate offences to use when considering what charges to bring and so on.

That is part of the normal activities of those agencies, which are rightly at arm's length from politicians. I am not arguing that it should be any different in relation to the Bribery Act. If you are making a broader criticism of the way those organisations operate, it probably goes broader than just the Bribery Act, but I am certainly not arguing that it should be different in this case for this Act.

The Chairman: Thank you. I take the view, although the Committee may disagree, that we have largely covered the following two questions, but if on reading the transcript or otherwise you feel that you could add further

to the answers you have given to those questions, we would be very grateful. That brings us to the question on resources.

Q35 Lord Plant of Highfield: Given your role as you have outlined it, you presumably have a strong interest in the effectiveness of the Crown Prosecution Service and the Serious Fraud Office, and an interest in developing practices in this area—for example, the National Crime Agency and the National Economic Crime Centre. I have two questions. First, do you think that these bodies are sufficiently well resourced to do all that they should be doing, or are you aware of any lacunae because there are not the resources to do what they perhaps ought to? Secondly, should the National Economic Crime Centre also have a remit to do with bribery?

John Penrose MP: It is always possible to add more resources to any public body, and most public bodies will always have a shopping list, particularly at the time of a spending review.

Putting that eternal truth aside for a second, are we focusing the existing resources in the right way? We talked before about the agencies obviously needing to make decisions based on their own independence. I am asking a couple of questions about things to make sure that we are not missing them out. There may be really good answers to these questions, which I have started asking but do not have answers to yet. I will share them with the Committee to see whether it finds anything useful that might help it in this area.

One is that there has been quite a lot of discussion recently about whether Companies House, in acting as a register for companies, is sufficiently checking the data that is held on that register, both for company directors and increasingly for company beneficial owners. Are we as a country spending enough time and effort to make sure that that data is accurate—data that is essential for the transparency that, as we have talked about, is one source for finding out whether we have a bigger problem than we were aware of? There is quite a lot of concern that we might not be checking that sufficiently strongly at the moment.

There is a different question about whether that should be done by Companies House, which is supposed to be a registrar service rather than an investigative service, or by somebody else checking its data. That issue is separate, but a lot of questions are being asked about whether we are being sufficiently rigorous about checking that data, particularly the new stuff about beneficial ownership. A number of people are also querying with me whether we are being systematic about checking some of the company agents—that is, the lawyers and accountants; HMRC has a stable of trusted company agents—to make sure that when they provide data that goes on to the Companies House register, for example, and in future will go on to the real estate property register that we talked about, that data is accurate and correct.

Those are new problems. The directorship is not new—the beneficial ownership stuff is relatively new—but questions are being asked about that, and we need to ask whether we are being sufficiently systematic about investigating whether those things have been done properly.

The only other issue that I have is that I have yet to get to enough of the regional organised crime units, which would obviously include bribery, to see whether they are focused on bribery and anti-corruption, since organised crime is broader than just corruption. Given that they are regional, some may be better than others, and I do not yet have a sense of the pecking order.

Those are the areas where I have outstanding questions. I would not want to mislead the Committee by saying that they are all screamingly awful, or anything like that, but those are the things that I am currently asking questions about for the Committee's benefit, if I can put it that way.

Lord Hutton of Furness: Is any of the data at Companies House relevant to the operation of the Bribery Act? I can see how it might have relevance to broader anti-corruption strategies that the Government are pursuing, but is there data that is relevant to how the Act is working?

John Penrose MP: It is a fair challenge. I think it is more useful, particularly to anti-money laundering and those sorts of affairs. It might be useful to some investigations, but I suspect that it is more important for anti-money laundering. I was just trying to share where those prosecutorial and investigative agencies are, on which I have questions at the moment.

The Chairman: We can move on to our last question.

Q36 **Lord Thomas of Gresford:** Do the whistleblowing legislation and the Public Interest Disclosure Act 1998 provide adequate protection for employees who report bribery? You will see from the note that was sent to you that Public Concern at Work found that four out of five whistleblowers have experienced a negative outcome. That has caused a drop, which it says is a continuous drop, in the number of individuals saying that they would raise a concern about serious malpractice in the workplace. What are your views on that?

John Penrose MP: Whistleblowing is much broader than bribery, but it clearly includes bribery, and it is part of the reason why you might blow the whistle. The difficulty is that quite a lot of it goes to culture as much as to the legal framework. Clearly the culture will be driven partly by the legal framework, and the legal framework will drive the culture, so there is a circularity there. There is widespread concern in health, for example. Many of you here who have been MPs may well remember that your postbags included concerns from people who had blown whistles for professional health organisations and who had been monstered by the organisation and ended up losing their jobs, not because of anything to do with bribery but because of evidence of some other poor practice.

It is bigger and broader, and some of it may have very little to do with the legal framework and everything to do with whether a particular profession closes ranks and ostracises that person and makes it hard for him to continue working or to get a job somewhere else. We need to frame it in that context, because it is not just susceptible to a change in the Bribery Act; it is much more broadly rooted and a great deal more sophisticated and complicated. I am not trying to say that it does not apply here. It clearly does, but the answers may be a great deal broader as well.

That leads me to the specific point, which is that a number of NGOs, for example, will argue that, regardless of our legal framework, we are not very good at dealing with whistleblowers simply because you get this sort of cultural closing of ranks. Whether or not there is an official whistleblower hotline, does the culture reflect the legal theory? Even if the legal theory is followed through in an absolutely meticulous sense, does the culture still fight against it or get you in the end?

My concern—this is a broader anti-corruption point—is whether we have a broader problem with whistleblowing in this country, rather than stuff to do with bribery, which tends to be a bit more serious. I do not know the answer to how we might fix that yet, but enough NGOs, constituents and MPs are telling me that they have things in their postbags about some of the broader questions on whistleblowing to make me wonder if we are doing this right, or to make me suspect that we are not doing it right. It is quite inchoate at the moment, and some of the answers will have very little to do with the Bribery Act and everything to do with organisational culture in everything from a local hospital trust through to the police, the Prison Service, or whatever it might be.

The Chairman: Does anyone have any further questions to put to Mr Penrose this morning? It remains to say thank you very much indeed for coming to give evidence to us. I have already mentioned that you will be sent a copy of the transcript, so any corrections you wish to make, please let us know as soon as possible, or if you wish to amplify any of the evidence you have given to us.

Kathryn Higgs and Susan Hawley – Oral evidence (QQ 37-52)

Tuesday 17 July 2018

10.30 am

[Watch the meeting](#)

Members present: Lord Saville of Newdigate (Chairman); Baroness Fookes; Lord Gold; Lord Haskel; Lord Hodgson of Astley Abbotts; Lord Hutton of Furness; Lord Plant of Highfield; Baroness Primarolo; Lord Stunell.

Evidence Session No. 3

Heard in Public

Questions 37 – 52

Examination of witnesses

Kathryn Higgs and Susan Hawley.

Q37 The Chairman: Good morning to you. Thank you very much for coming to assist this Committee with its scrutiny of the Bribery Act 2010. A list of the interests of the members of the Committee has already been supplied to you, and we are grateful to both of you for submitting written evidence for us to read before you came to give oral evidence to us. A transcript will be taken of this session. It is open to the public, it is broadcast live and it will be available on the parliamentary website hereafter. A few days hence, you will be sent a copy of the transcript, and that is your opportunity to correct it if it contains any errors. If you wish to clarify or amplify any points that you made during the course of your oral evidence, that is the time to do so.

Although we have received considerable information about you, I would like each of you in turn to introduce yourselves so that we have that introduction on the transcript.

Susan Hawley: I am the policy director of Corruption Watch. We monitor how the UK enforces its anti-corruption laws. We have had someone in the courts at pretty much every foreign bribery trial that has taken place over the last two or three years. We look at the policy implications coming out of the judgments. We have done a lot of policy work around corporate liability issues and deferred prosecution agreements.

Kathryn Higgs: I am the director of the business integrity programme for Transparency International UK. Transparency International is the leading global anti-corruption organisation. The business integrity programme liaises with UK businesses in order to drive business integrity standards up both in the UK and, by extension, around the world, as UK businesses work internationally. I joined Transparency International from the private sector, where I was a chief compliance officer for a number of years. We have

chosen for me to give evidence on behalf of Transparency International today so that we can bring that business expertise to the session.

Q38 The Chairman: Thank you. You have received a list of the questions. You are not limited to the answers to those questions, if you want to add anything to the subject matter of the question. Let us start by me asking you this: seven years after the Bribery Act 2010 came into force, how prevalent do you think bribery is across the UK? Has there been a cultural shift in attitudes towards bribery and corruption more generally as a result of the Act?

Susan Hawley: We were discussing beforehand that this is quite a hard question to answer, because there are very few statistics out there, if we are looking at a domestic level. There are two different questions in there. There is no current reporting mechanism in the UK for corruption and bribery. The UK Government committed to introducing such a mechanism, in 2014, in their anti-corruption plan, for delivery by July 2015. That has not happened. It is now in the national anti-corruption strategy to have that reporting mechanism, and that is important. One of the problems with domestic corruption and bribery is that it is often not named as such. We mention in our evidence that, certainly in the Crown Prosecution Service, there is a tendency to prosecute what we might consider bribery and corruption in some contexts as fraud by abuse of position or using other types of criminality to name it.

Kathryn Higgs: I would agree with Sue. It is difficult to measure the prevalence of bribery and corruption when some of it goes undetected, which makes it difficult to get a full picture of what is going on. While it is recognised that the UK has a lower likelihood, perhaps, of bribery and corruption than other jurisdictions, it is important to remember that UK businesses are working in a global business environment where they are exposed to those risks on a daily basis.

The Chairman: Do you have any suggestions as to how we could improve our knowledge of the effect of the Bribery Act?

Kathryn Higgs: Surveys have been conducted by various organisations. PricewaterhouseCoopers conducts one on a recurring basis. It gauges the exposure to bribery based on survey results for large multinationals. Its 2018 results indicated a marked increase in exposure to bribery and corruption by those participants. It would also be useful to conduct a repeat of the Government's 2015 survey, which would survey a wider audience, because the big four surveys tend to focus on large multinationals, whereas the 2015 survey looks at small to medium enterprises and other organisations.

Lord Haskel: How influenced are we by bribery and corruption that goes on outside the UK in dealing with corruption here in the UK? I do not know whether you saw the *Financial Times Weekend* magazine, but there was a long exposure about the financing of the Trump Tower in Toronto, and it

was obvious that there was international bribery going on. How influenced would we be by what is going on overseas? After all, these businesses are international.

Kathryn Higgs: My experience, from having worked in the private sector, is that businesses will monitor the sort of behaviour that is going on in all the countries in which they operate and they will carry those learnings across their entire operation. You will be cognisant of trends that are more prevalent in certain countries but, yes, something that can happen in Canada can happen in the UK, so you would take that learning across your entire organisation.

Lord Hutton of Furness: You mentioned the PwC report and its findings. Should we conclude from that that bribery is increasing?

Kathryn Higgs: There are two possible reasons for that statistic. One is that bribery and corruption are at least not declining; the other is increased awareness. Over the past eight years, with the introduction of quite sophisticated compliance programmes in the organisations answering this survey, more and more employees will be aware of the risks and, therefore, more sensitive or attuned to them when they see something going on.

Lord Hutton of Furness: Therefore, it is not increasing.

Kathryn Higgs: I do not think it is necessarily increasing, but it is not markedly decreasing at this stage either.

Q39 The Chairman: One of the specific criticisms you make of the Bribery Act concerns Section 13. Do you have any evidence from the security services that they would be happy for Section 13 to be amended or, indeed, abolished?

Susan Hawley: We do not have any evidence on that and we think it would be useful if the Government were to be asked if they have evidence of whether it has been used by the security services. As colleagues at Transparency International have expressed, there is a concern about how broad that exemption could be. Could it, for instance, include defence contractors in Saudi Arabia working on an MoD, government-to-government project? We do not have any evidence of it being used, but that would not necessarily come into the public domain either, so that would be a question for the Government to answer.

Lord Haskel: In your note, you speak of a lack of resources and the insecurity of the SFO. Has this had an impact on the prevalence of bribery detection here in the UK?

Susan Hawley: That is a good question. Our experience of the SFO in the last six years is that it has definitely been increasing its “mojo”, as David Green put it. It is taken seriously; it has showed it is prepared to take action; it is very robust. As for whether that is having an impact on detection, I would hope so. It now has a very dedicated intelligence team,

which will be increasing detection. It seems to be much more aware, in our experience, of cases where, in the past, you would go to the SFO and it would not have a clue, whereas now it seems to have quite a good grasp of most of the allegations that are out there and, in many cases, is doing something about it. There is definitely a sense that the SFO is on an upward trend of enforcement and that needs to be maintained.

Lord Gold: In your paper, you say that Section 13 should be narrowed as it is currently “open to abuse”, but is there any evidence of abuse at all?

Kathryn Higgs: You are referring to the Transparency International paper. I do not believe there is any evidence of actual abuse. My understanding is that there is, perhaps, insufficient monitoring of the use of the section and whether, in fact, the section is being used. I would like to comment at this point that, while I oversee the business integrity programme, we have a specialist defence team at Transparency International, which would be able to provide much more detailed responses to this. I would be happy to provide follow-up material, if you would like.

Lord Gold: I have been reminded that I should declare my interest in this matter, which is that I am the principal of a consultancy I set up called David Gold & Associates. I have been an adviser to Rolls-Royce and I am an adviser to Airbus and Serco. I was a monitor of BAE Systems and I used to be a partner and senior partner of Herbert Smith. That is where I come from.

Susan Hawley: It would be very hard to get public evidence about whether Section 13 was being abused in that way. It just would not come into the public domain unless there was a whistleblower.

Lord Gold: The issue for us is that, when we consider our report, there are several statements or suggestions that we should consider amending the Act. Unless there is hard evidence that supports change, I wonder whether the better course is not just to leave alone. If we do not have that evidence it is a bit difficult for us to make that determination in due course, is it not?

Susan Hawley: I completely appreciate that, which is why it would be useful for the Committee to ask the Government if they can present evidence as to whether it has ever been used as an exemption.

Lord Gold: In relation to SMEs, you make certain suggestions as well and suggest they have been prejudiced, but they are all quite happy. The statistics show they are quite happy with the Act as it is.

Susan Hawley: That is our experience from the public domain information, including the July 2015 consultation, apart from the one trade body that we mention in our evidence, which was pretty much of the view that “this is what we do and we are going to carry on bribing”. The Government and the OECD recognise there is a problem with SMEs and that problem is not in the Act; it is in the dissemination and the information. The APPG on Anti-Corruption did a report in 2016 precisely looking at this

issue, and there were some very good suggestions from that, which I am sure Kathryn will want to follow up on, about how you use collective action; how the Government can find ways to help SMEs with due diligence, for instance, in export. There is lots of support that can be given to SMEs without changing the Act or the guidance.

Kathryn Higgs: Yes. There are, of course, some initiatives that the Government are engaging in at the moment to consolidate guidance and provide resources to business in this space. As larger companies are introducing more and more sophisticated compliance programmes, there becomes an increasing burden on the supply chain to meet the standards that are expected by the large multinationals. Rather than compromising the standards that they are expected to meet, there is an opportunity for collective action, supported by the Government, for large multinationals to provide support to those SMEs.

Q40 Lord Hodgson of Astley Abbotts: I do not believe we have touched on our territories overseas and how they reflect back into the UK. We have now introduced tougher regulation of British Overseas Territories, which will be coming in by 2020, but the Government have not done so for the Crown dependencies, partly on constitutional grounds, partly on the grounds that they have adequate measures against bribery already in place. Would you like to say something about the Isle of Man, Jersey and Guernsey?

Susan Hawley: As far as I am aware, the people behind the amendment would very much like that to be extended to the Crown dependencies. They were not excluded from the amendment that was accepted by the Government on the grounds that it was all okay, but because there was a different constitutional arrangement. Ensuring that the Crown dependencies are compliant with the UN Convention against Corruption, and are signed up to and compliant with the OECD Convention against Bribery of Foreign Public Officials, is crucial, as is extending public beneficial ownership registers.

Lord Hutton of Furness: Following up on the Section 13 issue, if I understood your evidence to us correctly, Corruption Watch monitors every bribery case that goes through the courts.

Susan Hawley: We try to, yes, with foreign bribery.

Lord Hutton of Furness: You acknowledge that Section 13 has never been deployed as a defence in any case in the UK.

Susan Hawley: Never, no. But, to be honest, there have not been a huge number of cases and there are some key cases in the SFO caseload where I can see it could have been used.

Lord Hutton of Furness: Ms Higgs, as I understand your evidence to us, you would prefer Section 13 to be removed from the Act altogether; is that right?

Kathryn Higgs: Yes, we would prefer to see it removed or, failing that, to have better guidance from the Government on when and how it should be used.

Lord Hutton of Furness: Is it not generally a better principle to have defences in a Bill or clearly articulated in legislation rather than relying on the discretion of a prosecutor?

Kathryn Higgs: Yes, it is.

Lord Hutton of Furness: Then at least we know what is going on, do we not?

Kathryn Higgs: Absolutely.

Lord Hutton of Furness: Is that not an argument for keeping Section 13 in the Act?

Kathryn Higgs: Yes, or abolishing it entirely.

Lord Hutton of Furness: But then that would rely entirely on the discretion of the prosecutor and we would not be aware of any of those decision-making processes, because such a case might never reach the court.

Kathryn Higgs: But the difference is that having Section 13 in the legislation provides for an automatic presumption that this sort of behaviour would be acceptable.

Lord Hutton of Furness: It just provides a defence. It is not a bar to a prosecution, is it? The defence would have to be tested in court as to whether the actions of the defendant came within Section 13. It is not a bar to prosecution, is it?

Kathryn Higgs: I understand that. I am suggesting, though, that by having such a specific exemption in the legislation it sets a tone that this sort of behaviour is acceptable in the United Kingdom.

Lord Hutton of Furness: There is no evidence for that, is there? It is just an assertion, is it not?

Kathryn Higgs: It is an assertion, on this basis: why include a specific exemption, a specific defence, unless it is particularly required?

Lord Hutton of Furness: Indeed.

The Chairman: If I understand you correctly, the basic point you are making about Section 13 is that it waters down a blanket prohibition on bribery and, therefore, should be either removed or kept, perhaps in a modified form, only if it is clearly demonstrated that it is required. Would that be a fair summary of your views on Section 13?

Kathryn Higgs: That is correct.

Q41 **Baroness Fookes:** I want to turn to the specific area of facilitation payments. They are not allowed for in the Bribery Act 2010. The United States and some other countries make such provision. Do you agree with the stance of the United States? Should we be considering that here?

Kathryn Higgs: We should absolutely not be considering allowing facilitation payments under the UK legislation. The vast majority of countries around the world prohibit facilitation payments. There are some notable exceptions; the US is the main one. However, our view is that the United States is the exception, not the standard that we should be operating to and, therefore, there is no need. It is the equivalent of saying that you can steal a little, but not a lot.

Susan Hawley: We agree that it would be deeply regressive to make it an exception in the Bribery Act. This was discussed extensively. There was an amendment, when the Bribery Act was going through, to have such an exception. There was quite significant discussion then and it was rightly rejected, for various reasons. Petty corruption is hugely damaging to poor countries and it helps entrench bad practice if it is allowed. The UK's stance has been very successful in other countries seeing that as the gold standard. Canada has now removed its exception for facilitation payments and is phasing it out. In Australia, the Senate committee has recommended that the exception be removed. It would be massively undermining to those businesses that have put in place really strong procedures on this and that see the Bribery Act as a way of resisting those payments. We would strongly urge that not to be on the agenda.

Baroness Fookes: Do you have any evidence of companies—perhaps smaller ones in particular—that might be penalised or disadvantaged in doing this work overseas?

Susan Hawley: Do you mean due to the lack of an exemption?

Baroness Fookes: Yes.

Susan Hawley: I do not have evidence of that and I would be interested in what Kathryn has to say on it. The issue is that there are so many other ways of helping those companies, which do not include creating an exception. The Maritime Anti-Corruption Network has done amazing work in helping reduce small bribe payments through collective action. There might be a need for more support from the Government and particularly commercial officers in Foreign Office posts. During the APPG hearing on this, there was quite a lot of concern that there were very inconsistent responses from different embassies and high commissions. Improving government action to support SMEs in resisting those bribes is an area that could be worth looking at.

Baroness Fookes: You mentioned a number of ways in which businesses could be helped to resist making these payments. Could you describe them in a little more detail? I am not quite clear.

Susan Hawley: For instance, if there is a dedicated person within a Foreign Office post, and businesses know they can go to that person and that person will make representations to the relevant authorities where these bribes are being asked for, that would be an example.

Baroness Fookes: You said there was a number. What is another one?

Susan Hawley: I am thinking about collective action.

Baroness Fookes: What does “collective action” mean?

Kathryn Higgs: There are some instances of groups of companies working together to fight particular corruption challenges they face, such as facilitation payments. The Maritime Anti-Corruption Network is one such group, which has been operating since 2011. It has done a lot of work around the major ports where facilitation payments are likely to be solicited. You will also hear of examples where companies will work together, not necessarily in the maritime space, where they are experiencing similar issues with facilitation payments.

With facilitation payments, there is also a defence under the Bribery Act of being under duress, in essence. Some robust resistance to the solicitation of a facilitation payment without putting yourself in harm’s way can lead to those facilitation payments being waived and not pressed for.

Baroness Fookes: If you have fresh produce in a boat waiting to go in, which will go off if it is not dealt with, and you are being delayed without the offer of a bribe—is that the kind of thing you have in mind?

Kathryn Higgs: Yes, absolutely. The shipping of goods that are perishable is, indeed, an area where you risk loss of revenue to your business. My experience in the private sector in this space is that companies will actively pay attention to locations in which they are more likely to be asked for facilitation payments and reconsider their trade routes.

Lord Haskel: Are facilitation payments a matter of degree? Is there a case for defining a line somewhere?

Kathryn Higgs: I would counter that with a suggestion. If we think about a different kind of offence, is it okay for me to steal a pint of milk from my local corner store, but not a bottle of wine? Where do you draw the line? It sets a tone and makes it difficult for the lay person to understand what is acceptable and what is not.

Susan Hawley: I do not think there is any evidence that the prosecutors are trying to go after companies for facilitation payments. They have enough on their plate with large bribe payments, frankly. We have not seen any evidence that it is an issue or that they are being held up and prosecuted for those payments.

Kathryn Higgs: It is not something that, in our experience of feedback from the private sector, companies are complaining about. They are not asking for this to be lifted.

Q42 **Lord Hodgson of Astley Abbotts:** My life has been in small and medium-sized companies. To break into a market is difficult. You spend a lot of time working on it and you finally get to a position where, after many visits, suddenly you start to see that you might be able to get some exports going. Somebody says, "I can really help you and this will be the last hurdle" after you have been travelling to some rather god-forsaken part of the world for a couple of years. You say, "Okay, we will do that". The next time you are exporting, he says, "By the way, you did this last time", and you are now in a regular and pre-planned situation.

Why cannot small companies apply for safe harbour with the UK Government? To ask them to have to handle this seems, to me, entirely unfair. The UK Government ought to say, "Yes, you can do that, fine. We note you are doing it". Everybody else is doing it, you will hear, because your agent will say, "Do not worry about this; X, Y and Z companies, your competitors from other countries, always give me this". Why can we not find a way to help small and medium-sized companies to export by providing that sort of facility?

Kathryn Higgs: By excusing their—

Lord Hodgson of Astley Abbotts: It is a safe harbour, not excusing. You say, "This is what we are doing". "Excusing" is the wrong word. You are saying, "We know it is happening. We are telling you it is happening. We need to do it in order to break into this market".

Kathryn Higgs: The first thing that I would recommend any company does when it is thinking about whether to expand into a market is to conduct a thorough risk assessment of what it is going to be facing. If that is a risk you are facing, you should consider not entering the market in the first place.

Lord Hodgson of Astley Abbotts: I have to tell you that, if you think that, virtually every country ending in "stan" is not exportable to.

Kathryn Higgs: I have worked in companies that have decided not to work in jurisdictions because of the level of risk. It is a responsible decision for a company to make. I believe that the true way to succeed in the fight against bribery is for all Governments around the world that are the peers of the UK to have comparable legislation and comparable levels of enforcement. That levels the playing field.

Lord Hodgson of Astley Abbotts: I am not the Government. I am a small or medium-sized company. If the Government push for a level playing field, that is great. Let them get on and do it; I will be delighted.

Susan Hawley: To clarify, are you suggesting that there should be a safe harbour for facilitation payments by SMEs?

Lord Hodgson of Astley Abbotts: I am floating the idea that there is a way we can help small and medium-sized companies by some form of safe harbour provision.

Susan Hawley: Do you mean for facilitation payments?

Lord Hodgson of Astley Abbotts: Safe harbour would not automatically be available. You could say, "It is not available for this case", but there should be a facility.

Kathryn Higgs: What is the cost to the communities to which we would seek to export? On the one hand, we have DfID, which has priority countries and seeks to raise the conditions of human beings around the world. On the other hand, we say, "But in order to make some money we will have safe harbour". The Bribery Act exists for a reason: because we live in a country that aspires to raise the standards of living.

Lord Gold: If we were to adopt Lord Hodgson's novel idea, at what level would a permitted facilitation payment turn into a bribe? Would it be £100, £1,000 or £1 million? How do you make that distinction?

Kathryn Higgs: That is an excellent question. Would we then need to have a different threshold depending on the cost of living in each country? I would put it to you that you cannot.

Susan Hawley: Under the FCPA, it is not an absolute exemption. There is case law saying that continual payment of facilitation payments can amount to a bribe. There is another form of collective action, which would be more appropriate in the circumstances you are talking about. If a UK SME is facing that, surely most companies from all different jurisdictions are facing it. The Government could bring together some of the different embassies to say, "This has to stop. This is not okay". That would, in the long run, be better for the SMEs. The evidence is that, if you start paying small bribes, it escalates: you start paying big bribes. You cannot set a level. You open a door, but in the long run it is not better for the business either.

Q43 **Baroness Fookes:** May I pose a slightly different point? I believe it is true that in many countries, particularly perhaps in the Far East, the petty officials who need to have their facilitation payments or bribes are paid extremely badly and they need to supplement their income by the bribe facilitation payment. I am not suggesting that is an ideal state of affairs, but have you any practical suggestions as to how that might be dealt with? That is a bigger, broader issue.

Susan Hawley: That certainly is a bigger, broader issue, possibly beyond the scope of the Bribery Act. A lot of multilateral development agencies

look at that precise issue of whether civil servants are being paid enough. It is an issue on their agenda.

Baroness Fookes: You have mentioned a number of ways in which one might deal with the situation. This is another one for you to consider.

Susan Hawley: Yes. That would require will from the local Government to distribute their resources in that way.

Kathryn Higgs: Is your question how to avoid the payment of facilitation payments in countries where civil servants' salaries are at an unattractively low level?

Baroness Fookes: How could one try to raise their salaries so that there is neither the need nor, perhaps, the temptation to ask for bribes?

Kathryn Higgs: I wish I knew the answer to that, but I am afraid that is outside the scope of my expertise.

Baroness Fookes: But you would accept that it is a problem.

Kathryn Higgs: Absolutely.

Lord Haskel: I do not know whether it is helpful to this discussion, but my experience in business was before this Act came into force. We used to do a lot of business in South America and we had a very simple test: if the accountants allowed it as a business expense, we paid it; if not, we did not.

Susan Hawley: The world is changing.

Kathryn Higgs: That is very true, but one of the great successes of the Bribery Act is that it has been a catalyst for improved business ethics in UK companies. That is a wonderful outcome that we should be proud of.

Baroness Primarolo: You referred earlier on to small and medium-sized companies being together in networks to support each other in countries and across regions, which sounds like a good way forward in tackling a lot of the questions of bribery and corruption. DfID is obviously doing a lot of work in terms of good governance in many countries. Are you aware of any programmes that DfID is funding or plans to, post Brexit, to support small and medium-sized companies on exactly the challenges that have been identified?

Susan Hawley: I am not aware, but that does not mean it is not happening. DfID has been involved quite heavily in the discussions around how you support SMEs. As for what resources it has devoted to this, we could come back to you with that.

Kathryn Higgs: My understanding is that the primary focus at the moment is on collation of guidance and increasing resources. I may be mistaken, but there is an opportunity for collective action initiatives that are funded as well.

Q44 **Lord Hutton of Furness:** Why do you think the number of cases brought under the Bribery Act has remained consistently low and what does that signify?

Kathryn Higgs: The first thing I would like to note about enforcement rates under the Bribery Act is that, through the introduction of Section 7, we have introduced a positive onus on business to prevent bribery. There should be two measures of success when we look at the UK Bribery Act: not just the level of enforcement but the level of prevention. Theoretically, if businesses are living up to the requirements of the Act, there should be fewer incidents of bribery to prosecute. That is the first thing we should be mindful of.

There is, inevitably, somewhat of a lag when it comes to enforcement of legislation. First, the Act comes into force; then, infringing conduct needs to occur. These are highly complex cases that take a long time to investigate, and then they need to move through the legal system as well. We are seeing an ever-increasing number of enforcements, which have a time lag from 2010. Yes, we are supportive of there being more enforcement and we think there should be more enforcement, but we definitely recognise that, under David Green's tenure, the SFO has made strong improvements in the direction of enforcement.

Lord Hutton of Furness: Is this a case of the Bribery Act not being prosecuted effectively by the prosecuting authorities? Should there be more cases going through the system and is that supported by any evidence?

Kathryn Higgs: We would like to see more cases going through prosecution, but I could not, at this time, point you to specific examples of cases that we think should be going through at the moment.

Susan Hawley: The SFO has a lot of investigations on its books and I know this Committee has raised the issue of speed with previous witnesses. We mention in our evidence some of the reasons why we think there is a relative slowness in those Bribery Act prosecutions coming through the system. First, there are issues around resources and building up expertise. There was a serious hiatus around who does domestic corruption and bribery, and who does the lower level corruption and bribery, which was created by the amalgamation of the police forces. You effectively lost a whole unit from the City of London Police, which had expertise in dealing with that middle tier of foreign bribery and would not go over to the NCA.

There is a whole host of factors in why it has not been as quick. I am talking mainly here about foreign bribery and overseas bribery cases. The issue of domestic bribery and corruption is a different one, which is very interesting and relates to whether it is being classified as bribery or being prosecuted as something else. Is there enough reporting of it going on? Is it being recognised for what it is? Success breeds success, so the more the SFO

prosecutes, the more likely whistleblowers are to come forward and give it information.

Lord Hutton of Furness: It needs a bit more push from the SFO and the prosecuting authorities. Is that what you are saying?

Susan Hawley: The SFO is starting to get into its stride. We need to see more enforcement actions to maintain the will to have strong compliance procedures in place, so we would all like to see more cases coming through. Section 7 was meant to make it a lot easier to prosecute companies, because it is a slightly lower standard of proof. You would hope that that could be done quicker and more frequently but, as we mention in our evidence, there are serious problems around not having a proper economic crime court. It takes the SFO for ever just to get a court slot at Southwark Crown Court. We need to see the SFO and the NCA getting going with the job and being given the encouragement to do that. It has not helped that the SFO's future has been so consistently under question.

Lord Hutton of Furness: There are moves afoot to set up a dedicated cybercrime court, are there not? Do you think that should have jurisdiction in Bribery Act cases?

Susan Hawley: The proposals we have looked at so far do not mention it having a Crown Court and we think it would be extremely useful if it did. Having a dedicated Crown Court with specialist economic crime judges could reduce the time and increase the consistency of judgments.

Lord Hutton of Furness: Broadly, you are saying to us that it is a bit too early to tell what these low numbers of prosecutions mean, but you would like to see a little more elbow behind the enforcement function. Is that broadly right?

Susan Hawley: Yes. Issues around speed have been raised, and some creative thinking on how to increase the speed of cases coming through the SFO would be welcome.

Lord Hutton of Furness: Why do you think there have been no cases brought under Section 6 of the Act, dealing with the bribery of foreign public officials?

Susan Hawley: We think it is partly to do with the fact that the identification principle and the corporate liability laws still pertain to Section 6, so it would be very hard to prove that a large company was guilty under Section 6. This is an ongoing problem. With Section 1 and Section 6, you will still see a predominance of SMEs prosecuted under those offences, because it is almost impossible to prove that a large company is guilty of that offending. That could be one of the explanations for why we have not seen that: that a preferred option will always be to do a Section 7. It is easier to prove; you do not have to get, potentially, quite so much evidence from a different jurisdiction to prove as you would need for a Section 6 offence.

Lord Hutton of Furness: Have there been any cases, to your knowledge, brought under Section 7 that have involved the bribing of corrupt foreign public officials?

Susan Hawley: Yes. There was the Sweett case, so that is one. The Rolls-Royce deferred prosecution agreement was Section 7. The XYZ case included Section 1 and 7, but, interestingly, not Section 6. There have definitely been Section 7 cases resolved, both in court and through a deferred prosecution agreement.

Q45 **Lord Gold:** I am going to take us to deferred prosecution agreements. Do you think they are working effectively in relation to the Bribery Act?

Kathryn Higgs: The existence of deferred prosecution agreements is a positive. It is positive to see some recent high-profile deferred prosecution agreements. It is more challenging to have effective deferred prosecution agreements in the UK than settlement agreements in the US, given the way our legal system operates here. We have some concerns about how deferred prosecution agreements are proceeding. We have concerns about the level of transparency in the process. We have concerns about how thoroughly some aspects of the terms are scrutinised, and whether there is sufficient assessment of the harm suffered by victims of bribery, the benefit to the company and the impact of the penalty on the company. The call is for greater transparency and explanation of why an individual deferred prosecution agreement is set at a certain level, but we do not take issue with the existence of deferred prosecution agreements.

Lord Gold: Picking up on what you have said, do you mean that the level of agreed penalty might be too high and, therefore, prejudice the company going forward?

Kathryn Higgs: No, quite the opposite, in fact.

Lord Gold: It is too low.

Kathryn Higgs: From my experience of working on the other side, it is important for a penalty to be sufficiently painful for a company to retain it in its corporate memory for a long period of time, to ensure true cultural change, but not so high as to bring the company to its knees and lead to the loss of thousands of British jobs.

Lord Gold: Is the system fair on individuals? A deferred prosecution agreement is possible for a company but not for an individual. In this country, we do not have plea bargaining. Would it be right to think about introducing some sort of plea bargaining, so that individuals could also agree some kind of solution with the prosecutor?

Kathryn Higgs: We are not supportive of that proposal.

Lord Gold: Why?

Kathryn Higgs: For the Bribery Act to be truly effective and for there to truly be a decline in rates of bribery, it is important for individuals to be held accountable as well as companies. For that reason, we do not support plea bargaining, where you could, in essence, be the first to report an incident and get preferential treatment compared to others.

Lord Gold: There can be a different sort of unfairness, though. A deferred prosecution could be agreed on day 1 and there is a likelihood of a prosecution against individuals, but it might not happen for such a long time and the individuals do not know whether they are going to be prosecuted and what the consequence will be. Is that not an unfair pressure on them?

Kathryn Higgs: It is an unfair pressure on them, but it is not exclusive to the Bribery Act.

The Chairman: There is a perception among some that DPAs are an example of one law for the rich and another for the poor, in the sense that, if you have enough money and you are a big enough company, you can buy your way out of a prosecution. Is there anything in those criticisms?

Kathryn Higgs: That is why really scrutinising the claims put by a company is important, rather than relying on the general assertions of a company based on eloquent submissions put forward by expensive lawyers. It is incumbent upon the SFO and the courts to make sure they have properly scrutinised that and the penalty is appropriate.

Q46 **Lord Stunell:** The SME is really at a disadvantage in this process, is it not? You said earlier on that Sections 1 and 6 are practically impossible to prove against a big corporate, but an SME is a fairly easy job. So far, SMEs do not seem to be benefiting, if that is the right word, from DPAs: a big corporate gets Section 7 and a DPA, and an SME gets Section 1 to 6 and the directors go to prison. Is there a way of evening that playing field out a bit so some other people go to prison or whatever?

Susan Hawley: Individuals being prosecuted where there is a DPA is crucial for public confidence. This issue of public confidence is universal wherever these instruments have been introduced. You have seen a lot of criticism in the US: why are senior executives getting off when these companies are just paying fines? You see it in France, where the regime has just been introduced. There are genuine public confidence issues around DPAs and one of them is that, yes, the big companies can negotiate them. The small companies are much easier to prosecute, including for the substantive offences, which makes the offending more serious. Therefore, the public interest in offering them a DPA is lower, because the offending appears more serious.

The key way that has to be balanced is through corporate liability reform, to even up how the Bribery Act applies to SMEs and large companies across its range of offences. That should have been done a decade ago through

the Law Commission, and should still be done. Otherwise, there is a level of potential unfairness to SMEs.

Lord Stunell: Do you think the courts should treat Section 7 offences as seriously as Sections 1 and 6, rather than seeing them as lesser offences?

Susan Hawley: I do not think they can, because, legally, a failure to prevent offence is a lesser offence than an offence with intention, known as a substantive offence. I do not think that is within the courts' power necessarily. That has to be addressed through legislation and changes to the corporate liability regime.

Lord Stunell: You would say the key there is the corporate liability regime, rather than any particular amendment to the Bribery Act.

Susan Hawley: Absolutely, yes. We do not want to see any amendment to the Bribery Act, but we want the identification doctrine and its uneven application in the Bribery Act to be addressed as a priority.

Lord Stunell: I do not know which one of you it was, but your written evidence had some stuff about that. Do you have a specific proposal there that we might want to take a second look at?

Susan Hawley: I can send you some further evidence on that. The problem is with what option you take. Do you go for a US model and have vicarious liability, which is why the US is so easily able to get companies to plead guilty and to enter into deferred prosecution agreements, because the consequences of not doing so are extreme— they can very easily be found guilty—or do you find a way to abolish the identification doctrine? I have not yet seen how you would do that, but I am not a lawyer, so I would be very open to legal opinion as to whether you could do that in a different way. I would be very happy to provide more evidence on that if it would be useful to the Committee.

Lord Gold: Our policy is that deferred prosecution agreements are not offered unless and until the Serious Fraud Office is pretty certain that it will be successful with a prosecution. Do you think it should adopt a different attitude and be more willing to offer deferred prosecution agreements where they have a willing party that would be quite keen to co-operate? It all could happen much more quickly. The Serious Fraud Office would have certainty as opposed to risking failure before a jury, and it could move on and look at lots of other things.

Susan Hawley: There are several questions in there, which I will address separately. One of them is about certainty. We absolutely think that more attention needs to be given to the court system and how to improve prosecution outcomes. That means increasing court transparency. We have just released a report on that, saying that, potentially, with a DPA, a lot more information could come out in the public domain about wrongdoing than could happen in a court case, because of the reporting restrictions

and the inability to access basic court documents. That is essential to improving the DPA regime itself.

Under a DPA, you can impose a remedial order, but a court cannot unless you go for a serious organised crime prevention order. France has introduced a provision whereby courts can impose a remedial order in a conviction, and we would like to see some form of corporate probation order. You have to even out the DPA and the court regime so that the consequence of not self-reporting and co-operating for a company are genuinely worse than if you report, co-operate and get a DPA.

In terms of whether the SFO should give them more quickly, that is a separate question, because we have certainly been critical of the SFO in the past, and it is not just us. With FCA investigations, you have also seen criticism of the reliance solely on a company's internal investigation. If the SFO has not conducted its own investigation, you get into this quite dangerous area where it is just taking the company's word for it; it is not necessarily testing some of what the company is saying. We have seen cases where companies, in trying to limit the damage in order to get a DPA, may talk about some cases but not reveal the whole extent of wrongdoing that has come out from an internal investigation, for instance. We would definitely be reluctant to see a situation where the SFO was giving out DPAs without conducting its own investigation.

The Chairman: What about self-reporting? Should that have any effect on the question of whether to grant a DPA?

Susan Hawley: It should be a very key factor but, from talking to some of the people in enforcement agencies, you can get a bad self-report and not much co-operation, or you can get no self-report and very good co-operation. It is about how you balance that out. You can have a self-report that is not accompanied by a genuine commitment to culture change within the company. We have seen, in some of the cases so far, that a DPA has not been offered because there was not that sense of genuine commitment after a self-report. It is no longer the case that you self-report and you get a DPA; it has to be a more complex balance.

But you need to incentivise companies to self-report, because one of the primary policy objectives was to increase detection and get companies to come forward. As we say in our evidence, that is why you should have, as the DOJ does in the US, differential reductions in fine for where you self-report and co-operate and where you just co-operate. Otherwise, you get a lot of commentary, as there was after Rolls-Royce, saying, "Well, why do we not just hold out until we are caught and then co-operate?" Then you are not increasing the chances of greater detection of economic crime.

The Chairman: Going back to the question of the level of the fine under a DPA, the court is given discretion to grant a discount. Are you happy with that?

Kathryn Higgs: We do not take issue with the ability to grant a discount. We take issue with the level of the discount that may be available and the recent increase to as much as 50%.

The Chairman: Another question is whether the focus on corporate resolution through DPAs is to the detriment of the prosecution of the individuals concerned. Do you have any views on that?

Susan Hawley: We have always had concerns about that. In some DPAs, we have not seen any regulatory action. In the first DPA, the person's involvement was significant enough for Sir Brian Leveson to want their name included in the statement of facts. We wrote to the FCA afterwards saying, "Are you going to disqualify this person?" As far as we are aware, this person is still operating at the same level, with no removal of their approved status. There has to be action against individuals or the public confidence will be lost in this instrument.

Lord Plant of Highfield: We had a discussion about DPAs last week, which will not surprise you. One thing that came up was the extent to which there is public knowledge of what is happening with a DPA. The question was this: it is the prosecutor's decision to go for a DPA; is that in the public domain? Is how the DPA negotiation develops and so forth in the public domain? The only thing that seemed definitely to be in the public domain was the judge's ultimate ruling. If you are trying to build public confidence in something, is it a tremendously good idea to have these DPAs more or less settled behind closed doors?

It seems, from the evidence we had last week, as if things were extremely ad hoc; it happened sometimes, and did not happen other times. I am assuming it was your own work that was the news item on the second page of the *Times* yesterday. I am not talking about the business section; I mean the main newspaper. There was a very trenchant piece of reporting about how this issue of publicity really goes to the heart of what you are talking about, of public confidence in the system.

Kathryn Higgs: That is the issue we have with deferred prosecution agreements. The process behind the investigation and the discussions on whether to proceed down that path are too opaque. The community and the business community cannot see what consideration is going into this and whether it is something they would consider. When I worked in the private sector, my reaction was to ask, "Why would I ever self-report?" Much as I would loathe working for an organisation that needed to, why would I ever self-report? I would have no confidence in how my company would be treated in the process, which defeats the purpose we are trying to achieve by having deferred prosecution agreements.

In some recent DPAs, companies are starting to see that they could be an option. I have worked for a company that entered into one, so my view has changed, but that is because I have had the benefit of seeing it from the inside. There is a real need for that publicity. It also links to Lord

Stunell's comments about the issue of DPAs for large companies versus prosecutions of small to medium-sized enterprises. If SMEs do not know what is involved in a DPA—how it might absolve them and put a poor decision and poor past conduct behind them—they will not know to speak up, so awareness and transparency are two central pieces.

Q47 Baroness Primarolo: Building on the point that you just made, Kathryn and Susan, about transparency, confidence, publicity and how companies develop strategies, do you think that UK companies have developed effective anti-bribery policies as a result of the Bribery Act 2010? How could companies improve, if they need to, their efforts to prevent bribery in the business that they are conducting?

Kathryn Higgs: There are two questions in there. One is whether companies have implemented programmes and the second is what they could do better. On the first—have companies put in compliance programmes?—yes, absolutely. We included a statistic from the PwC survey that indicates that 75% of participants in the survey have put in programmes. There is an extensive compliance community operating in the UK. It is a very supportive network of individuals. There is a lot of collaboration and idea-sharing among that community to help develop compliance programmes across businesses, so companies have responded and introduced detailed compliance programmes.

Turning to your second question of how they could be more effective, there are two very important things to think about. First, managing bribery risk is not something you do once, tick off your list and then move on from. A number of companies are making that mistake. It is important that you continue to monitor the risk, because bribery risk evolves and changes. Criminals change their patterns and new risks arise, so it is something you cannot tick off. Continuous monitoring is important.

The next important piece, which links to not having a tick-box approach, is really making this a part of your culture. The future for business is of companies that are purpose-led and think about the impact of their operations. It needs to be values-based and not rules-based. A lot of good companies will very often use a descriptor in their code of conduct or training around not just whether it is legal, but whether it matches their corporate values or the newspaper test: how would this look if it was in the newspaper? Some will use the example of how you would feel if you told your mother. There are those sorts of human tests. That culture piece is very important. You have to live and breathe doing business the right way.

Susan Hawley: Something we had a concern about was when, in one of the cases we followed, which was not a Bribery Act case but a Prevention of Corruption Act case, during the trial, the company went to get an off-the-shelf British Standard. They went to the BSI people, who said, "You have to do all these things to get that". They said, "No, thanks", and went to another company that is not monitored or registered and got one off the shelf. It would be a very simple thing for the Department for Business to

make sure that anyone giving out those kinds of certificates is properly registered. They needed that to carry on getting public procurement and, indeed, are now on the Bank of England's Brexit committee. We would have questions about whether that was a genuine culture change.

Baroness Primarolo: That is very interesting. It is encouraging in some respects. Susan, your point lines me up to a slightly different question on that. I wanted to ask both of you if you are aware of any suggestions that companies, either UK or foreign, structure themselves within their corporate chain in a way to avoid detection of some actions that might be considered prohibited, under the Bribery Act, the OECD, US, French or international legislation on anti-bribery or corruption.

Susan Hawley: We have seen evidence of a slightly different issue, but one about corporate structures. This is a recently emerging picture in a couple of cases. Companies are effectively moving all their business out of the subsidiary that is under investigation, to reduce the amount that the company looks like it can pay and to carry on business as normal through a different subsidiary. It is slightly different; that is to avoid financial impact rather than detection. I will leave the detection question to Kathryn. If they are doing that in relation to prosecution, I would imagine there is quite a significant amount in relation to detection.

The Chairman: The idea, apparently, is to have a company structure in which what may be called a pre-negotiation company is set up, which deals with things like sweeteners, payments, bribes or whatever you like to call them, after which the formal negotiations take place with the company principally concerned. The result is that the latter can say, "We have nothing to do with bribery or corruption, so why are you concerned with us?" Have you come across any evidence of that sort of structure?

Kathryn Higgs: I cannot give you specific examples of evidence today, but I can take that away and see if we can provide you with some specifics. That is certainly a risk, as is the fact that the associated person definition is broadly seen to relate solely to first-generation associated persons. Therefore, you can structure your operations such that you either engage in an unincorporated joint venture or have a layered supply chain. There are ways for you to avoid prosecution and liability by taking advantage of that. It is akin to what you also see in the human rights space in relation to modern slavery. Companies have a chain of suppliers, and the factories that are engaging in human rights abuses are so far down the line that the companies do not need to report that in their modern slavery statements. It is pushing responsibility down. That is an undesired consequence, because we should be looking at the group company at the top to be taking responsibility for all its actions.

Baroness Primarolo: It would be very interesting to see anything you had on where companies were using, or it was suggested they were using, something at arm's length or outside of their normal structure but

controlled indirectly through a company seeking a contract. If you have anything like that it would be very interesting.

Kathryn Higgs: We will come back to you on that.

Lord Stunell: I will come back to your comparison to the Modern Slavery Act. I played a part on the Joint Select Committee leading up to that and am currently engaged in other work on it. It is often held out as being a good example of taking things down the supply chain. You are obviously far from convinced about that, so it might be interesting for you to supply any evidence you have about the failure to do so separately. After the Rana Plaza event in Bangladesh, companies in this country were strongly motivated to follow down their supply chain and try to make sure they had ethical performance at that level. If that is not the route to follow, what is?

Kathryn Higgs: I would suggest that the guidance on adequate procedures should not specifically acknowledge that companies are likely only to know about their first generation of suppliers. It expressly lets companies off the hook as soon as they read the adequate procedures guidance, so that should be removed from there and we could arguably amend the definition of associated persons to be more encompassing.

Lord Stunell: Do you have some words that you would like to suggest to us? This is a very important point about following things down the chain. I have a particular interest in the construction industry, where it is very relevant. If you have information that would help us to see how we might deal with that, I would be interested to hear it.

Kathryn Higgs: I can provide that to you.

Q48 **Baroness Fookes:** Is it customary for somebody at the highest level of the company to be given specific charge of looking at anti-bribery measures, so somebody at the very top of the chain? I am sorry; could you repeat that question, please?

Baroness Fookes: Is it customary, to your knowledge, that major companies—or indeed any companies—have somebody at the top of their executive chain with specific responsibility for overseeing their anticorruption measures?

Kathryn Higgs: Yes, absolutely. Most of the larger companies will have someone who is responsible for managing anti-bribery risk, who will report to the general counsel, to the CFO or directly to the CEO. It is usual for there to be at least a non-executive board committee that meets to hear reports from that individual and from the executive on anti-bribery measures and information. It is not uncommon for companies to have an executive committee that also conducts meetings to look at anti-bribery risk. Sometimes these committees will be merged with an audit, risk or ethics committee.

Baroness Fookes: That committee is obviously a group. I was thinking of a person, perhaps on the board, who might have such specific responsibility, so you could tie it to a specific individual.

Kathryn Higgs: I would suggest that the individual to whom you can tie it, typically, is the chief compliance officer or the general counsel. Sometimes they are the same person. The general counsel will usually be on the board, or should be on the board, if their role is being taken sufficiently seriously. The chief compliance officer is very often not on the board. Their line manager would be taking accountability for it in those meetings.

Lord Gold: Following on from Baroness Fookes' point, would you go one step further and say it would be good practice for there to be someone on the board who takes responsibility, even if there is a chief compliance officer, so it goes right up to the top of the company?

Kathryn Higgs: Yes, I think so, particularly for companies that face a high level of bribery risk. That may not be suitable for some companies, but would be for those that are grappling with this issue daily.

The Chairman: Would you like to see that in guidance issued on the subject?

Kathryn Higgs: Yes, that guidance would be helpful, because there is a debate going on about who should take responsibility and who should report to whom. There is a difference between being a general counsel and being a chief ethics and compliance officer. The general counsel often approaches things from a technical, legal standpoint. If you are following the spirit of what is intended to be achieved by being a chief ethics officer, you are thinking of going beyond the law and going for the spirit of the law, the values of the company and what we are trying to achieve. There can be a tension and those two individuals can approach issues from a slightly different angle, so it is good to have both those voices.

Baroness Fookes: It is the difference between the letter and the spirit. Absolutely.

The Chairman: We can move on to the next question, which has been covered to a degree. It is the question of whether the police, Crown Prosecution Service and Serious Fraud Office are adequately resourced to ensure the effective investigation and prosecution of bribery offences. Lord Stunell, do you want to ask further questions on this topic?

Q49 **Lord Stunell:** Thank you for the responses you have given so far on this. The obvious follow-up is whether you think the resources are being targeted at the right areas and sectors, and possibly companies operating in particularly risky environments, or whether the various authorities are simply waiting for cases to land on their desks.

Susan Hawley: That is not so much the case any more. With the intelligence function that the SFO has, for instance, there is more proactive matching up, to build an intelligence picture. Whether they could be doing more sectorally is an interesting question. There is another area where there is a growing sense that they could and should be doing more, which is to encourage whistleblowers. How whistleblowers are handled by the enforcement agencies has long been a source of frustration for whistleblowers. There are increasing suggestions that not going the whole way of the US system, but having greater protection and some form of compensation for whistleblowers might be a way to increase the number of whistleblowers coming to the SFO. That is an interesting question about whether they are attracting enough information through whistleblowers, which would definitely be useful to follow up.

Lord Stunell: Leading on from that, should more resources be devoted to investigating and prosecuting domestic bribery, where whistleblowers might perhaps be thought to be more readily available?

Susan Hawley: Definitely. From what we hear, it is not just about resources; it is about prioritisation at the local police force level. If faced with a murder and a burglary, or corruption, most police forces will obviously be focused on the murder and the burglary, the immediate threat to people's property and lives. That has long been an issue, for not just corruption, but fraud and other economic crimes. That needs a border review. Ensuring there is a reporting line for bribery and corruption, and looking at whether resourcing is enough overall for corruption, should also be priorities of the Government.

As we note in our evidence, the change in blockbuster funding for the SFO did not lead to any net increase in resource for it; it just usefully changed the way that resources were given, which we think is positive. Given the workload that the SFO has, the increasing interest in illicit finance and the fact that it might be drawn more into dealing with those kinds of cases, whether there is enough resourcing needs to be actively under review, both at a domestic level and at the SFO level.

Lord Stunell: When the Government gave their commitment to produce

a better monitoring system, back in 2015, would it have covered the point you are making? Do we need to look at the system that is still to come being changed or developed further?

Susan Hawley: What do you mean when you say “monitoring”?

Lord Stunell: There is no reporting system at the moment.

Susan Hawley: They are still to deliver on the reporting system. It is still in the national anti-corruption strategy.

Lord Stunell: When it delivers, as you imagine it, will it cover the points you have just been raising?

Susan Hawley: It should. One of the problems is that domestic and international corruption are quite different things. There is a question of who is responsible: should it go through ActionFraud? There are issues around resources and how you resource that kind of reporting mechanism, which is different from how you incentivise whistleblowers. That is a different question. If they introduce a reporting mechanism, I do not think it will necessarily deal with the whistleblower issue.

Lord Stunell: What incentivises whistleblowers?

Susan Hawley: That is a bigger topic, but the key thing that we have seen in quite a few cases is that whistleblowers do not feel properly heard by enforcement agencies, in contrast with some of the US authorities, which will meet with a whistleblower within a couple of weeks. It is about being met personally very quickly. It is about receiving updates on where your case is going. There are some interesting voices out there. For instance, Jonathan Fisher has done a paper looking at ways of providing some form of compensation to whistleblowers because, very often, they give up their whole career to provide this information, particularly for economic crime in the business sector.

Lord Gold: In the US, whistleblowers in connection with tax evasion receive substantial payments. If the Government, as a result of the whistleblower, recover substantial tax from the taxpayer, the whistleblower benefits from that. Should we have such a system here?

Susan Hawley: It is not just tax evasion in the US, as far as I understand it; it is across the board. There is some distaste about the huge sums they get, but that is different from looking at compensation.

Kathryn Higgs: I agree with Sue, because you can obtain a percentage of the amount and it is often astronomical. I believe that it is more appropriate to compensate a whistleblower than to bring them a windfall as a result of things. There is an associated part to this around whistleblowing within companies, where it is important for companies to develop an effective culture of speaking up within the organisation so that, except in those circumstances where corruption goes right to the top, companies can address it and self-report, alleviating some of the need for detection.

Q50 **Lord Haskel:** Thank you for your views about whistleblowers. We are concerned about whether there is adequate protection for employees who report within their organisation. As I understand it, the law provides people with protection, providing that the whistleblowers satisfy certain regulations so that they retain their employment protection when making the disclosure. As I understand it, there is also a public interest disclosure order, which gives a list of people to whom whistleblowers can report malpractice. Should these lists be changed? Is the legal test sufficient to give whistleblowers protection under the employment rules?

Kathryn Higgs: I can only give fairly high-level comments on the technicalities of whistleblowing and I would refer the Committee to Public Concern at Work for further input on whistleblowing. The overarching comment I would make about whistleblowing is this: no matter what protections are available, how do you continue to work in that company? My experience of companies is that they might have best intentions, but do not effectively provide a positive working environment for individuals after they have blown the whistle. Also, if it is sufficiently high profile, it drastically reduces your prospects of being hired by anyone else in that industry. It is highly difficult for any legislative regime to counter human nature and police it.

Lord Haskel: That overcomes the protections that they have as employees. I am sure you are right.

Susan Hawley: There is also an ongoing issue that the OECD has highlighted about whether PIDA extends to extraterritorial cases. In one of the cases we have looked at, you have a whistleblower whose case was dismissed straight away in the employment tribunal because there was not a sufficient UK nexus, despite being employed by a UK company that had an office in the UK. That is a real issue for these kinds of foreign bribery cases and it needs to be looked at, to see whether PIDA is giving sufficient protection to people operating for British companies overseas. Again, I would suggest Public Concern at Work, if you want more expert evidence on that aspect. We can suggest that it sends some information to the Committee.

Q51 **Lord Plant of Highfield:** As you know, the SFO's funding has been changed. It will no longer be quite so reliant on blockbuster funding, as I gather it is called, to pursue large and complex cases. Given that it has been given more control over its own money, will that be sufficient to deter government from seeking to interfere in a line of inquiry that the SFO believes is right and is being productive?

Susan Hawley: That is a very good question. On a day-to-day basis, the SFO operates effectively without interference, but these sensitive cases are still a real risk in the UK. There was the notorious case when, in 2006, a bribery investigation relating to Saudi Arabia was dropped because of national security concerns. The Attorney-General has significant power to direct that a prosecution be discontinued on grounds of national security. There is a particular case with the SFO at the moment that has many similarities to that 2006 case, and which will require the Attorney-General's

consent and extensive co-operation from a government department. This case has been under investigation since 2011, but it is not clear to us that there is no political interference taking place. Because it is still under investigation, it is very hard to get information.

We have concerns beyond that. Article 5 of the OECD convention, which prohibits considerations of national economic interest, the damage to international relations and any consideration of the person under investigation or prosecution, is still not domestically binding in the UK. National security concerns could effectively be used to mask some of those prohibited considerations. That has always been a concern of the OECD and we share that concern. When is it national security and when is it damage to jobs? It was clearly an issue in that 2006 case, so we would definitely like to see Article 5 made more binding in the UK. There are concerns that those considerations are given weight.

For instance, in the Rolls-Royce DPA, Sir Brian Leveson gave a long list regarding the potential damage that a conviction could cause to the UK defence industry and then said, "But I am not taking any of this into account". You think, "If you are not going to take it into account, why is it listed as a factor in the judgment?" We have concerns about Article 5, its lack of bindingness and whether it is always properly adhered to in prosecutions.

Lord Plant of Highfield: In relation to the SFO's budget and the blockbuster funding, which does not come in quite the same way, you do not think it is going to restrict the Government very much if they have grounds other than the cost of the inquiry. If they have other grounds for wanting to stop an inquiry, they can do.

Susan Hawley: That is absolutely right. Our understanding of blockbuster funding is that it looked bad but, in practice, what was bad about it was not the potential for political interference. It was very bad value for money for the SFO, because it could not build up the expertise. That is what the HMCPSP efficiently said as well. But it looked bad from the public perception that the Government could turn around and say, "No, we are not going to give you money for that investigation". We are pleased that that arrangement has ended, but it is not the only route through which political interference could happen.

Kathryn Higgs: In addition to insulating our own agencies, we also need to be mindful of our conduct with foreign agencies. There was a publicised incident with HMRC refusing to co-operate with the French authorities in relation to Lycamobile. Their grounds for refusing to co-operate may have been legitimate but, unfortunately, the individual who replied to the French authorities noted that Lycamobile was one of the largest donors, if not the largest donor, to the Tory party and to the Prince's Trust. There is a concern about perceived conflicts of interest, which also needs to be combated.

Q52 The Chairman: How does the Bribery Act compare to equivalent legislation in other countries? In particular, are there other approaches, in terms of either

legislation or enforcement, that we should consider putting into our own legislation or enforcement provisions?

Kathryn Higgs: Taking first the question of how the Bribery Act compares to equivalent legislation in other countries, at the time it came in, the Bribery Act appeared rather ground-breaking, and it was in many ways. Primarily what made it so ground-breaking was that it very articulately and clearly set out expectations. For example, for the Section 7 offence of a failure to prevent, there were ways under some legislation around the world at the time that a case like that could have been brought, but it would have been quite challenging. The success there was to make it clearer.

Since then, the UK's legislation has become the benchmark and exemplar for other jurisdictions. Currently, the Australian Government are considering introducing legislation that brings in a mirror of the Section 7 offence. The French have brought in laws, as have the Dutch, Brazilian and Thai Governments. There is now a whole raft of legislation that is OECD compliant, so other jurisdictions have stepped up to the level of the UK Bribery Act.

For that reason, we see it as a success in the global fight against corruption. We strongly hold the view that the Bribery Act should not be watered down in any way, shape or form. In fact, there is an opportunity to take it further, to learn from the Bribery Act and to introduce a failure to prevent offence in other economic crimes. That is one of the things we could do differently.

Another thing we could think about when it comes to the issue of funding is not something we have traditionally done in the UK. The Department of Justice retains a proportion, if not all, of its fines for FCPA violations, and that then funds investigations. When you think about the extensive amount of revenue brought in from these fines, it is fair to suggest that a larger amount should be deployed on furthering the investigation and the fight against corruption. They would be the two areas where we could think about doing something differently.

Susan Hawley: If there was one change to the Bribery Act that we would recommend at the moment, it would be that, where penalties are laid, you could add corporate probation orders. That is what you have in the French legislation. Courts can impose a remedial order, so you have parity with DPAs. The French legislation is interesting in that it makes it an offence not to have an adequate compliance programme in place. I cannot see us going that far, but it is an example of what Kathryn has just said, which is that we are no longer comparing ourselves to the US when we look at our legislation. There is a range of interesting legislation coming in, in order to be OECD compliant, and the Bribery Act is now just one player in that picture.

Lord Gold: How effective have local authorities been in taking that legislation forward? Are there proactive examples of the courts intervening in France?

Susan Hawley: It is quite new. It may be unfair. They have had their first bribery DPA, but I could not say. We could find that information.

Lord Gold: The PNF, the equivalent to the SFO, is very small. I am not sure about its funding, but it does not have the same resource at all.

Kathryn Higgs: We could get information for you from Transparency International France, if that would be of use.

Lord Gold: It would be interesting.

Lord Haskel: How tied up is this with the various money-laundering regulations that are appearing in different countries? Bribery and money laundering are very closely aligned. You made that point in your notes.

Susan Hawley: As we have been mentioning to the SFO for a long time, we would like it if, when it took an enforcement action under the Bribery Act, it looked at whether the proceeds of the bribe were in the UK and could be confiscated. You may have situations where a foreign politician has been bribed and bought a property in the UK, effectively with the proceeds of bribery, so they are related in that way. You have a policy in the US that they always look for the proceeds of the bribe, and they are very good at confiscating those proceeds. We would definitely like the UK, the SFO and the other enforcement bodies to get better at doing that.

The Chairman: One of the things that both of you stressed in your written evidence is this question of imposing vicarious responsibility on companies and abandoning what has been a pretty consistent line in the English courts of the controlling mind theory. Are you suggesting that this should be an exception to the controlling mind theory for bribery, or are you looking for a general change in the law on the responsibility of companies?

Susan Hawley: We would like to see the failure to prevent offence extended to economic crime. It is an incredibly useful offence for prosecutors and driving up standards, as Kathryn has mentioned, but the Bribery Act is a good example of where it may not be enough. You need both. You need a change to the identification doctrine, which is the corporate liability regime, and you need to keep the Section 7 offence. They should not be either/or. To have the full toolkit for prosecutors, and to ensure the burden of prosecution and exclusion from public procurement does not fall on SMEs, we need a change to the identification doctrine as well, even within the Bribery Act.

Kathryn Higgs: Even in the time since I graduated from law school, the size of companies has grown to such an extent that we are now operating in a world where controlling mind may be out of date. I acknowledge that this is a larger question of reform than the scope of the Bribery Act review.

The Chairman: It remains for me to thank you both very much indeed for coming and giving what I regard as extremely helpful and interesting evidence. We shall be considering it carefully in the course of our inquiry. Thank you very much.

Dr Carl Hunter and Lesley Batchelor OBE – Oral evidence (QQ 53-61)

Tuesday 4 September 2018

11.30 am

[Watch the meeting](#)

Members present: Lord Saville of Newdigate (Chairman); Lord Empey; Baroness Fookes; Lord Gold; Lord Grabiner; Lord Haskel; Lord Hodgson of Astley Abbots; Lord Plant of Highfield; Lord Stunell; Lord Thomas of Gresford.

Evidence Session No. 4

Heard in Public

Questions 53 – 61

Examination of witnesses

Dr Carl Hunter and Lesley Batchelor.

Q53 The Chairman: Good morning, Carl Hunter and Lesley Batchelor, and thank you for coming to give evidence to us. There are one or two things I should mention. You have a list of Members' interests relevant to the inquiry. The session is open to the public. It is broadcast live and is subsequently accessible via the parliamentary website. There will be a verbatim transcript of the evidence, which will be put on to the parliamentary website in due course. A few days after this session you will be sent a copy of it to check for accuracy. May I ask you to do that and to send it back as soon as you can, with any amendments that you wish to make? At the same time, if you wish to add to, amplify or clarify any points that you have made in giving evidence to us, please do so. You are welcome to submit supplementary evidence along those lines.

I will ask both of you to introduce yourselves for the purpose of the record, although we have some details.

Lesley Batchelor: I am the director-general of the Institute of Export and International Trade. We also run a sub-group called Open to Export. The institute has been going since 1935; we are a registered charity. We have a remit to be the professional body that represents international trade and international traders, importing and exporting both goods and services. Part of our remit covers providing networks for people and opportunities to share information through our membership and through interest groups.

We are responsible for the professional standards of international trade, and to that effect we run education programmes under Ofqual, the registered awarding organisation. We have qualifications that start at the age of 16 and go all the way through to a master's degree in international trade. The Open to Export website that I mentioned attracts, every month, 25,000 visitors, who are all interested in international trade, are starting to export or are already exporting in some shape or form. We have quite a good background in understanding how trade works because we teach it to people. We run education programmes and short one-day courses, and we

are completely committed to raising the standards and education of this country in international trade.

Dr Carl Hunter: Good morning, my Lords, and thank you so much for the opportunity to speak with you this morning. I am owner and chief executive of a specialist manufacturer called Coltraco Ultrasonics. It was formed when I left the Green Jackets and with my father, who was a submariner and who had a wonderful, crazy idea, which I will not bother you with. Today, we are the leader in our respective fields of testing the watertight integrity of ships and subsurface vessels, sinking being the number one cause of the loss of ships at sea, and we are the world leaders in monitoring the specialist gaseous extinguishing systems on board ships, offshore platforms and offshore wind turbines, fire being the number two reason for loss of vessels at sea.

In the course of my commercial career I have had the enormous privilege of spending upwards of four months a year travelling to 30 to 40 countries. Eighty-nine per cent of our company's output is exported to 108 countries—40% to Asia, 10% to the Middle East, 15% to Europe, 17% to the USA and the balance to South America and Africa. I have had an enormously fun time and an extraordinary array of experience, as I have had extraordinary support from some of the largest companies in this country, including BAE and Rolls-Royce.

Over the past two years I have stopped travelling, much to my wife's delight, and have been supporting, where I can, parts of government policy with regard to the export strategy, Maritime 2050 at the Department for Transport, and the business integrity initiative at the Department for International Development, and I have been doing a bit of work with UK Export Finance and recently with the trade and diplomacy directorate at the Foreign Office.

I am extraordinarily committed to the notion that our biggest institutional export is our reputational integrity. I feel that I have had an extraordinary array of experiences with regard to bribery and corruption, and I feel that I have been rescued from them by my wife. It is with great pleasure that I am here today. I thank you so much for the opportunity and I am delighted to share this moment with Ms Batchelor, whom I know well in a professional capacity.

Q54 The Chairman: Thank you both very much. We move on to the questions. I will ask the first question. Seven years after the Bribery Act 2010 came into force, how often do British exporters encounter bribery in their day-to-day operations in the UK and overseas?

Lesley Batchelor: That is a very interesting question, because we find that it is very difficult to get people to talk openly about their experiences with this type of thing. We ran a series of workshops and round tables with DfID and with Brook Horowitz, who I know has already submitted a paper to this Committee. We found it difficult to get people to attend, and when we did get people to attend they were not very open. They were very interested in hearing what was being said but not in telling us about their

experiences. So I am afraid that I don't have anything more than anecdotal and possibly hearsay evidence on this.

It is a very distressing thing, but we feel that the small to medium-sized businesses especially are confused and often unaware that this exists until it is brought up and given to them as an issue. Then they make an on-the-spot decision. It is never planned for or built into their policies.

Dr Carl Hunter: I think it arises every day in international business, and my answer will be restricted to the exporting side. It is worth mentioning that overall only 8.8% of the 7,000 larger companies in the UK employing over 250 people, and the 1.4 million companies that employ up to 249 people, export at all. But further figures for 2017 or 2016 show are that this country was still the second largest exporter of services, the fifth largest exporter of goods and the fourth largest exporter overall, so the opportunities are enormous if we build on the companies that do as well as those that do not.

There are opportunities every day for corruption in overseas trade. If you export goods or services that rely on intermediaries, or what I would call agents, it is sometimes not conscious. Typically in naval work, say in south Asia, you have retired naval officers who are what they call batch mates of their fellow peers who are going through their training courses and are now at certain positions in government or in industry. That can cascade from a relationship into something that could disclose confidential information, into something that could write the rules for future tenders and into the disclosure for information on the bidders, right through to full-blown corrupt practice. So you need to keep what a naval fellow would call a weather eye out for agent approaches. At any stage in a year we would, for instance, touch 1,000 agent approaches from a variety of countries, and part of my role would be to provide oversight so that we could watch out for the warning signs for any that we began to get close to that could offer that potential.

There is a series of warning signs, which I would certainly brief my team on, of what to spot regarding a corrupt opportunity. There are many times when you could touch on something that could become corrupt but you might not be aware of it because you might not be aware of the person who is approaching you and what their corrupt intent might be in future. However, it is worth bearing in mind that the UK is the eighth most happy—sorry, not the most happy but the most transparent, although they are often one and the same—place to do business. You therefore come at it from a different stance. Why are people operating at all with UK companies if it is not because you are doing truthful science? You cannot do truthful science without marrying that to commercial integrity, and the two combine into something that means that you need a bit of backbone in your values.

I hope I am answering your question to some degree. There are many more opportunities to be in and around corruption than one can see. If you have a weather eye out for that because of your experience or inclination to spot

it, it is easy to flush out because it will be revealed, largely by the lack of technical competence on the part of those who are exercising the corrupt act or intent.

Lesley Batchelor: May I clarify something? The UK Bribery Act talks about corruption in all senses, and a lot of the other Acts around the world talk about facilitation and bribery. Do you mean corruption in any shape, or can we draw a definition at the beginning of what we are really talking about? I think businesses quite often face facilitation issues.

The Chairman: I follow that. I think the answer is to wait for one of the later questions, which raises the issue of facilitation payments. You have touched on something that we have heard a fair bit about before, so please come back at that stage because it is a very important part of our inquiry.

Lord Grabiner: Dr Hunter, do you have an enormous number of world competitors in your business? I ask, because if you do not have a large number of competitors you are possibly less subject to the bribery approach, whereas if you have lots of competitors it may be more prevalent. I do not know if you have a view on that.

Dr Carl Hunter: I do. That is an excellent question, and thank you for asking it. The answer is that years ago, when I had one product that did not work very well, I learned that I had 11 competitors where I thought I had none. So my answer is the same as I gave the Chairman in regard to corruption: sometimes you see it and sometimes you do not. My answer today is that I have a much larger range of services, systems and products and, depending on which product item, I have more or fewer competitors. In some areas I have five or six competitors; in others I might have 30 to 40. I hope that answers your question.

Lord Grabiner: You will forgive the crudeness of this question, but have you ever been approached with a view to accepting a bribe in your business?

Dr Carl Hunter: I have, which is why I mentioned in my opening statement that I was relieved of the burden of carrying through those transactions by being married to the woman I am married to.

Lord Grabiner: Why is she not here giving evidence?

Dr Carl Hunter: I might ask the same question. Corruption comes in very many forms. Perhaps you would like me to share an anecdotal instructional piece that I give to my staff, if that would be of help.

The Chairman: Speaking for myself, yes.

Dr Carl Hunter: When you are sifting through consultants or agents to do business with, eventually you arrive at the shortlist and you aim to meet them, either here in London or in the host country. Typically for us it would be in the host country. First we would interview them in our hotels and then we would make a shortish shortlist and go to their premises—their offices.

There is a certain profile and an ascendancy of questions that send the worst signals on that journey towards corrupt opportunity. Regardless of the face side, it might start with the agent's relationship with any form of addiction, whether it be alcohol, drugs, gambling or whatever. Does he or she—it is typically "he" now—have a relationship with that? The second stage of ascendancy—and please forgive me here—is their relationship with people of the opposite sex. Are references being made to either of those in relation to oneself?

The third level of ascendancy is his description of his relationship with the target customer and possibly the government department concerned, and possibly the relationship with the senior members of the Government in that country. The first statement that would put my antennae on amber would be, "I know everyone in this country". The second would be, "I know the Prime Minister". The third would be, "I can get away with murder in my country". Once I have heard those, or indeed any of them—in fact I will be honest with you, nowadays it is the very last one that makes me walk away now.

I turn to working in advanced countries. Please forgive me here; I make no judgments about this, but my experience happens to be that those who are in unstable relationships offer the most probability for erring from professional integrity. I hope I am not imposing some personal judgment; I am just passing on some experience.

Corruption can happen as much in developed countries as in developing ones. I am sure you will come on to the Foreign Corrupt Practices Act. My experience there is that one way for American companies to deal with it is to appoint a European agent to manage the third-world agents on their behalf. That is my anecdotal story or instructional opening lesson to one of our own team who is joining a commercial team or a technical team travelling overseas about the warning signs in regard to who they are likely to meet.

The Chairman: Again, speaking for myself, that is incredibly valuable advice that ought to be widely known.

Dr Carl Hunter: Thank you.

Lord Haskel: You speak a lot about agents, and of course they are very important. One of the problems that I think we come up against is the agent who is getting commission from both ends. Does that contravene the Bribery Act?

Dr Carl Hunter: Sir, it is remarkable that you have identified something that I learned only some years ago. Just on the straight honour principle, it offended me. You are unique to have that understanding. The payment of commission for a job executed in good and open faith within the procedures, protocols and principles of the company that is paying those commissions is not in itself wrong. However, it is wrong if those fees are being used for corrupt purposes.

So while I think it is dishonourable to take commission from both sides, unless I have made it a contractual clause that that must not occur, I imagine—I am not a lawyer—that it is not in itself illegal, unless of course it is a kickback, in which case it is in direct contravention. I make no distinction, by the way, between facilitation payments and corrupt practice, and I think in that respect I am in sympathy with the Bribery Act, which does not do that either.

Lord Gold: Following the Bribery Act, is there less use of third-party agents or business partners?

Dr Carl Hunter: There certainly is among the 7,000 larger companies that employ more than 250 people in this country. They have been placed in a difficult position, because not all those agents were behaving improperly, but the perception is that certain things occurred that were exposed, which led to all of them—I suspect in some companies—being terminated.

Lesley Batchelor: I would say yes. The other major factor in this is that e-commerce is being used more and more, and that is a very different element again. These 7,000 very large businesses are very well aware of how to look after themselves, what they should be doing and what the right thing to do is.

My main concern as someone who works with both large organisations and the SME market is that they need partners to work with. They are not always aware—in fact, some of the surveys say that only around 10% of them are aware—of the importance of the Bribery Act and the fact that they may be taking vicarious responsibility for someone else’s actions. This is one thing that comes through. We should almost split off the 7,000 that are aware and can afford to be aware of how this works.

Lord Hodgson of Astley Abbotts: The Chairman’s stricture is not to prolong discussion. I will pick up what I wanted to ask later.

The Chairman: In that case, we can move to the second question. Lord Haskel.

Q55 **Lord Haskel:** I start by saying that my company is a member of your organisation and you do very good work.

Lesley Batchelor: Good. Thank you for saying that.

Lord Haskel: Can you tell us how aware British exporters are of the Bribery Act 2010 and its implications for their various businesses—large, small and medium?

Lesley Batchelor: Being unaware of a responsibility that you have can play havoc with a business plan, with any budgeting that you are trying to do and indeed with any staff training you are trying to do. Being unaware of these things is causing a lot of issues, I believe. We work very closely with DIT and we are very proud of that, but sometimes we worry when people are told, “Just have a go”, because actually we want people to take a step back and plan their entry into a new market, especially when looking at some of the more exotic markets such as the Philippines or Thailand.

There are great opportunities out there, but we have to try to get our businesses into the frame of mind of researching quite thoroughly, not just how the WTO tariffs are going to impact on them but how they are going to do business with the Bribery Act there in a much broader sense. We tend to look at a quick sale, whereas we should look at a larger picture.

Dr Carl Hunter: I have heard this question before, but you could ask the same question about every law that has been passed in this place for the past 1,000 years. I was taught that ignorance of a law is no excuse; it is no defence. I would also go further and say that a company is the sum of the individuals within it. My role as the leader of a company is surely to create a happy and dynamic environment so that we can create a sustainably profitable company honourably. Therefore, if you win but you do not win the respect of your opponent, my question is: what have you won?

I do not think there is a person in this country who does not recognise that a corrupt act is a bad act, regardless of whether or not they know it is an illegal act. I have never met anyone in my 28-year career in business who is not aware that a corrupt act is a bad thing to do. The Bribery Act, in my view, should be seen as a sequence of events that are part of the panoply of reputational integrity that the United Kingdom has.

Could you make a connection between the Bribery Act 2010 and the Modern Slavery Act 2015, with the Bribery Act leading to the Modern Slavery Act, and might it lead to something even more exciting in the future, such as an eradication of modern poverty Act 2020, let us say? I am saying merely that the Bribery Act is fundamental, and all it has done is enshrine in law something that we all know in ourselves is proper and right.

Lesley Batchelor: There was one instance—I will not mention the company's name—where a chap was talking about business he was doing and he had been asked to give a bribe and he refused. When he got back to his family home he found that the electricity had been switched off; he had a young family. We can have these high aspirations, but sometimes we need to think about the realities of what businesses are facing.

When I was doing my research for this, I loved finding out that there is a UKBA plastic card that you can take around with you and hand to people to establish that this is how you intend to operate. But I am still concerned about somebody who is in the situation of the guy with no electricity. What does he do? Also, what do you do if you are a small business and a huge amount of your personal equity is tied up in a cargo that is stuck on a dockside until a payment is made? There are a few issues with how it is interpreted here in the UK versus the realities of trading internationally.

I did not drone on about my background, but I worked for Ciba-Geigy pharmaceuticals, Coca-Cola and Fujitsu, and we were always moving goods. We were not, thank goodness, ever really implicated or compromised, but we were very fortunate. Because we were such big names, I think people did not try. But my experience of working with small businesses over the past 20 years is that they have not been very

fortunate. We need to come up with some solutions as to how we can do this differently, and how we can say no and not be impacted.

Lord Haskel: That is very true. Many companies come up against this for the first time when they have a shipment on the dockside—

Lesley Batchelor: Exactly.

Lord Haskel: —and they have to get it moving. So the implications differ from market to market. How can we deal with that as far as the Bribery Act is concerned?

Lesley Batchelor: I think there is a tremendous role for the Foreign Office and our representatives abroad, all over. We need to start making sure that they include more guidance, for instance in their overseas market introductory service reports. If they know that their market has issues, they should make the businesses aware of those issues. This is not easy to do, but we should try to come up with something such as a helpline that they can call—like a national AA service, where somebody can come and help them with this issue.

It is an issue. We cannot blame companies if we are not in that circumstance. I am not condoning it, but if we are inadvertently putting our businesses into awkward situations and they are people who would not normally break the law, we are placing them in a very difficult circumstance. I am not sure whether this is putting people off because I am not sure about the awareness, but once people find out more about international trade it can halt things.

The Chairman: Unless Members want to raise any other questions in relation to the second question we will move to question 5, which deals with facilitation payments. Lady Fookes.

Q56 **Baroness Fookes:** We know, of course, that the 2010 Act makes no exemption for facilitation payments, although some countries, such as the United States, apparently have this loophole, or whatever you would like to call it. Should this be considered? Perhaps I can come to you first, Ms Batchelor, because you gave the very graphic example of the firm with the ship at the dockside with the rotting fruit.

Lesley Batchelor: I find this very difficult. When you are learning about international trade you teach people about operating in a different culture and respecting other people's cultures. Quite clearly this is sometimes very much at odds with the culture of the country that you are going to visit. As an institute we do not have a view on it, but as an individual I feel that this places people in a very awkward situation. This is probably not for me to say, but the Americans are doing it in this way and perhaps it is working for them. I believe that we are waiting to hear a report on a comparison between how they do things in the Netherlands, Switzerland and other countries. It would be very interesting to do that.

We must also consider best practice and that the countries that tend to have facilitation payments tend not to pay their customs officials

particularly well. It is an inherently organisational thing, and we as a country have no control over how other countries run their customs and their processing of consignments. We can continue with this, and I applaud us for not making that distinction, but I am also very conscious, as I say, that this happens and that we place businesses in difficult circumstances.

I am not sure that I have any evidence to support this, but it may prevent a small business from going into a more exotic market. As we look to go to new markets outside the EU where we all trade with likeminded individuals, we are going to have to face this more and more. We need a solution to give them for this problem.

Baroness Fookes: If officials are poorly paid, in a sense this is part of their salary or payments for their job and it is a very blurred area.

Lesley Batchelor: Exactly.

Baroness Fookes: Rather as, in the old days, waiters got paid very little and relied on tips.

Lesley Batchelor: Yes, it is the same thing.

The Chairman: But would you be in favour of a change in English law, which has always turned its face against legalising things like facilitation payments?

Lesley Batchelor: I respect the UK Bribery Act tremendously. As Carl says, it is a very important part of the integrity with which we do business, which we are well known for. I am concerned that we are placing our smaller businesses in particular in difficult circumstances.

The Chairman: They are. The way it is dealt with at the moment, if it is dealt with at all, is to rely on the prosecuting authorities showing, frankly, a bit of common sense in cases such as the extreme one that you described, where either you lose your goods or you have to pay a small sum of money to get them taken ashore.

Lesley Batchelor: Yes.

The Chairman: So far, the evidence that we have received has set its face more or less completely against alteration in the law to allow for any sort of facilitation payments.

Lesley Batchelor: In that case, we have to think about a service to help businesses that get stuck. We have to be practical about this and think about how it could work. I joke about an AA-type of service that you could call, someone local who would come out and help you; but when I insure cargoes, if something goes wrong I am given a contact detail of a local insurance surveyor who will go out and look at the problem immediately. Perhaps we should tap into the insurance world and recognise that this is a problem. If they have local surveyors who will go out and do that, perhaps they might be able to come out and help and offer some sort of mediation.

Baroness Fookes: You mentioned the need for the Foreign Office and so forth to take a stronger line. Would they be a proper place for an AA line, as you put it?

Lesley Batchelor: They would indeed. The number of high commissions and embassies is being reduced, so we might have to think of a more constructive way of doing it, but yes, we have to be active about this. Pretending it is not happening is not the answer.

Baroness Fookes: Dr Hunter, from what you have said already in evidence, you have a different view. You would firmly resist any attempts to put facilitation payments back into the law, as it were, as now they are outside the law and against it.

Dr Carl Hunter: I do, because I think facilitation payments are the equivalent of soft drugs that lead to hard drugs. They are a gateway that leads to corrupt practice overall. I do not wish to go head to head with Ms Batchelor, but I do not understand at all why, after 28 years of sending equipment and systems into a diverse array of developing countries on every continent on this planet, you would attempt to do that without a freight forwarder or a shipping agent in-country to assist the transiting of your goods as they meet the interface of governmental customs and border checks that are going to happen.

The reality is that if you go to a market such as Pakistan, India, Sri Lanka, Indonesia or the Philippines and your sum knowledge, as it is for so many UK companies, comes from landing at the airport, getting into a taxi, going to a five-star hotel and then reversing the process three or four days later, you should not be surprised if a year or two later something negative happens to your business in those countries.

Surely you have to prepare an understanding of the country. You have to prepare a country brief for your travelling team, so that when they arrive they have a basic appreciation of the geography, the demographics, the population locations, the size of the cities, the economic structure, political and constitutional matters, the governmental relations with the UK, the host Government's relations with intergovernmental organisations.

Surely, if you hope to go beyond the transactional and create a relational business opportunity that will last you for decades, you should go to the trouble of doing a little heavy lifting and prepare your team a five or sixpage brief. I always remember that in the military we used to arrive in a new country and get a page of A4, and we considered ourselves experts in those countries within 30 seconds of reading it, although I subsequently learned that we were not entirely expert and one needs a slightly larger brief.

With regard to contracting HMG posts overseas, Baroness Fookes, you are spot on. I brief a lot of UK businessmen on exporting, as I am sure Ms Batchelor does. One of the things that I say is that if you are not visiting posts overseas, you are not "travelling well". I am afraid that in the past

10 years my experience is that a lot of businesses have ceased visiting their posts overseas and have missed the change in HMG, which is that trade and diplomacy are almost equally important when it comes to the establishment of our posts overseas. They are crying out for businessmen to visit them and discuss these issues.

So my answer to the question about facilitation in relation to the clearance of goods into developing countries is: first, use a shipping or freight-forwarding agent of repute and in 99% of cases you will not have a problem; secondly, prepare yourself for the emerging market that you are dealing with and go in there with your eyes open rather than closed; thirdly, enjoy the experience that it can give you, because you will discover that you are merely following in the footsteps of people who have done this for hundreds of years, and that there is a world of excitement out here that will cumulatively make you three things; the old American salesman's mantra is to be better, faster and cheaper than the competition. Your exposure to that array of overseas markets in the exporting field will make you all three of those if you are good yourself. At the point where you are better, faster, cheaper than your competition, there will be no need for any facilitation or corrupt practice by definition. It is a virtuous circle. It is a hard slog. It is not easy.

It is always easier to take a short cut. It is always easier to keep pretending that there are so many barriers to exporting. There simply are not. My first overseas market was New Zealand and selling there was as easy to selling to a customer in Somerset. I maintain 30 years later that the cows are indeed happier in New Zealand than they are in Somerset. This is an exciting opportunity for us all and we should not pretend that the difficulties of going through low-paid government officials are part and parcel of every third-world country. The reward for that low pay is their pension and possibly living in government accommodation and their children going to government schools.

Baroness Fookes: But would you not accept that the UK and New Zealand have a common set of principles that make it very much easier than if you are selling into Indonesia or the Philippines, for example?

Dr Carl Hunter: I would say that we have a common set of principles that apply between the UK and India that have endured for 400 years. The problems in India are well known: the infrastructure, the bureaucracy and the corruption. We can deal with the first two. The third is something we must not fall prey to.

Baroness Fookes: I still feel that the—

Lord Thomas of Gresford: No doubt you have the resources and the experience to brief your people when they go out to sell. The small business that is seeking to export does not have that experience. You referred to the Foreign Office. Do you think there is a role for government in providing a service to SMEs that wish to export to advise them on the sorts of things you advise your people on from your own knowledge?

Dr Carl Hunter: I do, sir, and the good news is that it is already happening. It started two months ago. The first mention of bribery and corruption went into the GREAT.GOV.UK website, which is the base website for exporters—beginners, intermediate and advanced. That is the first ever reference to the fine work that has been done in government over the past six to eight years—a cross-departmental effort on anticorruption, led by DfID. That is a cross-Whitehall message in regard to the government approach to corruption and what the individual British company that wants to export can do about it when it starts. So, happily, it has already begun.

Lord Thomas of Gresford: That is very good news, but to follow that up, do you think it should be a defence under the Bribery Act that you have taken the advice of the Government through the Foreign Office or whatever website you have read—that you can say, “I am too small to have all the protections that are in section 7 of the Bribery Act, but I am following the government advice”? Should that be sufficient?

Dr Carl Hunter: I do not think it should, for the simple reason that when two people combine in a mutual endeavour, it is the purpose of the mutual endeavour that that is the mission, if you like, regardless of whether it is one person or a million people.

I do not believe this notion that smaller companies are incapable of dealing with exporting. If that is the case, I do not believe they are incapable of dealing with morality and legality. It rather assumes that only the larger companies have a monopoly on resources and knowledge that enables them to act in a particular way. In fact, some of the things that led to the Bribery Act were unfortunately outcomes from some of those larger companies.

I want to talk about UK industry as a whole without making this differentiation between the smaller and the larger. When my company was not doing very well, I was a consultant to some of the biggest companies in the world—BAE Systems, Thalys, British Airways, United Airlines. Sometimes we did not make any money in the early days, so I had to be a consultant. In those larger companies there is an equal amount of ignorance and bad practice as you would find in smaller companies. Just because a company is larger, it is not necessarily better.

I merely try to encourage you on this extraordinary Committee—on which I warmly congratulate you all, my Lords—that the Bribery Act has been well constructed and that ignorance of it is no defence in relation to breaking it, and I see no necessity for any defence in relation to its lack of application by the exporting company, or indeed any other company that is doing corrupt practice in the United Kingdom itself.

Lord Grabiner: On your point about the use of reputable agents and sophisticated freight agents, do you go so far as to say that if you do that, you get rid of the facilitation payment issue completely? For all you know, the freight agent is making facilitation payments, or worse, to the overseas buyer and you might never discover that.

Dr Carl Hunter: Quite right, my Lord. He might also be playing golf on a Friday afternoon with him.

Lord Grabiner: You shuffle off the problem as a result. Is that your point?

Dr Carl Hunter: That is not my point at all. My point is that if I contract with a party to execute a particular logistic service in which they have more expertise than I do—I contract with anyone, from DHL to a large freight forwarder—I do so because they are better at doing that than me in my core business, which in my case is doing the science, development, manufacture and selling of the products, services and systems that we make. I am not a logistics expert, which is why I contract with any freight forwarder or courier company.

I am not saying, “Let’s pass the parcel”. I cannot control everything, but if I go for the most reputable in that country, that at least de-risks that prospect—presumably.

Lord Grabiner: If you have done that, what is the justification, or why should the person who has undertaken to do the business in such a careful way not then be protected by the fact that they have done that and are entitled to some sort of safe harbour, or whatever you may call it, because they have done as much as they could reasonably have done in the circumstances?

Dr Carl Hunter: That is a perfectly reasonable point to make, my Lord. I could encourage that, yes.

Baroness Fookes: Ms Batchelor, would you like to come back? I sense there is a statement on your face.

Lesley Batchelor: Yes, unfortunately—

The Chairman: I am going to interrupt you. I may mistake what you are about to say, but I was very interested in your suggestions about help, advice lines and so on, which leads us straight into the fourth question, which Lord Thomas will ask. I am not trying to shut you up for one moment, but within the context of the fourth question I think you will be able to say what you have just been invited to say.

Q57 **Lord Thomas of Gresford:** I hope this is the context. What do the Government currently do assist exporters with understanding and complying with the Bribery Act, and are these efforts sufficient? If not, what more could the Government do to help? We heard a moment ago that in the past month or two they have started to give advice about bribery. To what extent could an SME, for example, rely on that government advice?

Lesley Batchelor: We have had no feedback on that advice so far from our members, so I cannot really answer that. I have looked at it; it looks good. We need to be thinking about practical help.

On the point about choosing freight forwarders, normally you choose a freight forwarder based here in the UK, and then it chooses the clearing agents and the various people it works with around the world.

Sometimes, unfortunately, things do go wrong and things happen, and people who have control of ports and dockers and various other people are involved in it. That is just a fact of life.

However, I believe in and am coining this idea of an AA. I believe we need to do more to get people out. I do not know how many people visit the GREAT.GOV.UK website. I know a great deal of people visit our website. I took the liberty of checking. We have some articles on it about why it is important to be aware of corruption. We have advice for UK exporters and one on the Bribery Act explained. Between all those, we have had around 250 hits out of 25,000 people visiting those sites, so people are not aware of it. We tried to run some programmes with Brook on saying no and how to say no in different markets, but we had no takeup of those at all.

I suppose what I am trying to say is that the media is out there telling us that the Bribery Act is all about buying lunch for people, not about responsibilities internationally and how this can impact. Taking vicarious responsibility for your agent who is working for you or your distributor, and whatever they are doing on your behalf, is a big issue. But, of course, the major cases getting into the newspapers are always the big guys, and I am not aware of any small cases that have been brought. All the time while no small cases are being brought, that does not give people a licence but it does not make them aware of the Act and the power that is behind it.

Lord Thomas of Gresford: You mentioned an AA system. Are you suggesting that you or some other body should act as an advice giver to smaller businesses?

Lesley Batchelor: There are issues that crop up in-market that you probably need someone in-market to help you with.

Lord Thomas of Gresford: Rather than the Government?

Lesley Batchelor: It could be the Government. I was suggesting that the various insurance companies have these issues too, so it has to be in their interest as well to ensure that the goods arrive safely and are not damaged in any way. There are lots of different ways of doing this. We work really hard. We educate people. If they do our courses, they know about bribery, the implications of the Bribery Act and everything that we are doing, because it is inherent in our education programmes. We need more people to think of this as a skill and, more importantly, to actually do something constructive to help with this.

Lord Hodgson of Astley Abbotts: Could I press you on the issue of the business integrity initiative? I have the paperwork here and it describes a threeheaded service offer. Nowhere does it actually say, "If you take our advice, you've got a safe harbour". It says, "We're going to provide

practical information, pilot a One HMG approach and use the voice of investors to influence host Governments”.

Lesley Batchelor: That is not good enough.

Lord Hodgson of Astley Abbotts: There are some bones in that, but it does not make a useful framework for exporters. We need to know from you whether you would advocate crossing this line and saying, “Actually, if you get the advice from the Government’s business integrity initiative, you’re in a safe harbour”.

Lesley Batchelor: I agree that we should be pushing something that supports businesses, because you want them to go out and do more business. We have to give them something to go by, and clarity would be a great help. It is difficult when you have the USA going so definitely against what we have. It is a shame that we could not have worked together on that in some shape or form, as it is causing disruption.

I am not saying this is right or wrong. My personal belief is that if something is wrong, it is wrong. There is no grey area. However, this is not about what I believe personally; it is about what businesses are facing when they are out there. We have to think about something sensible to help them.

Lord Gold: Is this “safe harbour” idea not actually an unworkable minefield? The exporter follows government lines, or says he does, but then there has to be a forensic test as to whether or not he did, what he knew and what his real intentions were. I can see this occupying so much time, for both investigators and courts, that the whole thing turns into a nightmare.

Lesley Batchelor: Indeed, I understand that over in America huge resources are being ploughed into this. I suppose it is a question of whether we feel that it needs those sorts of resources, to the extent that they have a whistleblowers fund that you can draw down from. If we do not police it, it is a bit like when you are doing intellectual property and you decide to put a trademark on something: it means something only if you actively police and protect it.

Lord Hodgson of Astley Abbotts: Lord Gold’s point is perfectly fair, but if you accept it you are saying that if you are exporting into a country you can get advice and make up your mind but you have no protection from having taken advice. So what may look entirely reasonable at that moment, and you may have done all your checks fastidiously, may not appear reasonable 18 months later on cool reflection in a law court of the UK. I entirely accept what Lord Gold says, but somehow we have to find a way to pull those two different challenges together.

Lord Empey: I declare an interest as a vice-president of the Institute of Export and International Trade. Government policy is to encourage more export. We know from previous Committee work that SMEs are the one area that is not keeping pace with our international competitors as a

percentage of participants. So it puzzles me why, at this very point, HMG are actually constricting our representation internationally.

Are the embassies helping your business or the members? We have commercial attachés, people trained in the field, to help. If you went on trade missions, very often the embassy would hold a function and make people available to help small business to help them along. What do you feel is the implication of this conflict between encouraging more people and, at the same, restricting the facilities?

Dr Carl Hunter: It is extraordinary that you are looking at that with the sense of kindness that you are. I have to draw your attention to the fact that this year, and in all the preceding years since the Act—actually, I will speak only in regard to the last four years—we have had the largest share of exporting that we have ever had in this country. I therefore conclude that the Bribery Act has not damaged that at all.

My observation is that never in my business career has the work of HMG been at a higher level in front of business in some ways. I can give you some examples. When I started in business, UK Export Finance—it was phrased differently then—was available only to larger companies for seven-figure transactions. Now that is down to £10,000. Today, if you and I had a company, Lord Empey, and we developed a product and said, “This has been selling well, but we can’t make it better within our resources”, for £500 a day we could go along to a centre in Coventry started by BEIS and get access to 300 PhDs, 100 of the world’s best production engineers and a sample of every machine tool in the world.

At the same time, the Foreign Office has almost reconfigured itself into a trade and diplomacy delivery machine. DIT is now twin-pillared, one on becoming one of the world’s leading economic trade policy organisations—by the way, I believe it is on the way to being world-class on that—and the other as a department that is entirely given over to export promotion and the encouragement of British companies to do it, but to do it in the right way, which is what the Bribery Act is about and why it has been integrated into the GREAT campaign.

Incidentally, the Exporting is GREAT campaign is the single most successful cross-departmental marketing achievement that you and I have ever seen in our lives. I am afraid that in so many cases the effort from businesses that are not engaged in exporting is to diminish the work of the Government who are trying to assist them. Business has got used to shouting at government. Ministers now come along to so many events. I am a member of 16 trade associations, or something like that; I am on the governing councils of five of them and a trustee of one of them. There are so many opportunities for businessmen when Ministers or civil servants come to these trade associations and say, “How can we help you?”

That is the question they usually lead on. Too often the response from people who are not experts in exporting at all—they are not travelling the patch to learn how to do it better, they are not going with their teams—is to criticise the work of government, and they have not even read the export

strategy or studied the work of UK Export Finance. Even in government they call it the UK's greatest hidden secret, or something.

I am not just being an eternal optimist. I am saying merely that if, out of kindness, you are seeking defence for safe harbour et cetera with regard to the Bribery Act, the Bribery Act has not impeded exporting at all; indeed, exporting has grown since the Act was put on the statute book.

Lesley Batchelor: The point that I was picking up from Lord Empey's question is that a lot of high commissions and embassies have been closed, and that we should pull together something constructive. My vision of what would be constructive for business is that, when faced with an issue in-market, instead of just paying up they should be able to say, "Listen, I'm going to get "so and so" to come along and help me with this". That would be a deterrent for anyone asking for any bribe, and it would show that that small business was being supported by the Government in some way to avoid having to pay, or for them to understand that they were asking that company to break the law.

That is the sort of thing that I had in mind—not a question of encouraging them to break the law but finding a way of supporting them in saying no. We have to look at something constructive that says that we can do this. This is not about the excellent work that is going on; it is just about trying to find an extra piece of help that could work. There is no evidence on this. We have tried very hard to get people to talk to us and give us solid information. I probably managed to have 50 conversations about this. We are not getting people falling over themselves to talk about it. It is just the same when the BBC phone me up and say, "Can you give me someone who is in real trouble?" I say no, because nobody is going to go on national radio and say they are in trouble, just as they are not going to come and talk to us about breaking the law.

Lord Gold: At the same time, there is massive pressure on you from your members to change the law regarding facilitation payments.

Lesley Batchelor: No, I did not suggest that at all. I think my members feel that it is strange that some countries allow it and we do not.

Dr Carl Hunter: With regard to trade associations, Ms Batchelor is in a difficult position. This might not apply at all to her institute, but so many times the Government have had to talk to the sectoral trade associations—I am not talking about the Institute of Export—because it is so difficult for them to talk to the SMEs. It is very easy to talk to the larger companies. I have learned over 15 years that in many cases, if you ask a trade association head, "Of your 700 members, how many respond to your surveys?", you will find that it is below 5%. If you ask the same trade association head, "Of your 700 members, how many have you visited in the last year?", you will find the answer disappointingly low— sometimes one a month.

At the same time, the Government have actually been growing their representation. Forgive me for saying so, Ms Batchelor, but it is factually

incorrect to say that we have diminished the number of posts overseas. We have grown them, and we are now the second largest outside America. Those trade and diplomacy posts have been reinforced by a network of regional Her Majesty's Trade Commissioners, who are dealing with the global export stage on a regional basis.

The problem in so many ways is merely the complexity of encouraging something called human beings, which is what the SME business community is, to truly engage with government in a conversational manner to realise what support is available, which has never been higher than it is today in my entire career. So I do not think that what I am saying conflicts with anything that you are saying; I am merely trying to say that encouraging business to do more business is complex, and the work that HMG are doing on that is literally tremendous.

Lord Haskel: With more and more business being done over the internet, how do you think that affects the personal relationships that you speak about and the Bribery Act?

Dr Carl Hunter: Dramatically, sir. You are absolutely right in that observation. I came into business just as telex was going out and fax was coming in. Now we are doing so much on the internet, it is difficult to create the relationships unless you travel intensively, as we do. However, internet communication on small transactional issues will literally be related to quoting a price, negotiating it by email and possibly a telephone call, and then the order either being administered or not being received at all. The issue of bribery will tend to happen on larger contract awards where the values are attractive enough to create a potentially corrupt environment. That would go beyond email; it would largely involve meetings as well.

Lesley Batchelor: One of the constructive things that we at the institute have done is to recognise that a lot of smaller businesses are trading and leaving themselves vulnerable by not having international terms and conditions. We are just about to launch four different sets of terms and conditions that are internationalised, which our members can use to protect themselves if they choose to trade without a contract, as unfortunately a lot of businesses do.

I am going to go back after seeing you all and look at whether we can put a clause in there to try to protect them against any sort of bribery and whether there is something that we can do. We will talk to our lawyers about how that might be included to be a bit of a start perhaps to try to help people to be more aware of what is going on.

Lord Haskel: The problem with the internet is of course that you are doing a lot of business without a contract.

Lesley Batchelor: Unfortunately, yes, and without payment terms agreed as well, which is a huge issue. Again, this is an SME issue, not a large-company issue.

Q58 Lord Gold: Have UK exporters and their subcontractors developed effective anti-bribery policies as a result of the Bribery Act 2010? Assuming that some effort has been made, how could these companies improve those efforts to prevent bribery?

Q59 Lord Stunell: After they have done that, could companies that once had adequate procedures in place now find themselves at risk of a section 7 prosecution as the result of not having reviewed and updated their policies during the previous seven years? In other words, have those policies decayed over time?

Dr Carl Hunter: I think all policies are likely to degrade over time, my Lord.

I would have thought, in answer to Lord Gold's question, that the Bribery Act would have stimulated companies that might not have had such policies in the past to look at commencing them since it went into law. I maintain that the larger companies are well in advance of the smaller companies in regard to the Act. That is why this is an exciting moment that I wish to draw your kind attention to.

Talking about business integrity in a public governmental space, it being the first time that has ever been done, should be encouraged. I am certainly doing that in my non-company work in relation to businesses and encouraging them to grow and export. It provides a stimulus to creating those policies, although I maintain that a company of good moral fibre would not have gone into that in the first place. However, the reality is that you need policies nowadays, you need to exert due diligence and, as Lord Stunell, has referred to so well, you need to update them and make sure that your policy is practical. It is great having plans, but unless they are going to survive contact with the enemy they are pointless.

Lord Grabiner: In the context of both these questions, would it be wise for us to make a distinction in educational terms between goods and services? Financial services in particular are fairly heavily regulated in the UK and the regulators have strict rules in relation to bribery and corruption. My guess is that on the financial services side there is a very high level of educational understanding, whereas in a non-regulated area there may be a much bigger problem because of the lack of educational facility and less stick and carrot may be operating. Do you have a view about that?

Lesley Batchelor: I tend to agree, but unfortunately I have to draw your attention to the fact that SMEs—not the 7,000—have been surveyed and only 10% of them are aware of the Bribery Act. A lot of work on messaging and communication needs to happen to put this on a level with, for example, the GDPR. I think we all got to the stage where we hoped we were never going to hear that phrase again, because so much attention was given to it. We have 220,000 exporters. We have to get these messages out to them. We need to get them out to places such as the Alibaba website, where there are a lot of transactions with the more exotic markets that might be involved with this. So I think it is also a question of

awareness. We cannot expect companies to have policies if they are just not aware. It is a huge marketing job to get it out there.

Lord Hodgson of Astley Abbotts: Dr Hunter, you have obviously had an exceptionally successful career. You have a world reputation. You have told us about the countries you are exporting to. You have a brand. But cast your mind back to your first export sale: you were unknown, you were trying to break into a market; it would have been harder to find representatives because you had just turned up. You have now been able to build a really careful system, which you described to us. But is that really a practical approach when you are starting off, when you are completely unknown and you are trying to get a foothold as a small company, never having got into these markets before?

Dr Carl Hunter: Thank you for asking that question. Actually, I do think about that more regularly than you might imagine. As we become more advanced in some of our practices, we move away from some of the things that propelled us to experiment with something called success— that was borderline with failure for so many years—with so many pressures and just a willingness to believe that one was going to prevail.

Of course, it was different years ago when one first started. I always believed that we would be the only ones who did the science and could express it mathematically. I always believed that our worldview was generous, open, kind and riddled with core values of integrity, and that it was a battle or assault on all of the latter that one experienced for many years.

For me, it was exciting to navigate that battle, as the Americans say, for the nobility of purpose. For me, that was what it was about. It is in me now to be better, cheaper and faster than anybody. At any table, any competitor can sit in front of me and I will overwhelm them with those things. For many years I have not been able to have all of them. I am blessed to have the last one in the box.

The answer to the question about how government can better inform is to replicate what the Bank of England does. Along with 3,500 others, I am a member of the decision-making panel of the Bank of England. Every month the Bank of England sends you 10 questions—they get increasingly difficult as the year goes on—and you reply. Staggeringly, the Bank of England sends you an email two days later to say thank you, and once a month sends you a quarterly assessment of the collated replies from those who responded. If HMG did something similar to business, which they are perfectly capable of doing—as Lesley says, there are 220,000 exporters—there is literally no reason why they cannot all be contacted by a Bank of England-type process every month.

It can start with the Government asking some questions of business, as the Bank of England does, but they can depart from what the Bank of England does and start to inform business about what is available from government for business to export. That will point the way to something that has probably never been done in the advanced world before. If you

talked to Mr Philip Bunn at the Bank of England, he could guide your fine Committee as to how it could be applied in HMG as a method by which businesses could be contacted directly by their Government.

When I talk to businessmen, I always ask this question: “When was the last time you talked to government, except HMRC?”—because typically their only relationship with government is paying their PAYE and their corporation tax bill if they are lucky enough to have made some money that year. Similarly, I ask: “When was the last time you wrote to the Chancellor to say thank you for lowering corporation tax?” That always gets a bit of humour. The point I am trying to make to them is: “Why are you not talking to the respective government departments, to the 250 international trade advisers who are available to you throughout the United Kingdom?” The answer is merely that they probably just do not do the heavy lifting to discover that they are there at all.

Lord Stunell: You have made a very strong case for business standing on its own two feet, which I am sure many members of this Committee would feel was the right approach. But the reality, or the possible reality, is that in the end something goes wrong, you face a prosecution under section 7 and the question arises: “Were the precautions and procedures I put in place adequate?”

To what extent do you think the current advice, attitude and approach—all the things you have talked about—provide companies with all they need to ensure that they have adequate procedures?

Dr Carl Hunter: When I looked at the Bribery Act guidance given by the Ministry of Justice, I was struck by three things: first, that the guidance itself was readable; secondly, that it was guidance that I could imagine myself understanding, sitting with somebody of legal experience; and, thirdly, I was impressed with the case studies at the rear of the document—I think there were seven or eight. Certainly, more than half of them I felt I had some experience of myself. So I feel the guidance is already there.

I agree with Ms Batchelor that probably the majority of companies are not aware that it is there, but equally I suggest that those companies do not understand the computation of their corporation tax from a pure accounting-principle perspective. I commend your noble Committee to bear in mind that government can encourage, assist and inform, but this is all an effort so that British business becomes able to stand on its own two feet and succeed in global terms at a world-class level for the next three, four or five decades ahead, so that instead of being the fourth largest exporter we become the first, and instead of 30% of our GDP being exported we make it 48%. I would have thought that that was the objective.

Any of the noble guidance that you can provide on the Bribery Act would be a wonderfully welcome thing for business if HMG managed to communicate that message. It seems to me that the model is already there through the Bank of England.

Lord Stunell: Of course, you can lead a horse to water but you cannot make it drink. But the underlying point of the question is: are the horses actually being shooed away from the water by some of the apparent risks that the legislation presents?

Dr Carl Hunter: That is not my opinion, my Lord.

The Chairman: Ms Batchelor, would you like to add anything further to this?

Lesley Batchelor: I would add only that talking to people is a great idea. Businesses seem just to want to get on with business and tend not to do anything about these things unless they are legislated for. When the Bribery Act came in they were inundated with lawyers telling them that they would sort all this out for them, and I think they shied away from the lawyers, as opposed to the law itself, simply because it began to feel like a gravy train of some sort. It became a problem.

We need to make guidance accessible. I agree with you that the MoJ's guidance notes are brilliant, but not many people are using them. GOV.UK should be advised to make more of those guidance notes, and we should perhaps check on their stretch. We reach more than 40,000 exporters every month with our websites, so I am more than happy to go back and make sure that they are on them and are clearly stated.

Q60 **Lord Grabiner:** How does the Bribery Act compare with equivalent legislation in other countries? Are there other approaches in legislation and enforcement which the UK could learn from? I think we have already had a pretty full discussion on much of this in relation to facilitation payments, so we do not need to get into all that. Leaving that aside, do you have any views about either of those issues?

Lesley Batchelor: I am looking forward to seeing in the report that is supposed to be coming out a comparison with the approaches of four or five different countries. Until I have seen that, I am afraid I do not have detailed-enough knowledge of the different countries' Acts to be able to comment.

Dr Carl Hunter: All I know is that the Foreign Corrupt Practices Act led the charge in this in so many ways. People lived in fear of it and American companies spoke very passionately about it. I personally feel that you should be exceptionally proud of the Bribery Act. I do not think that it needs to replicate the Foreign Corrupt Practices Act, because there is a big distinction between the FCPA and the Bribery Act with regard to facilitation, which we touched on earlier in this session.

Lord Grabiner: But is there anything else in American legislation that you think we should have that currently we do not have?

Dr Carl Hunter: My only sense—I am not an expert in this any more than I am in financial services, and I have no expertise in financial services—is that the US Department of Commerce works more tightly on an interdepartmental basis, and I would like to see that occur here in the

United Kingdom. I think we are beginning to work more closely on a cross-departmental basis, but for me the direction of travel in the Bribery Act would have been to ensure that all the departments of state with an interest in its content knew about it. However, that was bound to a business integrity understanding on a cross-departmental basis and to an understanding on a national basis typically by companies that are beginning to export. I cannot talk in detail about the FCPA.

Lord Hodgson of Astley Abbotts: Arguably the most successful exporting country is Germany, and a lot is done by the Mittelstand companies, the small and medium-sized companies. Are there any lessons which this Committee should be picking up from the way the Germans deal with issues of bribery, facilitation payments and so on?

Dr Carl Hunter: I am not overly familiar with how the Germans have achieved that. There is some talk that it has been achieved because of their advantage in regional support on a number of levels being very aggressive.

Lord Hodgson of Astley Abbotts: I was wondering about aspects of the Bribery Act.

Dr Carl Hunter: I am not qualified to comment on the Bribery Act.

Lesley Batchelor: I have already stated that I am not qualified to talk about it either. I only know of it from a few experiences—not enough to be worthwhile.

Q61 The Chairman: That leaves us with the third question, but we have run out of time. The question was: has the Bribery Act 2010 deterred British companies from exporting abroad or otherwise harmed their competitiveness in relation to companies from countries with less stringent anti-bribery measures?

I will leave that question. If you wish to add to what you have already said in relation to it, please do so in any supplementary evidence that you want to present to us.

On behalf of the Committee, I would like to thank you both very much indeed for extremely valuable evidence, which will undoubtedly assist us in the job we have to do consider the effectiveness of the Bribery Act 2010.

Philip Bramwell, Joanna Talbot and Mark Gregory – Oral evidence (QQ 62-70)

Tuesday 11 September 2018

10.30 am

[Watch the meeting](#)

Members present: Lord Hodgson of Astley Abbots (Chairman); Lord Empey; Baroness Fookes; Lord Haskel; Lord Hutton of Furness; Lord Plant of Highfield; Lord Stunell; Lord Thomas of Gresford.

Evidence Session No. 5

Heard in Public

Questions 62 – 70

Examination of witnesses

Philip Bramwell, Joanna Talbot and Mark Gregory.

Q62 The Chairman: I welcome you all to the Committee. Thank you very much for coming along to give evidence to us this morning. As you will have gathered, Lord Saville, the Chairman of the Committee, is away and I am sitting in for him.

I need to read the formal introduction to you. A list of Members' interests that are relevant to the inquiry has been sent to you and is available. The session is open to the public and is being broadcast live, and it will subsequently be accessible on the parliamentary website. A verbatim transcript will be taken of the evidence and also put on to the parliamentary website. A few days after this session you will be sent a copy of it to check for accuracy. It would be most helpful if you could advise us of any corrections as quickly as possible. If, after this evidence session, you wish to clarify or amplify any points made during your evidence, or if you have any additional points to make, you are welcome to submit supplementary evidence to us.

Before we ask the questions, please introduce yourselves briefly and explain your role in respect of our inquiry.

Philip Bramwell: Good morning. I am the group general counsel of BAE Systems and have been so since the end of 2006. My responsibilities are to serve as adviser on legal, compliance and other matters to the board of the company and to manage and oversee the global legal compliance and regulatory communities in the company.

Joanna Talbot: Good morning. I am the chief counsel—compliance and regulation—for BAE. I have responsibility for providing the senior-level standard setting and leadership to ensure that appropriate policies and procedures are in place for compliance with key regulations, which are primarily sanctions, export control and, for the purpose of this Committee, anti-corruption and anti-bribery.

Mark Gregory: Good morning. I am the general counsel for Rolls-Royce and have been so for the past three years. I have been at Rolls-Royce for the past 13 years or so in various legal and regulatory roles, and like Philip I am responsible for legal and regulatory matters, advising the board sitting with the executive team.

Q63 **The Chairman:** Thank you. The acoustics in this room are bad, so if you could speak up as we go through the evidence session that would be most helpful.

I will start with the first question. Seven years after the Act came into force, how often do you think British defence companies encounter bribery in their day-to-day operations within the UK and overseas, and what impact has the Bribery Act had on the operations and policies of your companies?

Philip Bramwell: The answer is that we almost never encounter bribery and corruption. We have a very wide range of policies and processes aimed at ensuring that we do not find ourselves in a situation where we are exposed to bribery and corruption. We have a zero tolerance approach, of which the entire workforce is fully aware, to bribery and corruption. We recognise that any business tainted in any way by bribery and corruption is toxic, in both the short and the long run. So our answer to your question is “almost never”.

As to the second part of your question, the Bribery Act was and is a very carefully thought through piece of legislation, upon which there was extensive consultation. It is a practitioners’ statute, if I may call it that, in the sense that it is clear what is expected to meet the standards of the law. The law recognises the reality of the situations that businesses find themselves in and sets very clear and unequivocal standards that must be adhered to, which from a practitioner’s perspective is what you need to be able to do to convince tens of thousands of people of the legal basis for what you are asking.

Your Lordships will be aware that the origins of the policies and processes that BAE Systems currently operate are rooted partly in the Act but also in our implementation of the 23 recommendations of the Woolf committee, which preceded the Act and which was a committee, convened by the company, that produced our route map, and when the Act came into force our work on that Act consisted of ensuring that in every respect the procedures that we had put into place by then met the requirements of the Act.

In summary, therefore, it is a very good statute that is recognised as such internationally.

The Chairman: Ms Talbot, do you want to add anything from the point of view of BAE Systems, or are you happy for us to turn to Rolls-Royce?

Joanna Talbot: I would just echo what Philip said in support of the Act. Certainly from a practitioner’s point of view it is very easy to follow. I can talk at length about the policies and procedures that we have to respond to it, but that might be more appropriate in relation to a different question.

Mark Gregory: Thank you for the invitation to appear before the Committee. I am very grateful to be given the opportunity.

I echo what both Philip and Joanna have said and would add a couple of things; I am cautious about repeating too much. The Bribery Act has played an incredibly important role in encouraging companies to really look again at their policies, processes and procedures in order to strengthen them. The guidance that the Ministry of Justice, among others, has given has been helpful in showing companies how they can do that. In our experience, the SFO—I am sure we will come on to it later—has been taking a robust approach to enforcement, given our experience over the last few years.

Over the last seven years it has been incumbent on companies to make sure that their policies and processes are in line with the guidance that has been given. I will give an example. In Rolls-Royce we have done this in a similar way, I suspect, to BAE and other companies. We have taken the six principles that are set out in the Ministry of Justice guidance and refreshed our compliance programme to reflect them and to drive through that agenda.

I am sure that I do not need to talk through those six principles. The most important to me is the one that has driven the culture change over the last seven years through the tone from the top. That has been incredibly important. Again, as I am sure we will come on to, Rolls-Royce has changed. It is only six years since the SFO first got in touch with us, and that cultural change has been driven by that message and that tone from the top.

To come back to your first question, my perspective is that all companies that interact internationally face the risk of bribery and corruption, and in an industry like the defence industry—part of our company is part of the defence industry—there is a heightened risk because of the interaction with public officials. To reinforce the points that have already been made, that is why it so critical that we look at the policies and processes and make sure that they are fit for purpose based on the risk to make sure that we can manage that risk on a day-to-day basis.

The Chairman: Mr Bramwell, I think you said in response to the question that you almost never encounter bribery. Is that really the case? We hear noises swirling around, and it struck me as a slightly bland statement.

Philip Bramwell: I will elaborate and add more. Much of what we have been doing over the past decade has been ensuring that we as a company and our employees are aware of the potential pitfalls in a market, people and companies to avoid, situations not to allow ourselves to be put into, and the need at times to work closely with the British Government to ensure that there is a government-to-government framework within which to do business and to work with embassies and consulates to ensure that we have the right partners.

Investing heavily in due diligence, knowing who we are working with, and avoiding in the first place even being put into a situation where we think an attempt might be made to compromise the integrity of a process are at the core of what we do day to day. We have a zero tolerance approach, and the board has absolutely no appetite for the risk of exposure to corruption or even for the appearance of the potential for corruption.

Lord Thomas of Gresford: I was very interested in something in your written evidence, which was served in August. On this topic, it was said: “In addition, the Act has encouraged companies to hold to account suppliers and other commercial counterparties for their own anti-bribery procedures”. Last week, I was talking in a social context to Mark Phillips, the head of government affairs at Lockheed Martin, on this particular topic. He told me that they ensure that their suppliers—up to 4,000 or 5,000 personnel—take their annual course in this area. Do you have anything similar to that?

Joanna Talbot: We obviously look at our supply chain as an area of risk, but when it comes to anti-bribery and anti-corruption it is not just our own employees who need to be satisfied; we need to be satisfied that we are working with companies that we can trust and hold to similar standards.

So in the process that we adopt with our supply chain, first we screen them and undertake due diligence on them to understand what they are like and to ensure that they hold the same values. Secondly, we have a set of supplier principles in which we set out the expectations of their behaviour in relation to responsible business conduct. Then we will flow down to our supply chain, and ask them to flow down to their own suppliers, appropriate anti-bribery and anti-corruption clauses in our contracts. We also engage at conferences in face-to-face supplier training for our key suppliers, and our most high-risk suppliers will undertake much more detailed due diligence, training and contractual provisions. So, yes, we do.

Mark Gregory: Rolls-Royce does the same. As well as our global code of conduct for our employees and stakeholders, we have a supplier code of conduct, which in effect rolls out the same regimes that it sounds as though BAE has.

Lord Thomas of Gresford: What control do you have over it?

Mark Gregory: In our contracts we make sure that we flow down strict anti-bribery and corruption provisions. We carry out audits periodically, and we engage with our suppliers to make sure that they are getting the right training. Again—this sounds similar to what BAE has—we have a supplier conference and make sure that we are engaging with them appropriately.

Lord Hutton of Furness: You have all said that the Bribery Act brought about a sea change in British corporate attitudes towards corruption in business. Can you set out to this Committee what aspect of the Bribery Act in particular, in your opinion, led to that change in approach and attitude to corruption?

Mark Gregory: From my perspective, the obvious one is the requirement to have adequate procedures. It has required corporates to look at their policy and process, based on the guidance that has been given, and to test whether it still works. Rolls-Royce's procedures have changed over the past few years as a result.

So my immediate reaction is that it is the adequate procedures requirement in Section 7, which is new compared with the old regime, as opposed to the remaining provisions of the Act, which in some circumstances are something of a restatement of the existing law.

Joanna Talbot: As Philip has already explained in talking about the Woolf report, a lot of our procedures were already in place by the time the Bribery Act came into force. From our perspective, the change has been the associated persons provision and the focus that we now need to have on the nature of the relationships that we have with third parties. We put a lot of time and legal analysis into understanding the people we interact with as a company. We are driven to do that by the Bribery Act, but the benefit of it goes far beyond that; it is always important and good to understand the people you interact with and to have appropriate legal and compliance oversight over that.

Lord Hutton of Furness: It is very encouraging to hear that. In my experience it is very rare to hear such a glowing endorsement of any piece of legislation. We have heard an extraordinarily positive analysis from all of you about the Bribery Act. Some people would probably say, "Well, they would say that, wouldn't they?" given the particular difficulties both your companies have had with tackling this problem. What would you say to that?

Philip Bramwell: BAE Systems is probably this country's largest manufacturing exporter, so of course we would take this with extraordinary seriousness. We are in a contentious industry. We are very highly regulated across many dimensions, understandably so. We are positive about this Act because it removed uncertainty, where there was uncertainty, in British law about the standards that should be applied by large companies.

You are quite right to say that BAE Systems was beset by allegations of wrongdoing. Having changed its board and its management it has resolved never to get itself into that situation again, because it has been so plainly damaging historically. The company spent a decade rebuilding its reputation for probity and responsible business conduct, and neither the board nor the 80,000 people in the company are willing to put that at risk ever again.

We believe that the Bribery Act has been an enabler of that and that we can be vocal all over the world about it and about the standards to which we operate and which are expected of us in our home jurisdiction.

Mark Gregory: My view on behalf of Rolls-Royce is that compliance programmes and corporate responsibility for anti-bribery and anticorruption will work only if everybody in the organisation feels

ownership of those issues. If one just pays lip service by coming here and saying what feels right, we are not going to have changed as an organisation.

This organisation is very much like BAE but with more recent history. We went through a period six years ago when the Serious Fraud Office and others approached us. We have been through a global criminal investigation. The approach that we have taken both in dealing with the issues of the past and in fixing the company for the future is relatively well documented, I believe, but I am happy to answer any questions in respect of it.

Again, the tone from the top of the organisation is, “We don’t want to win unless we win right”, and we firmly believe that that cultural change and the continual beating of the drum of our corporate messages, supported by the policies and processes, training, guidance and co-operation with the various authorities around the world, makes Rolls-Royce a very different company from the company it was before the Bribery Act and before 2012.

Lord Hutton of Furness: How do you avoid that process becoming a tick-box exercise: “I’ve got to do an anti-bribery course. Yes, I’ve done it. Now I can get on with the real job that I have to do, which is to win business for Rolls-Royce”?

Mark Gregory: Again, it is difficult. I have to say that it helps to take advantage of a crisis. In a perfect world, you are there with the clear and simple policies and processes that all your employees and stakeholders can understand. There is a clear message from the top on zero tolerance for misconduct and a desire to show that we are not prepared to win unless we win right, and linking those behaviours and values that RollsRoyce holds strongly to the performance management of individuals so that we are not just looking the “what” but at the “how”.

We are providing training in many forms, whether it is written, desktop or in-person training. We now have a team of 60 compliance experts around the organisation, both centrally and embedded in the different businesses, driving support for people and consistently repeating the message over and over again.

Q64 **Lord Haskel:** As the Lord Chairman said, you have been very positive about the Act. Even so, has it deterred your business from exporting abroad or otherwise harmed your ability to compete with companies from countries that have less stringent anti-bribery measures? Have you been able to compete fairly?

Mark Gregory: I do not believe that I can think of an example where Rolls-Royce has suffered in a jurisdiction in a business activity. We have not chosen to step away from a jurisdiction as a result of its high-risk nature. The fact that the Bribery Act is the high-water mark of antibribery and corruption legislation around the world has stood us in good stead to understand the risks that we are taking and has enabled us to make good business decisions in jurisdictions.

Although I say that we have not walked away from jurisdictions, we have walked away from transactions and business opportunities where, as a result of those compliance regimes that we now have in place and the change in the organisation, we have not felt it right to enter into a specific business. To me, that is a positive. We do not consider losing an opportunity because it is potentially corrupt to be a loss of an opportunity.

Philip Bramwell: From BAE Systems' perspective, a characteristic of defence exports is that they are typically at the programme level—very long-run programmes and very high value in relative terms. Our focus, therefore, is first to become informed about the environment in which we are operating and the nature of process for selection. We want to win on quality, price and capability against our competitors and we want to ensure that the process will favour those objective evaluation criteria.

If we have a concern about the integrity of a process, we will engage, with the support of the British Government, to try to ensure that the process is fair, objective and untainted by the risk of bribery and corruption. As I said, this is about leaning forwards and trying to influence the business environment in which we operate. I appreciate that, as a very large company, we are better placed to do that than small to medium-sized enterprises. We do our level best.

Increasingly, as you move around the world, as a result of the good work done by NGOs, OECD and others, more and more Governments are engaging in, looking at, managing and getting involved in the potential demand side of the bribery equation, ensuring that their procurement programmes have integrity and pass muster with their own populations. We live in an information age and no Government want to see their major procurements challenged on the grounds of integrity. We feel that there is a positive momentum in this regard. Where we are going to fight to win business in an incredibly competitive environment, our first move is to ensure that it is a fair contest.

Lord Thomas of Gresford: What is the source of your information about the climate in the area?

Joanna Talbot: We take any number of soundings on the countries that we want to export to. We will talk to the British Government and the local embassies and work closely with them to understand the country. We will undertake research and take soundings from organisations such as Transparency International that look at countries and assess bribery risk, which we might factor in. When we choose where to export, we take any number of risk factors into account, of which the corruption environment is just one. We are heavily regulated when it comes to our export controls. We look at sanctions and any number of different issues when we are choosing whether or not to export. I echo what Mark says: having the Bribery Act and a clear understanding of what responsibilities we have and what procedures apply can allow us to export to markets that otherwise we might have been deterred from, because we can do so with confidence

knowing that our policies and processes are robust. The Act enables us to export to countries to which we might not otherwise choose to do so.

Lord Haskel: Have you actually lost business? Surveys tell us that 30% of companies surveyed believe that they have lost business because of the Bribery Act.

Joanna Talbot: I am not sure that we would say that we have lost business. We would not undertake business that we thought we could not do in an appropriate fashion.

Lord Haskel: So you have walked away.

Joanna Talbot: We have made informed decisions as to what our risk appetite will allow us to do and where we consider that the market, the opportunity or the nature of the transaction is not one that we are willing to work with or engage in.

Q65 **Lord Empey:** Good morning. I think that it was you, Mr Bramwell, who said that the Act is a practitioners' statute, which is an interesting phrase. What do the Government do currently—you have referred to it—to assist defence companies with understanding and complying with the Bribery Act 2010? Are these efforts sufficient? If not, what more could the Government do to help? Joanna, you mentioned embassies and so on. Could you elaborate what the Government actually do? Yes, Parliament has produced the Act, but what is the follow-through from the Government and what interaction do both your companies have with them on these matters?

Joanna Talbot: The starting point is that the general guidance that the Government gives is not specific to defence companies. We follow the same guidance as is afforded to all who are subject to the Bribery Act. Like everyone else, we use the guidance from the Ministry of Justice on how to interpret the Act. We find that guidance helpful and clear. We appreciate the emphasis on proportionality, which is very helpful, particularly for small and medium-sized enterprises trying to work out what elements of it should apply and how they should apply it. The emphasis on culture and cultural change, which Mark talked about, is also clearly set out in the guidance. We think that that is a helpful start.

As to how definitive the Government can be or how the guidance can develop, that will happen only once we start to get more cases that provide clearer judicial interpretation of adequate procedures or associated persons. You feel that there is a keenness among those of us who practise in this area to understand how the courts might start interpreting those phrases.

On the day-to-day assistance from the Government, I explained to Lord Thomas that when we export we talk to local embassies and seek their guidance on what the local environment is like. We find them to be a very good source of help and assistance. For example, we will want to understand what gifts and hospitality local public officials can accept and the embassies will assist us on how public procurement works in a country, all of which helps us to navigate our way through exporting. We certainly

find that assistance helpful. Our model is to have our own people in country to understand it as well, but they work closely with the Government in doing that.

Lord Empey: But it is fair to say that large companies such as yours have the capacity to do that. Are you able to point your supply chain and the smaller units in that supply chain in the right direction? Do the Government offer guidance to them? Quite clearly, they will not have the depth of having counsel and so on that you have.

Joanna Talbot: We would seek to help the supply chain when we are exporting. We see that as part of our responsibility. On embassies, the opportunities offered are open to anyone who wants to take them. It is part of any company's understanding of exporting to a particular market to take up some of those opportunities.

Mark Gregory: I do not want to repeat what Joanna has said, but I will reinforce it. It is the same approach that Rolls-Royce takes. I have a sense that it is incumbent on corporates such as Rolls-Royce when looking at their supply chain and stakeholders, especially given the journey that we have been on, to see how they can share and how they can help their supply chains to navigate these issues.

I reinforce Joanna's point that ongoing guidance from the Government, with examples of issues that have been uncovered as case studies, would be very helpful. I know that the guidance contains some case studies, but it would be good to continue to have that on a regular basis, to keep the information flowing. I look back at how our aerospace industry has approached safety issues. The safety of the aerospace industry has improved massively, due to collaboration and sharing lessons learned. We can learn from that when we are talking about anti-bribery and corruption, so I reinforce everything that Joanna has said.

I also believe that the speak-up culture—again, harking back to the aerospace industry—is important as a cultural message. Anything that the Government can do to encourage avenues of speaking up within corporates and to drive support to SMEs to enable them to have that resource available to their employees would be very useful.

Q66 **Baroness Fookes:** I turn to the rather controversial issue of facilitation payments. You will know that the Bribery Act does not allow for them, but some countries, such as the USA, do. What are your views on this?

Philip Bramwell: Our principle, which derived prior to the Bribery Act coming into force, is that we will not pay facilitation payments. We have only one example, which is where a payment is extorted from an individual whose safety and welfare is at risk, in which case employees have clear instructions never to place themselves at personal risk and immediately to report what they have been subjected to. That has never happened, to my knowledge, over the last decade. Our policy is absolutely clear and unequivocal: we will not pay facilitation payments anywhere in the world.

Joanna Talbot: As somebody who has responsibility for ensuring that our employees have appropriate training—we talked earlier about how important it is to give clear messages when training—from my perspective we have an incredibly clear message, which is that we will uphold laws and regulations wherever we operate and we will not engage in bribery and corruption. That incredibly clear message would be deeply complicated by having to explain to employees what elements of conduct may be acceptable and what may not when it is not always clear. We think that a very clear and emphatic message is needed that respects the law here and in the other country. Facilitation payments may be permitted by exporting countries—there are a few exceptions—but they are usually illegal in the country in which they are paid. We think that that is an incredibly complicated message to give our employees and we would rather spend our time and attention making sure that they can comply with the Bribery Act standards than seeking exceptions.

Philip Bramwell: I should add that we will not stand idly by when our employees are exposed to risks or to requests for the making of facilitation payments. If an expatriate colleague is told, “Well, it will take the best part of a year to connect your telephone in your new residence, but we have the executive service available for immediate collection in return for a cash payment of X”, we will decline to pay X and then immediately engage with the telephone company explaining what has happened. Funnily enough, it often then happens that the telephone is connected very quickly indeed. You cannot be passive about these things. You have to engage with Governments and say, “This is going on and we won’t tolerate it. We know that you profess not to tolerate it. Can we therefore ensure that we’re not exposed to it again?”

Mark Gregory: I agree with everything that has been said and will not repeat it. Clarity for our employees is really important. We start to muddy the message that we have been quite successful in driving through our organisation by taking a different approach. The one thing that I would add is that global consistency would be valuable to us. I am not advocating a change to the Bribery Act on facilitation payments, but anything that we can do to drive change elsewhere to try to stamp out this behaviour ultimately will be a good thing.

Baroness Fookes: I suggest to you that you represent two very major companies and are in a far better position to put pressure on the telephone company or whatever it is than some very small organisation that is faced with this and does not have your resources. Would you accept that this could be a problem?

Mark Gregory: I would absolutely accept that. I acknowledge that SMEs may have less resource to deal with this. I do not think that it takes away from the principle, which I stand by. In my experience of having gone through the investigation that we have gone through, getting to a point where it becomes acceptable for an employee to be forced to form a judgment at a point in time is the thin end of the wedge.

Baroness Fookes: Could you give these smaller companies any advice about how they might set about this problem with their lesser resources? Do you have any tips?

Philip Bramwell: I believe that this Committee has discussed, for example, problems of clearing goods in transit, through waybill releases at airports and points of entry. The clear opportunity there is to utilise the scale and influence of the very largest carriers. You will pay a small premium for using one of the big three-letter international freight forwarders, but it is worth it, because your goods will arrive intact and on time, in the main. Much international exporting, as other witnesses will have told you, is about understanding the environment in which you operate and being there, not outsourcing being there to a third party. It is there that British Government representation overseas can be of assistance. If one is exposed to inappropriate requests for facilitation payments, a port of call should also be your commercial officer in the British embassy or consulate in the place where you are trying to do business, whom you will already have met in preparing your sales campaign. Over the last decade, there has been a significant improvement in the mobilisation of government resources overseas in support of British exporters and we see that trend continuing.

Lord Hutton of Furness: Could you help the Committee with one thing in relation to facilitation payments? We are interested in this as a topic, but most of us do not yet have a feel for how significant an issue it is facing British exporters—and you are two major British exporters. In the BAE code of conduct, BAE officials who are approached by potentially corrupt foreign officials are required to report that to their responsible manager. Are you in a position to let us know how many of those reports have reached you?

Joanna Talbot: We see very low levels of that, because our very public stance is that we will not accept it and will not pay. We therefore do not encounter it very often at all.

Lord Hutton of Furness: What does that mean? No cases at all or one or two over the last few years?

Philip Bramwell: One or two over the last few years. The telephone connection example that I gave you was a real-world example.

Lord Hutton of Furness: That is very helpful. Your code also says that BAE Systems will seek to eliminate this practice wherever it occurs. Can you let the Committee know of any such efforts that BAE Systems has made to eliminate this practice in foreign countries?

Joanna Talbot: That commitment comes from the entire defence industry on both sides of the Atlantic. Those precise words come from the statement of global principles of the International Forum on Business Ethical Conduct, which is an association of both American and European defence manufacturers. It is a collective group of defence companies. You heard earlier about collective action and working together to seek to eradicate

certain behaviour. That is a collective commitment by the defence industries on both sides of the Atlantic.

Lord Hutton of Furness: But have you actually done anything about that, or is it just a commitment that you have entered into and reproduced in your code of conduct?

Joanna Talbot: As we have said, it is a question of raising it where we come across it with the government agencies where it occurs.

Lord Hutton of Furness: In foreign countries. And you have done that?

Philip Bramwell: We have done that and we will continue to do that. Frankly, 12 years ago when we started out, when we brought in this absolute, binary prohibition, we thought there would be a lot more incidents being reported to us and our plan, after consultation with some of the oil and gas industry, was to keep a log of every request that our employees received and then take that to local government representatives, explain what was happening, where it was coming from, that we would not tolerate it and that we would appreciate it if they would lend support. Candidly, we have not had enough incidents to get critical mass to engage with government. What we do through the embassy and through direct contact—and we are pushing on an open door in our industry—is to say to Governments that this is what we stand for, this is what we believe in, this is what we say to joint venture partners and this is the basis on which we will engage. We are not meeting resistance.

Lord Hutton of Furness: That is very helpful.

Lord Haskel: A lot of business, particularly for smaller companies, is now done over the internet. Have you come across any examples of facilitation payments to speed up things on the internet or to help things along? It seems that that is field where that could be required.

Mark Gregory: We have not. I cannot think of any examples where that has happened. We have a similar rate of reporting of facilitation issues, so I am afraid not.

Philip Bramwell: Likewise. The internet is central to procurement and supply chains, et cetera. As a cybersecurity provider, we provide services to companies that are subject to straightforward cyberextortion, but we have not been the subject of that in supply chains.

Q67 **Lord Stunell:** Have your companies and subcontractors developed effective anti-bribery policies as a result of the Bribery Act? I know that we have covered some of those aspects. What sorts of measures have you put in place and how do you know whether they are effective? A nil return does not necessarily mean a nil event.

Mark Gregory: Again, as I said, our approach in our anti-corruption programme has been to follow, broadly speaking, the six principles set out in the Ministry of Justice guidelines. I feel strongly about tone from the top being the key differentiator for a successful programme. Through our

exposure to the Bribery Act and—I am not going to hide from the fact—through a five-year criminal investigation into Rolls-Royce culminating in a deferred prosecution agreement, we are a different company from the one before. Leaders are measured on the behaviours and values that we expect of an organisation. You then look at the appropriate policies and procedures for the risks that a company such as Rolls-Royce has operating whether in the civil aerospace business, the defence business or our power systems business.

We learned that clear but simple policies and procedures are critical so that our people on the ground can understand. We provide as much clarity as possible, together with training and guidance. Our employees are asked to confirm that they have read and understood the global code of conduct that we issue and which we are about to refresh. We have made all those policies and processes and the training consistent across the globe. We have a team of 60-odd ethics and compliance officers who can provide support on the ground to our people, as well as centrally. We have refreshed our due diligence process when we are looking at advisers or intermediaries. I can give an example: through the refreshing of those due diligence processes in our civil aerospace and defence businesses, we reduced the number of advisers that we use by about 90% from 150-odd to under 20. Our power systems business operates a different model—a distributorship model—and distributors are caught by definition of intermediaries in our process, so there are more intermediaries there. Having an intermediary is not a bad thing, but the due diligence process to make sure that we are comfortable with them is really important.

Then there is monitoring and assurance. We operate the traditional three lines of defence model, so we have the management review of behaviours, the compliance team provides checks and then we have internal and external audit teams. However, I go back to my first point: the tone from the top is critical, so we have rolled out a consistent communications package to make sure that from the top down not just me as general counsel but my CEO, our board and every executive team member take ownership of these issues and drive that message consistently so that the shadow of the leader is a good shadow throughout the organisation.

Philip Bramwell: I echo everything that Mark has said. The Bribery Act is, as I said, useful to ordinary people because it is clear about what is expected of them. The pivot that occurred before and around the Bribery Act is a movement from a top-down, rules-oriented, potentially tick-box approach to something that is often called cultural change. What is cultural change? The pivot is trusting the women and men who work for your organisation to be capable of applying a clear set of values themselves and of speaking out when they see deviation from that. In our company, the clarity of expectation and standards of behaviour and the values of behaviour set by the board run through the bloodstream of the entire company. It is very clear to all our employees that the board relies on each and every one of their colleagues and everyone in the organisation to live up to those values, whether it is about how they behave in the conduct of business or how they behave towards each other or towards suppliers.

How do we ensure that that is working? We have a means to enable people to speak up. There is an externally run confidential helpline but our preference would be for people to raise it in the first instance with their managers, their colleagues or their local ethics officer, lawyer or whatever. We have internal audit that audits the representations made by businesses about their level of compliance. Jo's team also has the capability to investigate. Crucially, we sanction when violations have occurred. We dismiss more than 200 people a year from our company across the world for breaching the standards of behaviour expected of them in our code of conduct. If there is no sanctioning, you will not keep your workforce engaged, motivated and believing the sincerity of the words spoken by the leadership. That is how you go about it.

Lord Stunell: To follow that up, one of the perhaps more startling phrases that you used earlier was that you almost never come across examples of corruption, but you have just said that across the company you dismiss 200 people. I am not quite clear whether that was for corruption, attempted or successful, or for other breaches of the code. You may want to come back to that. Both companies operate in very high-risk areas and both companies have historically been caught with their fingers in the till, if I can put it in those blunt terms. Clearly there were corporate as well as individual failures in both companies at the time. I will put you under a little bit of pressure. If I heard what you have said before, everything is absolutely wonderful and glowing now and it is all due to the Bribery Act or the Woolf report or whatever. Is that transformational thing real, and how would you respond to what I have just suggested?

Philip Bramwell: I would say that it is absolutely real. Let us not forget that we are dealing with shifting standards of legal requirements. Over my lifetime, I have been in international business and exporting for more than 30 years and have lived on both sides of the Atlantic. Standards have shifted. We have criminalised things which before were lawful and we have decriminalised things which before were unlawful. You might argue that there may be latency in the speed at which the largest companies respond, but I am quite satisfied that in the case of major British exporters there has been a transformational change and we absolutely welcome being constructively challenged about this.

Yes, we dismiss more than 200 people every year and, yes, the number of incidents of corruption that we come across are vanishingly small. Most of that sanctioning has to do with breaches of the other policies to which Jo referred. Many have to do with the way employees treat each other. We have very long-established requirements about how employees behave towards each other in the workplace or towards third parties. We have to ensure that people do not get themselves into a situation of conflict of interest. There is a plethora of different expectations of conduct of which anti-bribery and corruption is but a small part. The key to avoiding exposure to bribery and corruption is to put people on the ground and broadcast your absolute intolerance of being associated with, involved in or tainted by allegations of corruption. In an industry that has its professional detractors, that is a critical part of any pragmatic business

policy and we follow it passionately. We have done that for more than a decade.

Lord Stunell: It might be helpful to the Committee if you were able to tell us in writing subsequently how many of the 200 could be said to be somewhat as a result of your new culture following the Bribery Act and the Woolf report.

Philip Bramwell: I am very happy to follow up with that.¹

The Chairman: Could you give us a similar number from Rolls-Royce? We hear 200 from BAE Systems.

Mark Gregory: It is not that many. I do not have the precise number, but I think that we report it in our annual report.

The Chairman: You can write to tell us.

Mark Gregory: I will write to tell you. We are on a journey. I recognise that Rolls-Royce has had relatively recent matters of concern that we have reported and responded to with the US, the UK and other authorities. I believe that the Bribery Act is helping us and other companies on that journey. I am not sitting here and pretending that we do not have concerns or that we do not get exposed to the risk of corruption. As I said at the beginning of our session, any corporate that is operating in multiple jurisdictions has that risk. You can have perfect policies and processes and you will still be exposed to corruption. Policies, processes, training and guidance give you the best opportunity to be able to manage and mitigate the risk of that happening.

I reinforce what Philip has said: you need to start with a clear message that there is a zero-tolerance approach to misconduct. My compliance team is very busy dealing with various issues that happen in interactions around the world, so I will not sit here pretending that everything is rosy, because it is not. The Bribery Act, the reinforcement of our policies and processes and the programme that our team has gone through from the board level down to drive change throughout our organisation give us the best way possible of being able to continue on that journey safely.

Rolls-Royce is in a unique situation, as we continue to have reporting obligations and co-operation obligations to the SFO. We have reporting obligations to the Department of Justice. We provide quarterly reports on our compliance programme, which gives us some validation about the journey that we are on being the right one. Again, I am not going to sit here and pretend that we are at the end of that journey.

Q68 Lord Plant of Highfield: Can I take you to the issue of the factors that lead to the discounting of the penalty that arises from a DPA? As you will know probably better than I do, the sentencing guidelines state that there can be a

¹ Mr Bramwell subsequently confirmed that “the vast majority of the 219 dismissals in 2017 for Code of Conduct violations were for issues relating to performance or behaviour, with only 12 relating to health and safety breaches, fraud or other criminal activity”.

discount of up to about one-third, following self-reporting primarily. However, in a case that is pretty well known, Sir Brian Leveson argued that there should be not only that discount but a higher discount that would kick in given the degree of co-operation, with the SFO presumably. In the case of Rolls-Royce, as you will undoubtedly know better than I do, he said: “In order to take account of this extraordinary co-operation, I repeat the views which I expressed above”—that is about the one-third rule—“and confirm that a further discount of 16.7% is justified taking the total discount of the penalty to 50%”. So 50% can be remitted on that basis, given self-reporting and subsequent extraordinary co-operation. The first question I would like to ask is: do you think self-reporting and co-operation of that sort should be the totality of what governs the discount or are there other factors that you would argue should also be in play in calculating a discount other than self-reporting and the degree of co-operation?

Mark Gregory: My colleagues have sat back, so I guess that I will answer this question. Rolls-Royce has been on a journey. I was in court as Lord Justice Leveson said those words. We believe that it is entirely appropriate to recognise companies that have made a real and genuine attempt to uncover wrongdoing and matters of concern and that have provided assistance to prosecutors in uncovering those concerns. You will not be surprised to hear that we feel that that is appropriate. When calculating a fine, other factors need to be taken into account, which were taken into account in the Rolls-Royce case, around the seriousness of the allegations of the alleged misconduct and the facts that were set out in great detail in the statement of facts. There are those issues. I also think that there is benefit in encouraging through that mechanism companies that have put proper mechanisms in place to deal with future issues in the form of a proper compliance programme and training. RollsRoyce has spent a great deal on its compliance programme over the past few years. It spends a large amount of money resolving the issues that we had. I believe that it is appropriate that there should be recognition of people who are making a genuine attempt at co-operation to uncover issues and are co-operating with the prosecutor’s investigation.

Lord Plant of Highfield: Do you think, as some commentators do, that self-reporting is equivalent to a plea of guilty and that, given that, the discount based on that alleged symmetry between self-reporting and a plea of guilty should be restricted in the same way as it is in other courts for an early, timely guilty plea, to 33%?

Mark Gregory: I do not believe that. I shall give the example of our reporting obligations to the Department of Justice. I know that this is not an exact comparison. We have an obligation under our deferred prosecution agreement in the US to report matters of concern where there could be a suspicion of wrongdoing. That goes nowhere near the test of criminal wrongdoing of a guilty verdict. We have taken a similar approach when reporting matters of concern to the Serious Fraud Office.

We have done so in the past six years, we will continue to do so during the period of the deferred prosecution and we will be happy to continue our

relationship with it going forward. I do not believe that what you suggest is right.

Philip Bramwell: We have no experience as BAE Systems of entering into a deferred prosecution agreement as such, but I have one comment that I think our lawmakers may wish to take into account. What is the overall objective of a statute such as the Bribery Act? It cannot have been the intention that the Serious Fraud Office would become a global police force when it is ill equipped and ill resourced to do so. It must surely have been the intention that those companies subject to the terms of the Bribery Act would behave responsibly and take the steps necessary to comply with the Act and, where there have been failures, to report them, as a responsible company would do.

If that is the intention, there should be incentives for companies behaving responsibly. I have a concern that one needs to think through company sentencing to make sure that it creates the appropriate incentives that encourage companies to police their businesses such that oversight by regulators is not a drain on the public purse and one has a more collaborative approach. If companies are doing the right thing, when wrongdoing occurs it will be the result of rogue behaviours and not the result of some failure of corporate culture oversight or board dereliction of duty. If that is recognised and accepted, one can deal with the rogues and not start sanctioning the company, its shareholders and wider society or incurring large costs in pursuing companies that are genuinely trying to do the right thing.

Q69 Lord Haskel: Your companies operate internationally. How does our Bribery Act compare with the equivalent legislation in other countries, and are there any approaches that we could learn from? Do other people do it better?

Mark Gregory: As I think I said earlier, we would consider the Bribery Act to be the high-water mark. Again, as we discussed, it stands us in good stead for operating internationally, because of the policies and processes that we brought in and the attention that is given to it.

Are there things that other jurisdictions do that we could learn from? I wonder whether there is an opportunity to learn from or to consider, for example, the mechanism that is available in the US for the giving of opinions. That is not to say that our interaction with the SFO has not been very constructive over the past few years. It has had its ups and downs, obviously, but throughout our experience with the SFO there was a real, constructive conversation.

However, I wonder whether an avenue should be available to small and medium-sized enterprises, or even to corporates such as Rolls-Royce, that are considering whether to do business in a certain way and where issues have been raised, for getting support and answering those questions and deciding whether it is the right thing to do.

Lord Haskel: Yes, as in America.

Mark Gregory: Yes.

Joanna Talbot: As we have said, we think that the UK Bribery Act is clear, robust and comprehensive, and a high-water mark, and we see other countries seeming to adopt a similar approach. The Malaysian anticorruption Act follows a similar model of associated party and reasonable procedures, and the Australian Senate is considering exactly the same kind of model for its anti-corruption amendment, so we see the Bribery Act as leading the way.

When we go into a new market, as I said, we will take a number of steps, one of which will be to take legal advice on the local laws on bribery and corruption. We will always work to the highest standards, whether they are the Bribery Act or anything higher than that, but we rarely find anything that requires us to take additional steps beyond the Bribery Act. There will be more specific, local issues to do with gifts and hospitality, as I said, that can be accepted by local regulators or local procurement rules.

From my perspective, I would take a slightly different approach from Mark in terms of some kind of opinion service akin to that of the Department of Justice in the US, which has a process whereby you can write and ask for an opinion on clarifying interpretation of the law. As a matter of practice, that process can be very slow. It is supposed to operate within 30 days, but that is 30 days from when all the questions, answers and clarifications have been provided, so it can take up to 18 months to provide an opinion. The opinion is made publicly available and includes the name of the requesting party, the question and the advice that is given. Few companies are willing to open themselves up to the publicity associated with asking that question.

Anecdotally, the number of requests that are now made pursuant to that opinion service is dropping dramatically, whether because of the publicity or because the Department of Justice now gives much greater, publicly available, guidance akin to the Ministry of Justice guidance on interpretation of the FCPA—the Foreign Corrupt Practices Act. It is much easier now to get a clearer understanding of how things will be interpreted, because that guidance and that resource guide are available. Quite apart from who would give that advice and how the SFO, which is an investigative agency, would provide regulatory interpretation, I am not sure as a practical matter whether it would necessarily be something of which companies would avail themselves.

On things that we have seen other countries do, the only observation I have is that in our international business we see that US companies can avail themselves of a process where their local embassies will do due diligence on the company's behalf for a very reasonable fee for small and medium-sized enterprises. It is not a report that is available to British companies, only to American companies, but it helps their small and medium-sized enterprises export without having to undertake expensive due diligence on their own behalf. That is one learning that we have picked up from what other countries do.

Lord Haskel: If you make a request in America, are they made public as a matter of course?

Joanna Talbot: It is not something that we have availed ourselves of, but that is my understanding. It is published on the Department of Justice website.

Q70 **Lord Hutton of Furness:** You mentioned a second ago that you have seen a change in behaviour on the part of the Malaysian Government towards tackling bribery and corruption and that they have introduced new legislation. Are you aware of any other Governments or, in particular, any other companies with which you do business that have changed their approach to tackling bribery and corruption since the introduction of the 2010 statute?

Joanna Talbot: The British companies with which we engage have certainly done so. We would expect them to, and part of the due diligence that we undertake when we look at them is to understand their approach to compliance with the Bribery Act. If we do not see changes or those policies and processes, that would be a red flag and we would have to think about how we could work with that company. We have absolutely seen that.

Lord Hutton of Furness: What about your international partners?

Joanna Talbot: The international reach of the jurisdiction of the Bribery Act is pretty comprehensive. We expect that behaviour of people we work with wherever they might be based. There seems to be a societal change in people's acceptance and understanding of the corrosive effects of bribery. There seems to be a political change in terms of unwillingness to put up with those corrosive changes. We see that.

Mark Gregory: As we mentioned, our policies are global, so we are applying the standard that we would expect in the UK globally to our customers. We have seen interest in our policies and processes and the approaches that we are taking from our customers and other stakeholders. There will be heightened interest in Rolls-Royce because of our recent experience, but I find it encouraging that customers are coming to us—the other way—to ask those kinds of questions.

Lord Hutton of Furness: Given all the due diligence that you both now do, are there some countries around the world where you consider the risk of bribery to be so high that you just do not want to do business there?

Mark Gregory: We have not made a choice in respect of specific countries. We have made choices in respect of transactions in countries based on the risks associated with that transaction, specifically counterparties, agents or whatever, but we have not walked away from countries unless it is a sanctions issue.

Lord Hutton of Furness: BAE Systems?

Philip Bramwell: We have a similar approach. In an important business opportunity for the company in what might euphemistically be described as a difficult country, we will put in place mechanisms and be willing to go to extraordinary lengths, to ensure the integrity of our business dealings, those of local supply chain partners and the procurement process. If we cannot be satisfied, we will not do it. So, yes, there are points at which we will not bid on certain terms for certain business, and we would do that elsewhere in the world on other grounds.

Lord Hutton of Furness: Is this specifically because of the Bribery Act and new legislation or would you probably have taken that course of action under the 1906 statute?

Philip Bramwell: There was a complete transformational change. Our changes were more Woolf report-driven but they were on all fours with the Bribery Act. There has been a complete transformation and I believe that that has had a knock-on effect in many countries. They want effective competition in procurement. If the large companies are saying that they will not play unless certain rules are adhered to and there is a certain level of transparency, and that is combined with OECD and NGO pressure, we are seeing an improvement in the standards of commitment to integrity in procurement. We are seeing that in Middle East countries and Asian countries. We are seeing statutory response and investigations of corruption. There is an ink-blot effect because British exporters are still significant across the world.

Lord Hutton of Furness: We have received some evidence that suggests that countries that are not signatories to the OECD convention are now more likely to be willing to take part in corrupt practices than they were before, which is almost the opposite of what you have just suggested.

Mark Gregory: We have not seen that. We have not experienced that.

Philip Bramwell: We have not seen that at all.

The Chairman: Thank you very much. We have kept you over time.

Peter Carden, Keely Hibbitt and Chris Blythe – Oral evidence (QQ 71-80)

Tuesday 11 September 2018

11.30 am

[Watch the meeting](#)

Members present: Lord Hodgson of Astley Abbotts (Chairman); Lord Empey; Baroness Fookes; Lord Haskel; Lord Hutton of Furness; Lord Plant of Highfield; Lord Stunell; Lord Thomas of Gresford.

Evidence Session No. 6

Heard in Public

Questions 71 - 80

Examination of witnesses

Peter Carden, Keely Hibbitt and Chris Blythe.

Q71 The Chairman: I am sorry that we are running a bit late, but thank you very much for waiting to give us evidence, which we are looking forward to very much. I am not Lord Saville, the Chairman of this Committee. I am standing in for him as he is away today. I have to read some words to you.

A list of the interests of the members relevant to the inquiry has been sent to you and is available. This session is open to the public, is broadcast live and is subsequently available on the parliamentary website. A verbatim transcript will be taken of the evidence given and will be put on the parliamentary website. A few days after the session, you will be sent a copy of the transcript to check it for accuracy. It would be most helpful if you could advise us of any corrections as quickly as possible. Finally, if after this evidence session you wish to clarify or amplify any points made during your evidence, or have any additional points to make, you are welcome to submit evidence to us at that time.

May I now ask you briefly to introduce yourselves, and then we will go to the questions?

Peter Carden: Good morning. I am here supporting the anti-corruption forum and I work for the Mott MacDonald Group as its director for business management systems and risk.

Keely Hibbitt: I work for Balfour Beatty, which is the UK's largest construction company by revenue. I look after the business integrity function, which looks after our ethics and compliance programme.

Chris Blythe: I am the chief executive of the Chartered Institute of Building. It has been around since 1834. It was formed about the time the original Parliament here burned down. I am responsible for everything the CIB does, particularly on ethics and integrity.

Q72 The Chairman: Thank you. The acoustics in this room are very bad, so in order for us to get the full benefit of your words, please always speak up. That would be very helpful.

It is now seven years since the Bribery Act came into force. How prevalent is bribery in the UK's construction sector, and how often do British companies encounter bribery in their day-to-day operations within the UK and overseas?

Peter Carden: It is difficult to measure precisely. The formal process of conviction for bribery would indicate that it is not particularly prevalent, but small transactions, whether they are bribes or facilitation payments, probably take place far more regularly than we would like in the industry. That is probably the situation in the UK. When one goes abroad the picture becomes more complex and the opportunities for bribery and corruption probably go further up the client organisations than they do in the UK.

Keely Hibbitt: I have some fact and figures about the instances of bribery that we see at Balfour Beatty. I agree with Peter; I do not think it is prevalent. It tends to be low-scale within our organisation. I have figures for allegations that come through our Speak Up! hotline, our whistleblowing hotline. In 2016, we saw four cases alleging bribery out of 247 allegations, so about 2%. In 2017, there were seven cases out of 238 allegations, so the figure rose to about 3%. In the year to date— 2018— we have seen five cases out of 176 reports, so, again, about 3% of the allegations that come through our whistleblowing hotline talk just about bribery.

When ones talks about bribery and corruption, one is talking about a wider subset, and the definition of corruption is up for debate. If we include fraud and dishonesty-type offences within corruption, the statistics show that it is much higher. Around 25% of allegations that come through refer to corruption, excluding bribery. We find that the incidents of bribery where we can find some evidence tend to be where somebody has refused the bribe. Obviously if you have two people, one paying and one receiving, they are quite happy with that arrangement and it is done offline and in cash, it is very difficult to detect, so I think it probably goes on a lot more than we see, and we certainly do not see a lot of evidence of it, but I think it goes on.

Of the cases that were reported over the past three years, in probably 80% of them we suspected bribery but had no evidence, whereas with different forms of corruption it is easier for us to see evidence as there will be processes and controls that have been breached and evidence trails that have been left behind. It is much more challenging with bribery.

Chris Blythe: The evidence that we have echoes what you have just heard. Back in 2013 we did a survey, and 49% of respondents thought corruption was common in the construction industry. There is an issue between bribery and corruption. Even down at the low levels that we have just been talking about, for things such as illegal working and ghost workers to appear on billing there has to be collusion, and when you have collusion

bribery is usually involved, so the two things get quite closely intertwined, whether one is talking about bribery or broader corruption.

There was only a small decrease from our survey on bribery and corruption in 2006. We discovered there was quite a tolerance within the industry in that the view was that things may be slightly corrupt, moderately corrupt or very corrupt. That was probably the most significant thing that came out of the work that we did. I still think that anecdotally there is ambivalence towards what is corrupt and not corrupt.

The Chairman: You gave us a number of percentages. Can we change them into numbers? How many members of the staff of Balfour Beatty have been disciplined or dismissed for offences under the Bribery Act, and how many suppliers have been dispensed with?

Keely Hibbitt: The answer is none, because the bribes that we have found have been third parties bribing Balfour Beatty employees, and our people have raised concerns about money that they have been offered. We have not found any instances of bribery by Balfour Beatty employees. That is not to say that it does not go on but that it is difficult to find evidence to support it.

The Chairman: And your suppliers in your supply chain?

Keely Hibbitt: I do not have the numbers in front of me, but I suspect the answer is that the number is still very low, if it has happened.

On the question of wider corruption, I agree with Chris that the two tend to go hand in hand. Examples in the construction industry of where we see wider corruption are ghost workers and falsified time sheets where people say that they have been on-site and the client will be paying additional money for people who have either not worked those hours or were not physically on-site. In order for that to happen, somebody is turning a blind eye, so it is likely that somebody is getting a kick-back for allowing that behaviour, but it is very difficult to find evidence to find people guilty of that.

Q73 Lord Haskel: Construction has its own particular complexities. Does the Bribery Act and its associated guidance adequately account for the specific challenges and complexities faced by the construction industry? Are there specific areas, such as hospitality or the tendering process, where business finds it more difficult to meet the requirements of the Act?

Chris Blythe: The guidance is adequate. The problem is people's ability to understand it. You have to remember that, in the construction industry, 90% of people are employed in firms that employ 10 or fewer people. It is very fragmented, so people come in and out of the construction industry. It is a bit like the tide; there is ebb and flow, and on some days you could be working in one industry and on other days in another.

The ingrained knowledge at the lower levels is very low. The large sophisticated firms, such as Balfour Beatty, have very good structures and procedures in place to deal with that, but that is not there at the bottom

end. The Bribery Act, the Competition Act and the Enterprise Act are not on the radar of a lot of people working in the industry. You have people who work in what I would call the white industry, the grey industry and the black economy and can move between them with ease. It is very fluid. Therefore, in answer your question, it is quite difficult to put your finger on who knows what and how they can use that to affect behaviour.

Lord Haskel: Does the industry make any effort to enforce the Bribery Act with its suppliers and subcontractors? Construction companies have an enormous number of small companies that work for them, as you know.

Chris Blythe: That is very much written into companies' supply-chain processes and the obligations that they put on their subcontractors and try to put on their sub-subcontractors. Of course, the more steps you have in the chain, the greater the risk. It is very clear that the bigger firms go through quite a lot of risk assessment of their supply chain. Keely could probably say more about what they do in Balfour Beatty. I know from the work I have been doing on modern slavery that it has a much higher profile.

Far more work is now being done on the risk assessment of the supply chain. It is not just saying to a supplier, "Just tell me that everything's okay in your supply chain". They want to look down into the lower supply chains and see a lot of work going on. Unfortunately, with the low margins in construction, you might think that that puts more pressure on the firms, because they have to resource that type of activity.

Keely Hibbitt: I agree. We have those processes in place in our supply chain. We have quite rigorous PQQs in which we ask for information about how different companies deal with bribery and corruption. We put the usual things in: we have clauses in contracts and audit, and we use a third party to verify that information to ensure that there is no information out there that we have missed. We go through all those processes, and the industry is looking to try to formulise that, so that if you are a smaller supplier in the industry you only have to answer one set of questions. Once you have answered one set of questions, it is good enough for one, so it should be good enough for all.

So the industry acknowledges that we all have slightly different requirements, we all ask slightly different things and we require different evidence, but we are trying to work together to change that and to make it more straightforward.

Chris's point about the SMEs is a good one. Balfour Beatty has a dedicated function that looks after our ethics and compliance programme. We launched it in 2009, so we are very proactive in trying to deal with ourselves and our own supply chain. But there can be hundreds of different people working on one site, and very few of them will be Balfour Beatty employees. A lot of them will be supply chain, and it is not unusual for people to be employed by umbrella companies or to be individual employees.

It is very challenging, and the further down we go the less awareness we find of the Bribery Act. People simply do not have the resource or the time to have their own programmes. We have been working with the Supply Chain Sustainability School, a dedicated school that is online and in person, to train SMEs. It is free at the point of use, and we have been looking to work with government to come up with bribery and corruption modules to push it through that channel and to try to upskill the smaller companies in the industry.

Lord Haskel: Perhaps you could send us a note saying exactly how you are trying to formalise that.

Keely Hibbitt: Absolutely. We have been working with the National Crime Agency and DfID through the Anti-Corruption Forum to see whether government can work closely with the school. The school is very keen to provide that. There is nothing in the bribery and corruption space at the moment, but we have already met with the CEO of the school and he is very keen to get something there. They did it with modern slavery, and the percentages in relation to the number of people who were unaware and then went through the school are very impressive. So I am very happy to provide more information.

Lord Hutton of Furness: The picture you have just painted for us is that in the top level of large companies like yours there is a lot of activity— new processes, new policies, dedicated resources and so on—but that the further down that supply chain you go, particularly in the smaller companies that you have just referred to, there is less and less awareness of the Bribery Act. So there you are as a major contractor dealing with companies that, from what I understand of what you have just said, have very limited awareness of the Bribery Act and compliance and so on. How do you satisfy yourselves about the extent of compliance with the legislation at that point?

Keely Hibbitt: Working with them is more of a partnership. It is fine for Balfour Beatty to have a full training programme that it requires all its employees to go through, but companies in our supply chain simply do not have those resources. Where we find organisations that do not have the things we expect, we work with them to try to upskill them. We do that directly by sharing our resources. Our supplier code and our code of conduct are freely and publicly available, and anybody can use them if they want to adopt a similar approach. So we tend just to work with them to partner and upskill them.

Of course there is risk in our business, and we have to accept that. Some areas in the construction industry are riskier than others, so we tend to do more due diligence on them, and we work more closely with those types of provider to ensure that we are comfortable. So as well as looking at their policies and procedures, if they have them, and any statements that they make, we also visit them and talk to them about the culture that they promote on-site.

Peter Carden: In answer to the fundamental question, I think the Bribery Act is very succinct and clear, so it works in the context of the construction industry and it is understood.

The other thing that we should not lose sight of is that people understand that it is wrong to pay a bribe or to take a bribe. Whether they understand that in the context of the Act or not does not change their fundamental understanding. The tier 3/tier 4 operatives on construction sites still know what is right and what is wrong, and that is understood around the world.

Q74 **Lord Stunell:** In some ways you have gone some way to answering my question, but what does your company do to tackle petty bribery of the

kind that might occur on building sites and with contractors? Do contractors and subcontractors generally understand the Bribery Act and its implications? To some extent that is a review of what you have already said, but it would be interesting to hear what you might want to say in response.

Keely Hibbitt: We do not differentiate between different types or scales of bribery and corruption. If it is bribery and corruption, regardless of the amount involved if you are a Balfour Beatty employee it is very likely that you will be dismissed. I think that 33 people were dismissed in 2016 for the wider offence of breaching our code of conduct, which is not just bribery and corruption but the full remit of how we expect you to behave. So we do take action against our own employees where we find it.

As I say, we do not find a lot of bribery among Balfour Beatty people. We have the same programme, which covers all these things, and it does not matter whether the offences are large-scale or small-scale offences or breaches of the code; they will be dealt with in the same way. We do all the usual things that all the large organisations do. We have a training programme, we have policies and communications, and we have online training and face-to-face training. We do a huge amount of work internally with our own people, and, as I say, we work with the supply chain to ensure, to the extent that we can, that we assist them in upskilling and understanding the implications not just of the Bribery Act but of wider corruption issues.

Chris Blythe: I am being hypothetical, because at the Chartered Institute of Building we do not do work on building sites, but I know that if any of our members were reported to us for being involved in matters of bribery and corruption dishonesty they would go through a full disciplinary process, and the sanctions are quite wide, including exclusion from the institute.

Over the years we have had a couple of serious incidents involving theft and people have been dismissed from the institute. It is very simple: if the case has been proved in court, that is the end of the matter. It is far more difficult if you get a complaint but it has not been through the legal process. It is then for the disciplinary panel to decide whether there are grounds there.

Peter Carden: I agree with what has been said. The big difficulty linked to this is not necessarily the petty bribery but the possible conflicts of interest in the construction area and being able to differentiate between when people have sufficiently removed themselves from a conflict of interest so that they do not take advantage and when they have not. The Act is quite clear that a bribe is not just about cash; all sorts of benefits can be brought into the relationship that we need to be aware of and take account of.

Lord Stunell: It is a very confrontational industry. People talk about supply chains, but the situation is much more conflicted. One only has to look at the fallout from Carillion and its subcontractors—second, third, fourth and fifth tier et cetera—and the opportunities for undue pressure or for bribes to be solicited, for retention payments to be released or whatever it might be. There are real pressures in the industry which a more structured industry might not have.

What steps do you take to get the corporate culture at the top tier right to make sure that those things are limited?

Keely Hibbitt: You are right. In terms of the opportunity, the industry makes so little margin. If we look at the top 10 contractors for the past 12 months, the average margin was a loss of 0.9%. The industry standard margin is around 2%, so even when the industry is functioning there is not a lot of resource. The main contractors are pressurised and that pressure is pushed all the way down the supply chain, so where there is an opportunity to make some money through illegitimate means, some people will take it up, so you are right that there are some real pressure points in the way the industry works.

With the subcontracting model, given the scale and ebb and flow of the supply of people and the requirements on-site, it is difficult. As Chris has already said, having different people on-site is where most of the issues we have with the bribery aspect come from. You can have lots of different employers and lots of different people on different days. With some sites managing who the people who work there are it is easier, because you have perimeters and biometric gates, so you can clock who is going in and out, but on some sites that is just not possible because the site is temporary or very large or very small. Those sites are the most challenging.

We all know that the best way to ensure that a compliance programme works is that the culture within the organisation makes that the right way to behave and empowers people to speak up when they see wrongdoing. Trying to change the culture on a construction site is made more difficult by there being lots of different people who may come from different employers who have different ways of dealing with the same issue, but it is also because they come and go.

I can deal with the tone from the top in a minute, but the way we deal with it on site is to get out on-site and train and speak to people. Ethics and compliance training has been moved to be part of health and safety

training. If you look at the construction industry, we are much further ahead in the way we have changed behaviour on safety, so we are learning from our safety colleagues. Now, part of not being allowed onsite before you have been trained in safety includes bribery and corruption, so it is all part of the same training to try to ensure that whoever is on-site, whoever they are employed by, they are all very clear about the culture on-site and what behaviour is expected.

On Balfour Beatty and the tone from the top, I report directly to our audit and risk committee, which is a committee of the full board of Balfour Beatty plc, and all our programmes are sponsored by our CEO. We do tone from the top well, but our biggest challenge is still what goes on onsite and how we change behaviours in those more traditional building sites.

Q75 Lord Empey: Has the 2010 Act deterred British construction companies from exporting abroad or otherwise harmed competitiveness when set against companies from countries that do not have the same standards? Have you detected any change? Do you or your members have personal experience of that in the international arena?

Peter Carden: From our perception, it is the reverse, in the sense that UK companies have a reputation for not paying bribes, and that is understood. Where there is going to be clean procurement, we are able to find positions that open up opportunities for UK plc. That completely unambiguous position helps us in the dynamic with clients overseas. It would be naive to suggest that other countries and other organisations do not pay bribes—they do—but where there are major opportunities, and often now there are multinational and international funding for those opportunities, the quality of the procurement process has improved hugely over the past decade, and that helps British industry.

Lord Empey: Are you saying that people who are procuring a contract feel that because British companies operate within a strict limit it is likely to assist their competitiveness as opposed to the moral issues or values involved?

Peter Carden: I do not think it affects the competitiveness particularly, although if bribes are being paid by an organisation, that money has to be earned from someone, so ultimately it goes into the cost of the projects. The competitiveness of British companies comes from our knowledge and the engineering excellence that we bring to the different projects rather than the not-paying-bribes issue dominating in the balance.

Keely Hibbitt: Balfour Beatty has been restricting the markets in which we operate generally since the Act came in. As an organisation, we have been concentrating on our core market and have naturally withdrawn ourselves from a number of international markets. We are now based primarily in the UK, the US and Canada, and we have a joint venture business in Hong Kong.

I do not have any statistics on whether our approach has had any effect on us as an organisation, because we have naturally withdrawn from some

markets where there may be more challenges because there is less legislation on bribery. If we were to go back into a different territory, as part of the risk assessment we would look at how we could operate legally under the Bribery Act and ensure that we did not pay bribes or have any paid on our behalf.

Lord Empey: So you are saying that Balfour Beatty has taken a strategic decision to remove itself from some markets, because basically they are too corrupt.

Keely Hibbitt: No, not because they are too corrupt but because of our review of our strategic organisation and decision to revert to our core market. The corruption risk in some of the countries we were operating in would have been reviewed, but operational efficiency, profit margins and so on would have been taken into account.

Chris Blythe: I think that is the case if you look across British contractors. For example, there are very few British contractors operating in the Middle East now. They have probably followed a similar pattern to Balfour Beatty because of those issues. One of the things that has added to the difficulty in places such as that has been the Modern Slavery Act, which has added another level of scrutiny and made a difficult job that much more difficult. There were a few cases of British firms being caught by that.

Lord Hutton of Furness: There is no shortage of other European companies willing to do business in the Middle East, for example. Do you think it is fear of prosecution under the Bribery Act that has led British construction companies to pull away from that market?

Chris Blythe: I cannot answer that question. All I can say, anecdotally from feedback, is that some of my members who worked for British companies in the Middle East have, after this withdrawal, found themselves working for companies where they sometimes feel challenged in the positions they are put in. That means that if they want to stay in the Middle East they go on a bit of a merry-go-round to try to find an organisation that works for them. We hear expressions of discomfort about the situations they could face, and that causes them to make decisions about moving on.

The Chairman: Are there any statistics on overseas work done by British construction companies since the Bribery Act came into force?

Chris Blythe: There probably are. It would take some time to research them. It is not something that the CIB has done particularly.

The Chairman: It would be helpful if you could find those statistics.

Q76 **Baroness Fookes:** My question follows on from the previous one and relates to facilitation payments. None of our previous witnesses has accepted that they should be made legal. They are currently illegal under the Bribery Act, and I assume you would follow that, but would facilitation payments in relation to overseas business in particular be yet another disincentive to operate abroad?

Keely Hibbitt: Yes, potentially. We agree with the previous people who have given evidence and do not think there should be an exemption for facilitation payments. We do not think they are a good idea, and we think they blur the line between what is and is not acceptable. We have to do business to the best of our ability within the law, and that should include preventing facilitation payments. The only area in which Balfour Beatty's policy enables them to be paid is under duress, which obviously mirrors what is in the guidance in any event.

Peter Carden: The decision about whether one does business in a country is complex, and the Bribery Act, the pressures of bribery and the need to pay facilitation payments are just three elements of that.

Going back to the discussion about the Middle East, one of the key issues in the Middle East is getting paid for the work that one does. That is a significant issue for British business, whether consultants or contractors. The Bribery Act and British extraterritorial legislation are just facets in a complex picture that informs whether people will work in a country.

Q77 **Lord Stunell:** That is a mirror of retention payments in this country. There is a crossover point between bribery and blackmail, is there not? If you want your money, you have to provide Prince So-and-So with something or other. The same can happen in the UK context.

I am interested to know about the balance between the corporate means that would be used to, say, free up your money in an unnamed Middle Eastern country and those to retrieve your retention money in the UK. There is an area there where it seems to me that the industry, at the corporate level, is very much exposed to charges—risks, I should say, rather than charges—under the Bribery Act.

Peter Carden: I do not think we would see it like that. We do not go down the route, and I am sure other British businesses do not, of thinking that a gift has to be given to a prince, a sheikh or whoever it might be, to free a payment. That is recognised as a breach of any reasonable business ethics judgment.

In my experience, the way business works nowadays is that government departments, usually with international advisers in the background, manage these contracts. In spite of the international support, they can still make it very difficult to get paid despite having done the work. The pressure to make a payment is not there. Since the financial problems of the Middle East, where the potential pressure is more about accepting a partial payment in final settlement rather than giving a gift, that is seen as a commercial decision to get something rather than nothing, rather than it being seen in the context of a bribe.

Baroness Fookes: I was interested in your point about the difficulties of operating in the Middle East. How far do you engage with local embassies, consulates and so forth? Previous witnesses have told us that they have found it helpful to engage with them and to do a lot of preparatory work with their help and with others on the ground before they get involved in the sort of difficulties which you have described.

Peter Carden: Speaking on behalf of Mott MacDonald rather than the ACF, we have a slightly different business model. Mott MacDonald's normal expectation is to build up a long-term business in a country, so we will have nationals from that country working with us as full-time employees and they can advise us on which clients to work with and where not to work. We can have our own internal expertise, and we also have positive relationships with the Foreign Office and others from the British Government in-country to get advice about how to work.

Ultimately, when we make decisions, we tend to make decisions about transparency in relation to clients in a country rather than about countries, and we make those decisions on the basis of senior national staff who will be able to tell us whether an individual in a ministry will run a clean tender adjudication or not.

Baroness Fookes: Balfour Beatty, how do you go about it?

Keely Hibbitt: We have done the opposite. We have not been operating in the Middle East. We left the Middle East about 18 months ago for a variety of different reasons, as I mentioned earlier. Certainly, if we were going into a country, part of the risk assessment would be to understand what the landscape would be like, and I am sure we would engage with local embassies or consulates in order to understand that better and to make sure that we were working with the appropriate party.

Baroness Fookes: I think you said that you concentrate on Canada.

Keely Hibbitt: The UK, the US and Canada.

Baroness Fookes: Where the ethics are probably much more similar, so you have not considered others in the Middle East.

Keely Hibbitt: Since the Bribery Act came in we have been withdrawing from different countries. We have done the opposite for a variety of strategic reasons, not necessarily just because of the bribery and corruption exposure issue.

Q78 Lord Hutton of Furness: Do the UK Government currently do enough to help construction companies to understand and comply with the Bribery Act? If you think the answer to that question is no, can you give us any examples of where you would like the Government to do more?

Keely Hibbitt: There is one thing that I mentioned earlier, which is the Supply Chain Sustainability School. It is a great vehicle in upskilling SMEs. There are 30,000 individual learners from different SMEs who want to learn and there is a very clear gap when it comes to bribery and corruption. The school is very keen to work closely with the industry and the Government to try to produce some content. It has worked up a proposal about the money and the time it may take to create some of those models for online and in-person training. It would be a great opportunity for industry and government to work closely together to upskill the entire industry. Balfour Beatty has been very supportive of that, and we are at the forefront of driving that programme.

Lord Stunell: Can you send us some details?

Keely Hibbitt: Yes.

Peter Carden: There is possibly a slightly different approach. One of the consequences of a number of pieces of British legislation is the need for quite extensive due diligence. If all of you represented a different company and you wanted to contract with me, each of you would have to do the due diligence at the moment. That is not a particularly efficient way of doing things. Some form of kitemark-type registration that people could volunteer to secure themselves and in which other people could place a degree of reliance—the ultimate reliance would still have to be with the procuring organisation—would be helpful. There are a number of different Acts. We have talked about modern slavery, and safeguarding is not an act but an agenda, but the due diligence workload is quite extensive and it is becoming inefficient.

Lord Hutton of Furness: Are there any examples of any country or Government doing what you have just suggested and providing some sort of kitemark which others can rely on?

Peter Carden: Not that I am aware of, but the UK is ahead of other countries in legislating for the requirement on due diligence, and the obligations on modern slavery here are significantly more onerous than we find around the world.

Chris Blythe: I support Keely 100%, because the opportunity to use things such as the Supply Chain Sustainability School to take things forward is immense. With government being one of the biggest customers in this country of the construction industry and probably accounting for more than half the output, a small investment there would pay a big dividend for the Government because it would take the risk of this sort of practice out of the work that they do. As was said, this has to be paid for, and if there is low-level corruption going on the Government will eventually pay for it. A small investment there would pay dividends elsewhere.

Q79 Lord Plant of Highfield: How does the Bribery Act compare with equivalent legislation in other countries, and are there other approaches which the UK could learn from? I think we have already covered quite a lot of ground on this question in the points that all three of you have been making.

I am a bit intrigued by the issues here, because one of the points that has been drawn to our attention is that it is not just being a signatory of the OECD convention and all that kind of thing but the degree of enforcement. We are told that Italy, Canada, Australia, Austria and Finland are regarded as moderate enforcers; the US, Germany and Switzerland as more-on-the-ball enforcers—they are in the top tier, as it were; eight countries have little enforcement of the convention; and 22 countries have little or no enforcement.

I am interested in this issue in two ways. First, okay, we are going to leave the European Union, but some of these non-enforcers, for example, must be members of the EU, given the numbers that we are talking about. They

have no doubt signed the OECD convention, but they do next to nothing to enforce it, apparently. Can you tell us anything about the experience of people doing business in the European Union when we are high enforcers of anti-bribery legislation and many of those, even within the EU, who we are doing business with are moderate or poor enforcers of the legislation? That is first issue: how has this impacted, if it has, on joint projects or on just doing straightforward unilateral trade by going and doing a building rather than being involved with another contractor? I assume that being involved with another contractor is quite usual.

Also, and perhaps much more importantly as things are turning out, how is this going to play to the idea that once we are out of the European Union we will be able to conclude all these trade deals with other countries? In your view, will the Bribery Act act as a brake on being able to conclude those deals?

Keely Hibbitt: When it comes to enforcement, we were more operational in European countries previously, but since the Bribery Act we have withdrawn from those countries as well, so I cannot really comment on enforcement in those jurisdictions.

In enforcement in the UK, we see a gap between the types of cases that the SFO takes and the amount of resourcing that the police have to be able to take up some of the cases. We have seen low-level bribery. The example that stands out for me is a bribe offered to us in an email, which is very unusual. We do not tend to see it offered in that way, but it was very helpful because it was very clear and could be forwarded to law enforcement. Unfortunately there is just not the resource to deal not so much with bribery but with fraud, theft and some of the other areas that we see that probably fit more squarely into the corruption bucket.

We see that there is a bit of a gap in enforcement in the UK in relation to some of the issues that we are referring to. We tend to refer them to the police rather than the SFO, because they are not large scale, complex or international. They tend to be more localised issues. Unfortunately, the police just do not seem to have the resourcing to be able to pick up these sorts of fraud, theft and dishonesty offences.

Chris Blythe: In terms of enforcement, the statistics that came out of the Anti-Corruption Forum show that there has not been a big increase in the number of cases being brought.

Looking more globally and internationally, the Bribery Act would be the least of our issues with Brexit and international trade. I was recently in Sri Lanka, and the issue raised by a colleague from the Ceylon Institute of Builders was that there was a big Chinese firm building a big project in Colombo using Chinese convict labour. You are never going to compete with that, so do not worry about the Bribery Act in relation to keeping us out of markets like that. There are other issues at play in some of these markets that are related more to the geopolitical ambitions of, say, a country like China than to what we can deal with. Some of those things can be exaggerated.

Q80 Lord Stunell: Can I bring you back to the UK environment as far as this goes? The majority of the British construction sector is working inside the UK, and you said very clearly at the beginning that at the lower level there is obviously not only opportunity but that almost certainly quite a lot of cases occur. How does an upper-tier company set a tone that changes that? If that is true in the UK construction industry, it must inevitably be true at the lowest level of construction work that you are doing in Canada and the United States, and in any other country in the world, because it is endemic in the industry as a whole. Do you just hit it when you see it, or do you chase after making sure it does not happen?

Keely Hibbitt: It is a bit of both. A lot of the stuff that we do is reactive. We have had a whistleblowing hotline since 2009. It is very well used. The benchmark for the number of reports per 1,000 employees is 14. We were up to 11.6 per 1,000 employees last year, so we have a very well used and well-established whistleblowing hotline. There is not just a hotline but the web and all that stuff. It comes through to us as a team internally. Most of what we do is reactive, because you get some real-life cases coming in, and that enables us to investigate. We investigate 100% of the issues that come through and we publicise the statistics. We do case studies where we have found issues and wrongdoing. We publicise what happened and what the impact was for the individuals involved and for us as an organisation.

It is really a culture change thing. There is no point in having posters and the policy. It will not change the way people behave on-site if the only way you get things done is by paying bribes as bribes will be paid. I can do all the training and have lots of wonderful communications, posters and all sorts of things, but it will not change the way that people behave.

We are trying to change how people behave by showing that at Balfour Beatty it is important to us, so there are messages coming right from the top of the organisation. When we have things that we require people to do, such as making a declaration to say that they have complied, they come from their boss. They do not come from me because nobody really cares who I am. I sit in the centre, but if your boss tells you it is important and it is important in the place where you work, it is more likely to work. Balfour Beatty view it as a cultural change piece, and we are doing all we can to change the way people behave, not just when we are looking but on-site each and every day.

Peter Carden: The other aspect is to cut out opportunities. One of the advantages of the electronic transfer of funds is that it reduces the opportunity for individuals to get cash to pay a bribe. That is happening throughout business.

The Chairman: Lord Haskel, do you think your question has been covered?

Lord Haskel: I feel it has very much been covered. I think you described the impact overseas fairly well.

The Chairman: Before we close, you raised the question of a kitemark. It has been drawn to my attention that there is international certification:

ISO 37001, anti-bribery management systems. Can you tell us how that would fit in with your view and why the kitemark would be different?

Peter Carden: There is the ISO standard, which is just emerging, and has been for some time; and BS 10500, anti-bribery management system. Those are quality systems whereby people write about how they are going to manage the issue, and they are measured against the processes that they have developed. They are specific to an agenda. One of the things about British legislation now is that due diligence requires us to think not just about bribery but about modern slavery and a series of other aspects. Having a single, good, ethical business type status would drive efficiency.

The Chairman: Thank you very much.

Gillian Mawdsley – Oral evidence (QQ 81-90)

Tuesday 9 October 2018

11.30 am

[Watch the meeting](#)

Members present: Lord Saville of Newdigate (Chairman); Lord Empey; Baroness Fookes; Lord Grabiner; Lord Haskel; Lord Hodgson of Astley Abbots; Lord Plant of Highfield; Baroness Primarolo; Lord Stunell; Lord Thomas of Gresford.

Evidence Session No. 7

Heard in Public

Questions 81 – 90

Examination of witness

Gillian Mawdsley.

The Chairman: Gillian Mawdsley, on behalf of the Committee, good morning to you. We are looking into the workings of the Bribery Act 2010. Thank you very much for coming to help us.

There are a number of administrative matters. You have, I hope, received a list of Members' interests that are relevant to the inquiry. The session is open to the public. It is broadcast live, and it will subsequently be accessible via the parliamentary website. There will be a verbatim transcript of the evidence, which will be put on to that website. A few days after this session, you will be sent a copy of it, so you have an opportunity to check it for accuracy. If you require any corrections, it would be helpful to let us know of them as soon as possible after you have received the transcript.

If, after you have given evidence and read the transcript, you wish to clarify or amplify any points that you have made or you wish to add any further points, please do so, because you are perfectly entitled to do so and we would welcome any supplementary evidence that you would like to give us.

Would you now please identify yourself to the Committee so that that can appear on the transcript?

Gillian Mawdsley: Thank you, Lord Chairman. I am here in my capacity as secretary to the Criminal Law Committee of the Law Society of Scotland. My background is that I am Scottish practising solicitor. Most of my experience has been gained in the criminal justice sector in Scotland, which has included working for the Crown Office, although I hasten to add that I do not speak for the Crown Office today. However, I also have 20 years' experience in Scotland's prosecution service. I have also worked on secondment to the Scottish Government in policy, and policy is obviously one of the areas I am involved in as secretary to the Criminal Law Committee.

The Chairman: Thank you.

Is the Bribery Act sufficiently clear as to the jurisdiction of the courts in different parts of the United Kingdom? The Ministry of Justice guidance makes only passing reference to the fact that Scotland is a separate jurisdiction. What changes would you like to see?

Gillian Mawdsley: I will deal first with the question as to whether the Bribery Act is sufficiently clear about the jurisdiction of the courts. Yes, is the simple answer. Criminal law statutes seldom make specific provisions with regard to jurisdiction. The 2010 Act applies fully to Scotland, so if offences as constituted under that Act arise in the Scottish jurisdiction, they will fall to be prosecuted under and in accordance with Scots criminal law, including procedural and evidential rules.

Cross-border jurisdictional issues may well arise, and no doubt we will talk about them later. They would be dealt with under the Scottish perspective by what I will refer to throughout this hearing as the Crown Office guidance. I am not aware that the Bribery Act as legislated and its specific provisions cause Scotland any problems.

The Chairman: So, really, the Ministry of Justice gives no guidance at all, but if I understand your answer correctly you do not think it is needed.

Gillian Mawdsley: I was going to address the subject of guidance separately. I was talking about the legislative context first. The second is that there is indeed Ministry of Justice guidance, which as I said makes only passing reference to Scotland.

A number of issues arise in respect of that guidance which I can perhaps clarify further. The guidance says: "Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing". If that guidance is there, it is obviously giving guidance on the provisions of the legislation. It is written by the Ministry of Justice, but it makes only passing reference to Scotland. As I say, I could go on to make a number of comments about it, if that would be helpful to the Committee.

The Chairman: It would help us greatly if you could provide us with your comments.

Gillian Mawdsley: Okay. There seem to be two forms of Ministry of Justice guidance. There is what we call the quick start guide, and there is the guidance that I have before me; I have referred to the cover. The quick start guide makes no reference to Scotland and a separate prosecution system. If someone looks at the quick start, they will see that there is no reference to Scotland. Clearly this is UK legislation, UK policy. I would have thought that it should refer to Scotland somewhere.

The principal guidance does say that it is made by agreement with Scottish Ministers, but it stops there. Therefore, I think that guidance is required in Scotland that is Crown Office guidance, which I have here; it is called *Guidance on the Approach of the Crown Office and Procurator Fiscal Service to Reporting by Businesses of Bribery Offences*. However, there is no cross-referencing whatever between the two forms of guidance. At the very least, the Ministry of Justice guidance should cross-refer to Crown Office and

Crown Office should cross-refer to Ministry of Justice. It is as if the two pieces of guidance have been drafted in silos and there is no interlinking.

This raises a number of other points which it may be relevant for the Committee to consider. The first is the readership. Clearly, the Ministry of Justice document appears on the Ministry of Justice website, as you would expect. If I am a Scottish company, subject to Scottish jurisdiction, would I think to look to the Ministry of Justice to find information about what my company should be doing in Scotland? I therefore question the readership. To whom is the Ministry of Justice guidance directed and where is it located? The Ministry of Justice website is certainly not the first place we in Scotland would look for something. Criminal matters are, of course, devolved to Scotland. That, if you like, is question 1.

Question 2 is about aspects such as the Serious Fraud Office and Section 10. I said that the 2010 Act applied fully to Scotland, but Section 10 really only applies to England and Wales. It does not have a jurisdictional restriction, but there is clearly one in its wording. That is not unusual, because in Scotland all prosecution is conducted by the procurator fiscal—the Lord Advocate—is responsible. I can come back and talk about the consent to prosecution at a later stage. What is the role of the Serious Fraud Office and what is the role of Section 10? There is a reference in the guidance to UK law, but in fact this is criminal law, and I am not quite sure if there is a body of UK law. There is a reference to duress, which is not something I know about in Scotland: I know it as coercion.

Without necessarily changing the guidance, the role of Scotland needs to be made clear. Where there are different legal aspects, that should be clarified. I recommend that how the Ministry of Justice guidance refers to Scots law should be reviewed, perhaps in consultation with the Crown Office.

The Chairman: Should the guidance be published by some authority in Scotland?

Gillian Mawdsley: Yes. If this is the guidance, it should clearly be available in Scotland. I would have assumed that it should be the Crown Office or the Scottish Government, which both publish matters of relevance, and it should certainly be made available. After all, if the company is in Scotland—there is reference in the OECD report to the oil and gas sectors, which are very active in Scotland—the appropriate place would be within the Scottish Government or the Crown Office, or both.

Lord Thomas of Gresford: Do I understand you to say that the Crown Office guidance, which does exist, is not published on the MoJ website?

Gillian Mawdsley: I could not see any reference to that.

Lord Thomas of Gresford: Is it published on any other website?

Gillian Mawdsley: If you Google “Crown Office”, you will find it on the Crown Office’s website. Effectively, you find it on the internet and then link into the Crown Office.

Lord Thomas of Gresford: So clearly there should be cross-referencing for any firm, such as an oil firm, that operates in Scotland to quickly see—or be directed to—the correct approach.

Gillian Mawdsley: Absolutely. That is what I meant about being in silos. It is not worse, but different. It seems that the Crown Office guidance is restricted to giving information about cross-jurisdictional cases and self-reporting, whereas the Bribery Act talks about six principles. I would expect a Scottish document to take cognisance of the six principles, and that is what I mean by cross-referencing. It is not my job to work out how you cross-reference but, given that it is UK-consistent policy, I would have expected both documents to interlink. A company in Scotland—it might be that the place of business, the main place of work or the location of the incident is under Scottish jurisdiction—would be shown how it pans out in separate forms. I am not the drafter, but if I were a company looking at this, I would not know how, or if, the Ministry of Justice principles are being factored in, or whether it is back to the Scottish prosecution authority, which is the Lord Advocate, to prosecute in the public interest. Does that help?

Lord Thomas of Gresford: Yes indeed.

Lord Grabiner: Have you done a comparison of the two guidances? Beyond what you have already said, what are the material differences, if any, between them?

Gillian Mawdsley: They are substantial. The Crown Office's seems to be very restricted to dealing with what happens with cross-border companies. It also talks about parameters, initial reporting, investigations by the serious organised crime unit within the Crown Office, appraisal and the Civil Recovery Unit. It is very much giving guidance to a Scottish company about how the Crown Office will investigate and deal with it and what might happen to it under self-reporting. It does not take a step back and say what happens if I am going to be prosecuted. It does not talk about all the aspects which the Ministry of Justice guidance talks about, with its foreword from the Secretary of State. It does not begin to cover that. You can tell by the difference in size: one is about 45 pages, the other is about 10.

Lord Grabiner: This is interesting. It looks as though, although the legislation contemplated that there would be some discussion, and that the produced guidance would be the result of discussion, that has not taken place, at least with the Scottish equivalents.

Gillian Mawdsley: Yes. That is what I meant by silos. The Bribery Act guidance definitely refers to Scotland and that it has the agreement of Scottish Ministers, but that is where it stops. When you see English law terms such as "duress"—I am a lawyer and I know what it means—it is unhelpful. The Serious Fraud Office website quite correctly describes itself as part of the UK criminal justice system, covering England, Wales and Northern Ireland, but not Scotland, blah, blah, blah. Given the role of the DPP and the Serious Fraud Office within that, I would have expected equivalent provisions referring to the way that Scotland is going to have exclusive jurisdiction to deal with matters.

Lord Grabiner: Just out of interest—not that it is relevant, because we can decide these things for ourselves—has the OECD criticised the lack of marry-up between the two?

Gillian Mawdsley: The OECD report is obviously very long, and makes a number of criticisms of the Scottish procedure. It does not seem to me to criticise that specifically. It may be that that is what it meant when it talked about communications among the various agencies. That may be the subtext, but that would be conjecture on my part. There is clearly some reference to communication. I do not work for the Crown Office, but I am not aware of any difficulty in practice with issues of cases falling between the two countries. I am aware, however, of how it looks as a public-face thing for a reader: there is a disconnect.

Lord Grabiner: Thank you very much.

Lord Thomas of Gresford: When it says that Scottish Ministers have been consulted, does that mean the Crown Office and the Lord Advocate?

Gillian Mawdsley: I would assume so. The Lord Advocate is a Scottish Minister, so that is what I am assuming. That would be normal. I suspect that they were consulted. I do not know whether somebody has gone on to look at it or whether the Crown Office then thought it appropriate to set out what its self-reporting regime would be, rather than looking back at the document and the Ministry of Justice.

Baroness Primarolo: In that case, could the relevant Minister fill in the gaps with regard to Scotland that you have identified—the cross-referencing on guidance, Section 10 and the clarification of different aspects, or is that a reserved matter? Forgive me; I really do not know.

Gillian Mawdsley: No, that would be a devolved matter. My guess is that it would be a case of liaison between the Crown Office and whoever, as they renew or refresh the Ministry of Justice. I do not think it is a difficult job. There may be some issues in looking at the Ministry of Justice and how the cross-referencing should be done. Obviously I have referred to the principles. I assume that the principles in the guidance should also be applicable in Scotland, but that is not for me to judge; it would be for the Lord Advocate and his prosecution authority to decide whether he needed to make mention of that.

Baroness Primarolo: So the Lord Advocate could initiate the sort of discussion that you all say is required.

Gillian Mawdsley: Absolutely.

Baroness Primarolo: Thank you.

Q21 **The Chairman:** Thank you for that. In the other UK jurisdictions, prosecutions require the authority of the Director of Public Prosecutions, or the director of the Serious Fraud Office. Do you think that decisions on prosecutions in Scotland are taken at a sufficiently high level?

Gillian Mawdsley: The answer is yes. Obviously you have consent to prosecution in England and Wales, which is necessary because different

people can prosecute. In Scotland, however, the only prosecution authority is the Crown Office, operating under the auspices of the Lord Advocate. There is virtually no right to private prosecution in Scotland. In any event, private prosecution can be done only with the consent of the Lord Advocate or the High Court of Justiciary, as the Glasgow bin lorry case illustrates. All prosecutors operate under the single prosecution service under the direction of the Lord Advocate, so no case—and these are serious cases—would not be done at the highest level, with Crown Counsel’s instructions.

Lord Grabiner: Maybe we have something to learn from that.

Gillian Mawdsley: There are advantages to the Scottish system of one prosecution authority, yes.

The Chairman: Thank you for that.

Baroness Fookes: Perhaps we can look at finances now. We understand that the Crown Office and Procurator Fiscal Service recently received £3.6 million in additional funding to deal with complex financial cases. I have a general question: do you think that is sufficient, or could further funds be made available?

Gillian Mawdsley: The first thing to say is that I cannot speak for the funding of the Crown Office. The Crown Office’s budget is set by the Scottish Government’s budget allocation.

What I can advise, and this is public knowledge, is that £3.6 million was indeed allocated recently to the Crown Office, but I understand that that related to the taking on of 140 extra permanent staff following an increase in funding. It was described as relating to an increasingly complex case load, and that 60 more lawyers would be employed in various areas, including the Scottish Fatalities Investigation Unit, local court teams, the National Sexual Crimes Unit, and victim information and advice.

The Lord Advocate said that, “The effective, rigorous and fair prosecution of crime in the public interest underpins our freedom and security and helps keep our communities safe from crime, disorder and danger”, that the Crown Office was “responding to the changing nature and complexity of criminal cases prosecuted, and to the public’s reasonable expectation for timely investigation of deaths” and that “this increased funding represents a strong commitment to supporting the work of the independent public prosecutor”.

That probably brings us back to the point that we are talking about: the independence of the prosecution service within the criminal justice system. So, Lady Fookes, it was not specifically to do with financial crime; it was being done to increase the budget substantially.

Baroness Fookes: It was broadly based, in fact.

Gillian Mawdsley: It is broad-based, but certain priorities had clearly been identified by the Lord Advocate.

Other points can be made about the funding, which is relevant to this Committee’s consideration in the sense that one was the effect of Brexit in

relation to this area of work, and the second related to resources, which I could expand on. These are both significant points of interest and relevance to the way such cases would be handled.

Baroness Fookes: In England, we have an arrangement whereby particularly complicated, expensive cases in our field can have additional funds allocated to them. I take it that you do not have a similar arrangement in Scotland.

Gillian Mawdsley: I am not aware of that. I assume that there are arrangements whereby the Lord Advocate could make a reference to Scottish Ministers if there was something particular, but my understanding—and it is only my understanding, I stress—is that it is a question of managing cases that arise within the budget that the Crown Office has available. Clearly what seems to have been identified here is the need for an increased number of staff, so some of the increase in funding is the result of staffing. It is also because there has been a significant increase in historical sexual crime, which we are aware of. On the other hand, some of the other criminal statistics have reduced, so it may be a reallocation of resources. I assume that if there was something, the money would be made available, but it would be through the Scottish Government.

Baroness Fookes: Thank you.

Lord Haskel: Was it sufficient?

Gillian Mawdsley: I do not know; I could not possibly comment.

Lord Thomas of Gresford: It has certainly expanded since the Barnett formula anyway, has it not, or is this a special fund?

Gillian Mawdsley: My understanding is that it is devolved funding. It is a completely devolved matter, so it is for the Scottish Parliament to allocate the funds to the justice system. I could not comment on how that is derived from the Scottish Government and the UK, I am afraid.

Baroness Primarolo: You did say that you could make some points about how it has been complicated by Brexit, and then you moved on.

Gillian Mawdsley: Yes. I was going to say that there are two factors to bear in mind when looking at funding, and one is the effect of Brexit. Obviously the negotiations continue, and this is one area that you have to recognise has international connotations. There are areas to do with evidence gathering—things like the European arrest warrant, our membership of organisations such as Eurojust and the European Judicial Network, and investigation orders—which are all relevant to how that will resolve itself, because these are clearly matters regarding the nature of the crime.

The OECD also made a recommendation about the UK reporting generally in relation to how it was all working out and with regard to the implications for the prosecution of bribery or enforcement relating to bribery.

That was really all I was going to say about Brexit, but clearly it is an unknown factor for the Crown Office, too. I can speak for my own society; we are now involved in looking at a number of secondary pieces of legislation, so the amount of work that the Crown Office may be involved in too is perhaps a factor for it to consider in the light of increased funding. Resources are a separate matter, which I can also touch on.

Lord Grabiner: Ms Mawdsley, in England and, I think, in Wales, and maybe also in Northern Ireland, we have deferred prosecution agreements—so-called DPAs—which have a detailed statutory basis. Then, when an agreement is reached, it will not be effective without approval from a judge—a High Court judge, indeed—after proper consideration. In Scotland, you do not have that mechanism; you have a civil settlement mechanism. First, do you have any idea why that discrepancy exists?

Gillian Mawdsley: I am not sure that I would call it a discrepancy. I am not quite sure why Scotland devolved. I tried to ask that question, and I am not sure why that was the way it was reached. That is probably a question to ask the Crown Office policy officials, but I am not aware of the reason, and nor was the Law Society. I asked one of our academics. I should just say that our criminal law committee is made up of Crown Office academics as well as defence solicitors. So I am not sure why it should have evolved separately, unless it was something to do with the idea of civil recovery. The Crown Office highlighted for us, in our submission, the amount of money that can be recycled within the Scottish jurisdiction. I am only speculating here, but it may be Scottish policy for the money to come back to Scotland and this is a way of doing it. I am not sure.

Lord Grabiner: So, aside from the history, do you agree with the OECD, whose suggestion is that Scotland should consider adopting a statutory scheme along the lines of the DPA that we have here?

Gillian Mawdsley: Obviously the scheme that is adopted is a matter for Scottish Ministers and the Crown Office. Given the number of years that have passed since the Act came into force, I can see why it is appropriate for the two systems to be looked at and analysed to find out how they are working. There are clear advantages to a system that provides a statutory basis, because it will be set out and agreed by the legislation and it has the benefits of clarity and transparency. If I am looking at prosecution from a public perspective, that seems to be recommended, particularly when there could be judicial scrutiny or core oversight.

I am not, for one minute, suggesting that what has happened in Scotland is not totally appropriate, relevant and proportionate, but the advantage of a court is that you have an area of independence. It can also see that a suitable balance has been maintained between the state and the company. It would also mean that decisions would be subject to appeal mechanisms in the usual way and allow for case law in practice to evolve, which might be useful. Touching on some points I made earlier, it might be useful in interpreting how the guidance applies on a case-by-case basis.

We are looking at a consistency of approach, demonstrably for the UK, and upholding transparency. This might allow the guidance, which has not yet been judicially determined, to be incorporated into case law. I am not

saying that the system is not working, or that it is not appropriate to continue self-reporting, but I can see advantages in the other system, for the reasons I outlined.

Lord Grabiner: Is it possible—

The Chairman: If I may interrupt for a moment. The reason that deferred prosecution agreements are not part of the law of Scotland is because they do not come out of the Bribery Act: they come out of the Crime and Courts Act 2013, which does not apply to Scotland.

Gillian Mawdsley: That is right.

The Chairman: But we are considering them because, even though they are not part of the Bribery Act, they are a very important facet of our bribery law.

Lord Grabiner: That was extremely helpful. One of the other obvious criticisms of the civil settlement process is that there is no possibility, short of agreement—which I suspect would never be forthcoming—of imposing a penalty.

Gillian Mawdsley: I can understand that point. We do not have sentencing guidelines in Scotland either, which is different. When fines are imposed it is always a case of balancing all the factors, such as an early plea and the limitation of time spent by the prosecution service. I question whether a penalty, on top of whatever has been paid, is necessarily appropriate, if you look at the sheer cost in time and management of the courts in trying to bring these big cases. We have just watched an 18-month fraud trial in Scotland and the cost of that was clearly enormous, as was the complexity of evidence and everything else.

I have not touched on this, but Scotland also has a very separate system with regard to criminal evidence, which brings in other factors such as corroboration and the difference between the English and Scots law of caution. Obviously what a company official may or may not say in an interview in Scotland might be very different from the position adopted in England.

Lord Thomas of Gresford: You referred to financial constraints. The purpose of judicial oversight is so that a Minister is not encouraged to come to a settlement with a company because of financial constraint. The court overlooks to make sure that the proposed settlement is in the public interest and is fair.

Gillian Mawdsley: Certainly in the Scottish system the Lord Advocate is operating in the public interest, but the overall scrutiny of that interest is a matter that can be open to judicial review. For instance, if the Lord Advocate exercises his discretion not to hold a fatal accident inquiry, he can traditionally be reviewed in his decision. You would expect a lawyer to say that they can only see the advantages in a court coming in or processes for appeal or transparency, in the perception of the company, the public and everybody else.

Lord Plant of Highfield: Do you have a comment on the fact that the OECD talks about how adopting something comparable to the deferred prosecution agreement in the other countries of the UK would overcome the weakness apparent in civil settlements? Do you see the factors that you have been discussing as weaknesses, as the OECD clearly does?

Gillian Mawdsley: I am certainly aware of the OECD's criticisms in this area. One thing I would say is that it takes time for the effectiveness of any legislation to come through. It may be early. Scotland is a small jurisdiction. The Crown Office would clearly need to be asked how many cases it has actually considered and how many are under active consideration. It would take time before you could ascertain whether the civil settlement process is appropriate and working.

The OECD talked about the application of the public interest—we have already talked about that in Scotland—and the question of the effective, proportionate and dissuasive character of the sanctions being applied. This is where the Crown Office talks clearly about the publication of decisions. That is a factor which the OECD has picked up and reflected on. Specific examples are the cases of the Abbot Group and International Tubular Services, both of which have attracted criticism that the reports were not as full as appropriate. Perhaps that was because of operational reasons, but transparency, whether is achieved by oversight of the courts or the Crown Office, helps us to see what has happened in other cases before and to try to begin to glean common factors for settlement. That is very important for our precedent-based and case-based operation. You say that Scotland could and should provide more comprehensive information about such relevant cases. That is obviously a factor. I do not know if it is still true today, since the OECD report, but it certainly matters.

There is a second factor which also relates to public awareness and how you achieve it. The Crown Office clearly goes out and does some teaching. Education is obviously very important. A number of UK firms with Scottish bases do indeed carry website information about the processes in Scotland, so perhaps that is another area.

Lord Plant of Highfield: On your point about transparency, information and so forth, it might be thought that one of the advantages of the non-Scottish system which prevails elsewhere in the UK would be that the DPA—if it is granted—would be signed off by a judge and that would appear in the report of the court. How is the civil recovery arrangement communicated publicly?

Gillian Mawdsley: Again, this question is best asked through the Crown Office. As far as I can understand, it has no judicial oversight. Effectively, it would communicate such information as was made available on its own website. That would seem to be the only place it would be. If it was appropriate that this was withheld, on grounds of public interest, there would be a redacted report. I think that has answered your question. I do not think it would be anywhere else. It is not like a reported case decision where we can look at the facts.

Lord Plant of Highfield: I have one more question on this topic, about the five cases that have been decided by civil settlements and which are

discussed in your written evidence. In all those cases, the profits of the company have had to be disgorged. If that is the default position, does that mean that there is no room for judicial oversight, because, first, there is the default position of disgorging all the profit when it has been illegally arrived at and, secondly, there is no penalty element to it because—in the view of many people—as there is no additional penalty there is no room for judicial oversight?

Gillian Mawdsley: The question about penalty can be reflected back. If the purpose of the agreement reached is to make a settlement and take a note of the factors, is a penalty necessary? The company has been subject to sanction and its name is out there as having been involved in bribery. Is that fact not public condemnation to the extent that you do not necessarily need a penalty? I am not saying that you do not but, if you were looking at it from a judicial perspective, you would be looking at all the factors coming into sentencing. You would then impose a global penalty. If you are looking to manage resources appropriately, by all means encourage companies to self-report. They are doing so because they see that the consequences could be worse. Civil reporting is still a fairly daunting and onerous undertaking and there is no guarantee, in doing it, that you are not going to be the company that goes on to be prosecuted.

I must emphasise that point: I have self-reported. I have laid myself open but we have not achieved agreement and we are off into prosecution. Those are the consequences that would follow through.

Lord Stunell: Are you aware of any cases where there was self-disclosure and it was followed by prosecution anyway or is it just automatic?

Gillian Mawdsley: I am not the best person to ask: that is best answered by the Crown Office. I think there was one that went on to be prosecuted but I am not sure. I would have to get back to the Committee on that. My knowledge of cases comes, like yours, from the public website.

Lord Hodgson of Astley Abbotts: Going back to your very incisive comment about self-reporting not protecting you, we have been struggling with the question of the different position of big companies and small and medium-sized ones. Big companies are obviously well resourced, with permanent legal departments, and are able to handle this. Small and medium-sized ones operate under much more onerous and tricky conditions. Is there a reason for having some sort of safe-harbour arrangement whereby you could say you are faced with a particular problem and put on record what you are going to do about it? This would be a means of helping small companies particularly which are faced with a need to act quickly and with the worry, which you have identified, that if you self-report you may still get prosecuted post event. I think they have one in the United States.

Gillian Mawdsley: I am not sure what they have in the United States. International examples of dealing with this problem would be useful for any jurisdiction to explore. There should never be immunity from prosecution and that is not what you are suggesting, for one minute, by saying “safe harbour”. Perhaps, as the Act works through more and more examples, more information can be made available about what constitutes good practice and putting adequate safeguards in place and what defences case

law supports—I am an educator as well. If that comes out as public information, I, as a company, need to take cognisance of the growing body of examples of best practice. It also provides me with advice about what I should be doing and, perhaps, with some level of defence for reasonable excuse or adequate safeguards—whatever the terminology is. I can then say, as I self-report or, indeed, am subject to a DPA, that I looked at those and followed them; I did this level of training and this still happened.

I like the idea of us moving on as a result of cases that are being dealt with at the moment. Small and medium-sized firms are particularly vulnerable because, as you say, they do not have the specialist advice. They do not necessarily want very expensive legal advice to tell them what to do. It is more about information dissemination and awareness of good practices.

Lord Hodgson of Astley Abbotts: I understand that five cases have reached civil settlement. I meant to go on Google and see what size the companies were. They were certainly not names that sprang off the page at me. One therefore wonders whether we have gone for the small fry, which are easier to catch. We can nail them down, but the big fry, which have access to expensive advice, can dodge the bullet.

Gillian Mawdsley: That is quite a sweeping statement, but there is a difficulty. We touched on resources before. The big company operates with complex tentacles. I have worked on fraud cases myself; it takes an incredible amount of time, with documents and technology, to understand the systems that are in place. The trouble is that a big company may be offending, but it takes an inordinate amount of time before you can bring it to going one way. With a small or medium-sized firm, perhaps more UK-based, which is a smaller operation, it may be easier to get the information.

In Scotland, it certainly seems that the only way you can self-report is through a lawyer. That presupposes that you have taken legal advice at some point. One assumes it would require to be Scottish legal advice, but it tends to be the big firms with branches that are dealing with this.

Lord Grabiner: Is the OECD criticism of the Scottish civil settlement mechanism—that it lacks something equivalent to the DPA—based on its concern about foreign bribery cases only, or is its conclusion more general? I notice that the convention is entitled *Combating Bribery of Foreign Public Officials*. It seems to be focused on that, quite understandably, but is the lack of a DPA a concern to it so far as any other kind of bribery is concerned?

Gillian Mawdsley: I tend to agree with you. It seems to be concerned about foreign cases and then make general comments. There is certainly a critical comment about the memorandum of understanding. Although the Crown Office was a party to it, that is, again, as far as it went. No cognisance seems to be taken. I noted that a couple of the paragraphs of that memorandum, at 5.6 and 5.7, say what the COPFS will do if it encounters a case that has significant English comments or if an allegation concerns a case in Scotland. But that is really all it does. It does not really talk about the different system in Scotland. I understand that the OECD is quite critical of the lack of awareness of that document in Scotland. It is

difficult to tell, because the recommendations seem to go wider. Communication is something we could all look at, on both sides of the border.

Lord Thomas of Gresford: May I ask you about publication of these settlements? You referred to something being redacted. Are the full settlements actually published to the press? Does the offending party have the opportunity to limit the amount of publication of these settlements, as part of the settlement itself?

Gillian Mawdsley: That is a very good question, which I will have to come back on. When writing the submission, I had difficulty finding information about the cases, other than on the private firms' websites. There is no go-to place within the Crown Office and I spoke to my opposite number. What is published by the Crown Office is probably discussed with the solicitors representing the company. I would be astonished if it were not. Redacted may be the wrong word, but it is certainly contracted. There is more information available on websites of the big firms that have been involved on the other side, such as Pinsent Masons or Brodies. But they represent what they have done for their client. Again, if you are a member of the public, would you know to look at those websites? Would you not expect information to be contained on the Scottish Government or Crown Office websites?

Lord Thomas of Gresford: In the course of your research, did you see any press release of any of these settlements?

Gillian Mawdsley: Not as such. I do not remember whether I found any articles. One of my colleagues was helpful; he has been involved in cases. I am not aware of any major news headline saying "Bribery case settles", or reports in things like *Scottish Legal News*. It is probably not the most newsworthy item and I was certainly not aware of anything like that.

Lord Thomas of Gresford: That suggests a complete lack of transparency of the arrangements that the Lord Advocate comes to. Presumably he would have a say on these settlements; he would tick them off.

Gillian Mawdsley: I am sure that the transparency is there as to what is ticked off. What is then communicated in public is perhaps not as full. I think that that is what the OECD is saying would be appropriate. I do not doubt that the internal processes have been done appropriately and with independence. I do not know how that is communicated to members of the public who were not party to the case.

Lord Thomas of Gresford: You talked about building up a picture of case law and decisions. If these five cases are not published, and the terms of the settlements not known, other firms in Scotland have no idea what the parameters are and what amounts to offending. You might think that is against the public interest.

Gillian Mawdsley: That is what I was highlighting. It takes time before there is a body of case law in any legislation. That is why you are doing post-legislative scrutiny. The fact that the information has to be gleaned partly from the Crown Office website, partly from a private firm's website,

does not give us as full a picture as would be helpful in looking to provide guidance for future cases. I am quite sure that, if it was approached, the Crown Office would offer to go out and speak about cases in training. They may proactively engage, but the transparency you are talking about is not there.

Lord Thomas of Gresford: So if I am a Scottish firm and concerned about a particular transaction, I would have to do an enormous amount of research into the websites of these various companies to find out the principles that were agreed.

Gillian Mawdsley: You would certainly have to do some research, yes. That would seem to be the position.

Baroness Primarolo: Does that not mitigate against self-reporting? How would you know? Forgive me. In explaining the different processes, there seems to be a complete lack of transparency on one side, yet you talk about educating and enabling firms to understand their obligations under the legislation. I cannot see where those two very important points come together if finding the information is like a treasure hunt.

Gillian Mawdsley: The self-reporting is coming in through solicitors. I assume that a company which thinks it may have offended would consult solicitors who would then, presumably, give appropriate legal advice. They can then self-report to the Crown Office, if appropriate. There would then be a period of discussion about the circumstances before a settlement was reached. That takes time. You are right: there is no scrutiny of that process. Only the parties to the process would know about it and, ultimately, come to an agreement. As I have said, if you and I do not agree, I can prosecute.

Again, I stress that there is no evidence that the system is not working, but if you are asking about transparency that seems to be the process. Scotland is a small jurisdiction. How many cases would normally arise in Scotland, notwithstanding the specific Scottish interest in the oil and gas, which the OECD seems to have been particularly concerned about? I suspect that a lot of cases have been cross-jurisdictional and may well fall to the City of London where there will be a detailed submission from the lawyers representing the fraud departments and the Law Society of England and Wales.

Lord Hodgson of Astley Abbotts: A lot of our questions have been right round this point, but it is probably worth asking it directly, to get it completely on the record. In England and Wales, a deferred prosecution can be agreed, even when there has been no self-reporting. It would be helpful to us to learn whether or not a reference to the Civil Recovery Unit in Scotland can be made even where no self-reporting has taken place.

Gillian Mawdsley: Could you clarify that?

Lord Hodgson of Astley Abbotts: The issue here is that in England and Wales you can have a deferred prosecution agreement, even when you have not self-reported. In Scotland, if you do not self-report, can you still escape prosecution by being referred to the Civil Recovery Unit, which is

roughly the equivalent approach?

Gillian Mawdsley: Again, my understanding is that self-reporting comes through a solicitor. Having said that, as is the case with any criminal case in Scotland, and as we highlighted in our submission, one very serious fraud case came in through a very junior police officer. The circumstances of whatever your company has done could have come to the attention of Police Scotland, or an auditor or one of the financial institutions may feel obliged to make a report. I am sure that the case could come to the Crown Office for consideration for prosecution in the normal way. It would therefore be looked at in a criminal prosecution. I assume that that would be treated as a criminal report and dealt with under the criminal law, if appropriate. I am not quite sure whether the Civil Recovery Unit would come in, because it would normally do so after a conviction. A statement of assets would be served and a proof held. A criminal case of bribery could come without a self-report.

Lord Hodgson of Astley Abbotts: So is the short answer to the question no?

Gillian Mawdsley: Probably, but a lawyer has to give two sides.

Lord Stunell: We have discussed aspects of this already. The OECD working group suggests that there is scope for improving communication between the law enforcement authorities of England and Wales and those of Scotland. You made that point, but could you set out what improvements could be made? Some fairly basic stuff appears in the OECD report. In talking to people in the Crown Office in Scotland they did not even seem to be aware of the memorandum of understanding.

Gillian Mawdsley: That seems to have been the case with regard to a specific person. I obviously cannot respond on behalf of the law enforcement authorities in Scotland and Police Scotland. I have touched on the role of the Serious Fraud Office, which clearly does deal with the Crown Office, but I cannot say much more about how communication could improve, other than reflecting on the guidance, as I have done.

I have touched, too, on the fact that reports may also be a factor to consider. If a case is being reported at a very junior level by police officers, that is not going to help move cases forward. I stress that in serious cases in which I have been involved we have discussed a very early report and the whole investigation and evidence-gathering processes to try to move things on. However, these cases can take a considerable period of time, so who reports might be another area to look at.

This is probably not relevant here, but in reply to an earlier question I drew attention to the existence of a memorandum of understanding relating to cross-border jurisdiction in terrorism cases. Some of you may be aware of this. When we were talking about communication, I wondered whether there might be scope to follow that kind of documentation. There is also one for competition and marketing. The joint statement by the Attorney-General and the Lord Advocate on handling terrorist cases talks about jurisdiction to prosecute and where prosecution should occur and sets out various agreed arrangements. That is a public document and is clear for

everybody. When you are looking at better communication, I wonder if the scope of that document could be a good example to follow. It is one document, with two parties, that could then cross-refer to other matters.

There is also a memorandum of understanding between the Competition and Markets Authority and the Crown Office, which talks about the basis on which they will co-operate, investigate and/or prosecute individuals in respect of cartel offences established by the Enterprise Act 2002 where such an offence may have been committed within the jurisdiction of the Scottish courts. There is some precedent, which might help when you are talking about the role of the SFO when something become apparent in London, because of some financial thing, but in fact relates to a Scottish company and jurisdiction is better in Scotland. The memorandum of understanding is certainly very clear on multi-jurisdictional terrorism cases. The terrorist attack at Glasgow Airport was prosecuted, quite appropriately, in England, under English law, because it was related to an incident in London.

Lord Stunell: Clearly you are giving evidence on behalf of the Law Society of Scotland. Do practitioners who are dealing with this legislation have a sense of frustration because there are not those links?

Gillian Mawdsley: You had better ask them. There were, perhaps, some observations made about some of the aspects that have been raised here.

Lord Stunell: Is that a yes or a no?

Gillian Mawdsley: That is as far as I can go.

The Chairman: Are there are any further questions on that issue? If not, the last question is: what do England and Wales have to learn from Scotland in deterring bribery and dealing with offences of bribery.

Gillian Mawdsley: It would always be nice to say that you have a lot to learn from Scotland. Scotland appears to have avoided lengthy prosecutions and significant sums—albeit that we have reflected on the profit aspect—have been recovered and reinvested into Scottish communities. If you are looking at the overall purpose of the bribery legislation, that seems to be a good thing.

There is a need to learn from experience. We have highlighted that Scotland has an economic presence and its industries operate internationally. There are areas that are corruption sensitive. If you are reporting on scrutiny for the UK, it may be a case of looking at the purpose of the 2010 Act and how far it has gone to achieve the Government's legislative purpose. It was clear from the OECD report that the United Kingdom can be complimented on the approaches it has taken. A lot has been gained, even at this stage, and there is much to be proud of. There might be other and better ways of doing things, but it is far from not a good record sheet. There are a number of points that would be good to reflect on going forward, but the legislation is there and it seems to be working.

The Chairman: Thank you. Would you like to add anything to the evidence

that you have given so far? As I have said, when you receive the transcript—or at any stage after this hearing—you have the opportunity to amplify or add to the evidence that you have kindly given to us.

Gillian Mawdsley: I do not think that there is anything I would seek to add. I stress my point about memorandums of understanding seeming more like joint documents than separate ones. I also stress that these cases are very resource and time-intensive. There clearly need to be appropriately trained staff. That reflects back on the point about resourcing the organisations and maintaining the expertise, because it takes so long to make effective decisions. There is nothing more I wish to add.

The Chairman: Unless anybody has any further comment—

Lord Empey: Is there any evidence that a company that operates in both jurisdictions finds itself encouraged to be prosecuted in one rather than the other?

Gillian Mawdsley: That is an interesting question. Again, it is probably too early to tell, but that alone is one of the reasons why the scrutiny here is so appropriate: to see that there is consistency in practices when it is UK legislation, no matter who prosecutes. That is terribly important, because I do not think you would wish to encourage a company that could be dealt with by either jurisdiction to fall to one because of a perception that it was simpler, or that there was a lack of experience and they would get an easier outcome. However, that question might be better directed to the lawyers advising the companies. As a lawyer, that is not a practice that I would want to see. We would want to see consistency. It is complex because of the nature of bribery, which is a complex crime. That is why the guidance and the principles are very important. It is hard to discern factual similarities between my company and yours when you are trying to see that a parity or consistency of approach has been adopted.

Lord Plant of Highfield: I have a supplementary question. There are five cases that we have details of civil settlements in. There was one a year up to and including 2016. There seems to have been nothing else since. Can you speculate on why that might be?

Gillian Mawdsley: It would be mere speculation. I was advised by the Crown Office that a number of cases were in the pipeline. Again, it might be a matter of when cases arise and when they are appropriate. As we all know, one case comes along and it could be five years before that circumstance comes again. That question is better asked of the Crown Office.

The Chairman: On behalf of us all, I thank you for your extremely helpful evidence.

Gillian Mawdsley: Thank you, Lord Chairman.

Mark Anderson and John Bray - Oral evidence (QQ 91-97)

Tuesday 16 October 2018

10.35 am

[Watch the meeting](#)

Members present: Lord Saville of Newdigate (Chairman); Lord Empey; Baroness Fookes; Lord Grabiner; Lord Haskel; Lord Hutton of Furness; Baroness Primarolo; Lord Stunell; Lord Thomas of Gresford.

Evidence Session No. 8

Heard in Public

Questions 91 - 97

Examination of witnesses

Mark Anderson and John Bray.

The Chairman: On behalf of the Committee, good morning to you both, John Bray and Mark Anderson.

There are a few administrative points. You will have received a list of the interests of members relevant to the inquiry. The session is open to the public, it is broadcast live and it will subsequently be accessible on the parliamentary website. A verbatim transcript will be put on to that website. A few days after this session you will receive a copy of the transcript to check for accuracy. At that stage, you are more than welcome to advise us of any corrections or, indeed, additions by way of clarification or amplification, or any other points you wish to bring to our attention.

I will ask you both in turn to describe your position—in other words, to introduce yourselves to the Committee.

Mark Anderson: I am a partner in forensic services at PwC. In that capacity I help clients with a range of investigations, compliance programmes and diligence work, most of that in the context of anti-bribery.

John Bray: I am a director with Control Risks, a risk consultancy covering a wide range of disciplines. My background is in political risk. Over the last 20 years or so I have been working on policy issues, especially anti-corruption but also business and human rights. I am from the UK but I am based in Singapore, and I hope I have an international as well as a British perspective to share with you.

The Chairman: Thank you. Let us proceed with the list of questions. How have companies responded to the Bribery Act since it came into force, and has this response changed over time?

Mark Anderson: In our view, companies have responded positively to the Bribery Act. Our statistics and experience show that that response has changed over time. I will quote a couple of statistics from our global economic crime survey, a survey that we run for about 8,000 clients

globally that also has a particular UK set of respondents. There are some statistics in there that demonstrate that.

Since we started that survey, just before the Bribery Act came into force, we have seen a rise in the number of companies that have both invested in and adapted their compliance programmes. That has changed steadily over time. The latest version of the survey in 2017 showed that 75% of UK respondents now have a formal ethics and compliance programme in place, 62% of which have specific policies and procedures in relation to anti-bribery.

You asked how that has changed over time. Historically, many of the companies we work with—and that is a range of companies, from large multinationals through to small and medium-sized enterprises—have updated and adapted their programmes due to the risks they face in the jurisdictions they operate in and the different scenarios they face. One example is third-party due diligence, where many clients have looked at changing their programme, adapting it over time and streamlining it to be more effective and cost-effective, while also seeking to comply with the Act.

Another area where the Bribery Act has significantly helped change is transparency and attitudes to corruption within companies. Another statistic from our survey is that this year 23% of companies surveyed in the UK reported experiencing a bribery incident in the past two years. That is up from 6% when we did the survey two years ago. Our view, in talking to clients, is that that change is not an increase in the number of acts of potential bribery, but more that the issue is being discussed, raised and raised up within companies and reported. Similarly, many of my clients who are chief compliance officers in large corporations have found that they are able to get the topic of ethics and compliance much more on to the corporate agenda, as part of a wider discussion of ethics, compliance and values with their boards.

The Chairman: Has Section 7 had a significant influence?

Mark Anderson: It has—a very significant influence. I know that one of your questions is about clarification, particularly of adequate procedures. We have spent a lot of time working with clients and advising them on the interpretation of adequate procedures and what that actually means for them. As I am sure we will come on to, that area of the law, defining what “adequate” actually is, still causes some consternation and difficulty among clients.

John Bray: My experience is very similar. We see a progressive change; it is a kind of ratchet effect. Well before the Bribery Act, bribery was on our agenda and on the agendas of some of our clients. Illustratively, 20 years ago I wrote a report, our first white paper, and we had some trouble getting people to come to the conference that we launched, a free conference, because it was considered a sensitive topic. Now, of course, it is still a sensitive topic, but it can be talked about maturely and addressed.

On one particular issue already, well before the Bribery Act, we asked companies in our own survey, "Have you been deterred from an otherwise attractive investment on account of corruption?" In the case of British companies, a significant number said yes. When we asked the question more recently, it was not more than before the Bribery Act; it was actually slightly less.²

I also make the point that a level playing field is one of the things our clients talk about and worry about a lot. The impact of the Bribery Act is not only on UK companies. Working in Asia-Pacific, we work with a lot of Australian companies. Australia is just now in the process of revising its law and introducing adequate procedures. Many Australian companies also come under UK jurisdiction or hold up the UK Bribery Act as a standard, so we have seen an impact on them, too. I endorse the point about third parties, but on that and on adequate procedures I would say that it can be difficult but it is really important.

My main point about adequate procedures is that this is a legal discussion, and it is right that we should look in detail at the law, but from my point of view, as a non-legal business practitioner, the legal detail is less important than the overall message. The overall message is about prevention and, from that point of view, adequate procedures were something of a breakthrough. It is appreciated as a breakthrough; Australia has picked up the same phrase, and India has recently passed new legislation also bringing up adequate procedures. My overall argument is that it is challenging, but it is a positive challenge.

Baroness Fookes: In your written evidence you refer to the diverse forms that bribery can take, including non-financial, and that firms are better aware of this. Can you give us illustrations of these non-financial methods of bribery or attempted bribery?

John Bray: I guess that question could be put to both of us. It could be jobs, it could be a multitude of gifts, it could be a business advantage in something unrelated to the deal in question. There is a multitude of creative ways of giving and receiving bribes. There is a multitude, there is creativity, but the basic principles are fairly clear and not so difficult to explain. In our training, we give examples. There is an example of racehorses being given as a bribe. Jobs would certainly be an issue—jobs for the children,³ unproductive jobs that serve no purpose.

Mark Anderson: There are now tests for those areas within the financial controls of companies. There are other areas, in addition to the ones that John stated. Some areas of corporate social responsibility or philanthropy are subject to potential bribery or sponsorship. Dare I say it, political

² In the Control Risks [International Business Attitudes to Corruption Survey 2015/2016](#), 43% of UK companies said they had decided not to do business in a country because of the risk of corruption. In response to a similar question in our 2006 survey, a larger percentage of British companies (52%) said they had avoided certain countries because of the corruption risk.

³ Note by witness: an example would be offering jobs or internships to children of senior officials with a view to securing commercial favours in return.

donations are another area that we often test for. We help clients to look at where bribery risk might lie for their organisation.

Baroness Fookes: With something philanthropic, what are the criteria for deciding whether it is truly philanthropic or a means to a nasty end?

Mark Anderson: Again, it would always depend on the facts of the case, but it is an area that is known to be of potential high risk, because you are often interacting with officials, some of whom may have dual roles, being heads of charities or charitable foundations while also retaining some form of political office. It will depend on the facts of the case. You can look at whether a particular transaction is linked to either party and whether the aspects of the transaction are demonstrating any unusual characteristics.

John Bray: The principle is the same as with any other donation, including a personal gift. You are making this donation because it is part of your corporate programme, but you are not looking for anything in return. It can be problematic. There is a US FCPA case—it was an SEC case—and it was a donation for a historical conservation programme.⁴ That was caught under “books and records” rather than under the criminal offence.

There are other ways in which it could be problematic. This is a hypothetical, but let us stick with a building restoration or a school construction. You could be awarding a contract to a firm associated with somebody you want to influence. That could be a form that bribery could take. This also relates to my wider point about how anti-bribery should be holistic. You should not in any case give corporate donations in an uncontrolled, careless manner. We sometimes have clients who say, “Our solution is to make friends by building schools”. Well, you do not just build a school, you need to understand whether the school is wanted, who is going to build it, what its purpose is. You need to be considered in what you are doing.

Lord Grabiner: Do you have examples of clients who say to you, “I have competitors and I really am in a disadvantaged position, either because their bribery laws are different, or they are enforced in a different way, and as a result I am significantly disadvantaged in my endeavour to secure the business because of the differing approach, depending on the place where the competitor resides”?

John Bray: Of course it is an issue. Again, in our survey we asked, “Do you think”—“think” is an important word, because you often do not know—“that you have failed to get a contract or an opportunity because a competitor has paid a bribe?” So, yes, it is an issue.

That is also why we said in our submission that we should not just focus on the Bribery Act unilaterally. The UK is working with the OECD and, for

⁴ Note by witness: this is a reference to a US Securities and Exchange Commission (SEC) case involving a pharmaceutical company that contributed to a castle restoration foundation, apparently in the hope of influencing a health official. See: <https://www.sec.gov/litigation/litreleases/lr18740.htm> [accessed 9 November 2018].

that matter, with the UN. Companies do say that. It always depends on the specifics. I am careful about generalisations, but the issue comes up.

The way the issue might come up is that you would be selective in the opportunities that you go for. I have two examples. One is about an international construction company and the nature of the contracts they would go for. It was a French company and it would typically go for high-tech opportunities where it could be reasonably assured that its competitors were fellow OECD companies. The other example is also from the engineering sector. I will not name the country, but it was an Asian country. My source said that he would not go for a construction and build contract but might go for a design contract, the reasoning being that you can deal with a design contract without coming under pressure.

So that question is an issue. I would not want to turn the clock back and say that you have to compete with your competitors by paying bribes. There are all sorts of reasons why I would not advise that, even before the Act.

Mark Anderson: I would answer that question similarly and add a couple of points to those made by John. We asked the same question of our survey respondents, and 21% said that they had failed to win an opportunity because they felt that a competitor had paid a bribe, so it is a significant issue. I think that number has been coming down as the international enforcement of anti-bribery regulations has been improving, not just in some of the countries that you mentioned but in some emerging markets. I do not think I have ever heard a client name companies from those particular territories as having an unfair advantage.

I would add that most of our multinational clients have codes of conduct that seek to achieve what I would call a high-water mark in anti-bribery compliance and broader ethics. That tends to be focused around the Bribery Act: most clients see it as a very positive and well-considered piece of regulation, but also one that gives them flexibility in the way they draft and construct their own compliance programmes. They do not seek to put in, for example, exceptions to things such as facilitation payments, as the US legislation does. None of my clients would have any kind of exception to any form of bribery in their general codes of conduct.

Q22 **Lord Haskel:** I assume that most of your clients are large companies. How should small and medium-sized companies go about developing or updating their approach to anti-bribery and corruption compliance, with their potentially limited resources? How important is the concept of proportionality, as contained in the guidance, when developing these policies? Has the recent Skansen case changed things?

Mark Anderson: As I mentioned, we work with a range of clients at PwC. My experience is in working for a number of multinationals, it is true, but also a number of small and medium-sized enterprises. It is fair to say that the population of small and medium-sized enterprises that have sought our advice and have, from our survey, invested in anti-corruption frameworks since the Bribery Act came into force is a smaller percentage than the percentage I gave you earlier. I do not have the exact figure, but it is

somewhere around 50% or lower. I can come back to you with that, if that would be helpful.

As for how they should go about developing or updating their policies, and the concept of proportionality, the two concepts that run through all the Ministry of Justice guidance, and certainly any advice that we give to clients, is that all programmes in the anti-corruption space should be risk based and proportionate. We would always advise our clients to start by undertaking a risk assessment to look at the different corruption risks to their business and the jurisdictions they operate in and derive a framework of policies, procedures and controls that mitigate and deal with those specific risks. Proportionality therefore comes very much into play in the structure of those frameworks.

On the issue of guidance, a fairly good body of guidance is now publicly available, which small to medium-sized enterprises can avail themselves of. That goes beyond the Ministry of Justice guidance. There are a number of very active NGOs that we work with in this space—Transparency International is one that has already been before the Committee, I believe—which have published, with the help of advisers such as us and Control Risks, elements of a toolkit that small and medium-sized enterprises can avail themselves of without cost.

There is some information available. In certain areas it is helpful to get professional advice. In particular, some elements of an anti-corruption programme can be complicated and difficult to enforce. One of those is third-party due diligence, which I know a lot of my clients, small and large, spend a lot of time dealing with when it comes to risk.

Lord Thomas of Gresford: What do you mean by “third party”?

Mark Anderson: It deals specifically with the concept of associated persons, so it covers a range of different third parties, from consultants to agents to suppliers, that may be providing services to the main client. Adaptation has perhaps presented an opportunity to streamline a wider ethics or compliance programme alongside elements of the Bribery Act. Bribery is not the only compliance risk that companies face overseas; there are also sanctions and money laundering. So there are opportunities to streamline those and have procedures that cover several different types of regulation. Technology is now available to many companies to help handle the volumes of information or programmes that they run.

John Bray: I will echo and reinforce what has just been said. First, proportionality is important whatever the size of your company, so I particularly endorse Mark’s comment about the risk-based approach. The US guidance, the *Resource Guide* for the Foreign Corrupt Practices Act, has a point that says—I paraphrase—that the DOJ and the SEC would give credit for a company that concentrates on the main risk of a large contract and might overlook minor risk, such as to do with customs payments. I need to check the example. Proportionality is important for everyone.

For SMEs, I am quite clear that the principles are the same. Again, I reinforce the point that the adequate procedures have to be principle-

based. SMEs have fewer resources, but their businesses are also less complex, so they need fewer resources. I also endorse the point that there is a wide variety of guidance available anyway. It is not just the Ministry of Justice guidance. Transparency International's guidance is free, and it is excellent. Many of our companies are subject to more than one jurisdiction: they look at the US and the OECD. All the guidelines say the same thing. It is the same principle: it is about leadership and appropriate training—I emphasise appropriate—and, yes, third parties.

With regard to third parties, it is to do with paying bribes indirectly. A classic example would be an agent—or a lawyer or an accountant—you pay by commission and they then pass on part of the commission as a bribe. There is a variety of different scenarios, but the basic principle is the same. Again, I regard this as fundamental. You cannot duck away from it because it is difficult. It is fundamental, because the overwhelming majority of bribes that are paid internationally, which is my main focus, are paid through intermediaries, so you have to tackle it.

The first questions that our own guidance suggests you should ask—again, it is not unique to us—are the questions that you would have to ask anyway if you were a businessperson. The first question is: what is the business case for employing this person? If there is no business case, that in itself is a red flag; you think that something is wrong.

The second question is: are they qualified? You should have a reasonable judgment of that. The third question, which is more difficult, is: is what you are paying commensurate with their services? If you are paying a vast amount for some minor service, that again is a red flag. We would also recommend reputational due diligence. That is an area where it can be challenging for a smaller company with smaller resources, but there is a lot of friendly competition within our sector. Our companies do slightly different things, but we do due diligence. There is a lot of friendly but commercially quite fierce competition to provide cost-effective due diligence.

For the SMEs, the principles are the same, the basic challenges are the same. I do not think that the issues are fundamentally different. We work mainly with international companies, including companies that are quite small; I recently did a project for a company with 20 full-time employees. I would not draw many conclusions at all from the Skansen case. For me, the main lessons are that you need to have something rather than nothing. You need to record what you are doing. For me, that case is an outlier and I would not draw very many conclusions.

Lord Grabiner: Would you be happy to provide us with a copy of your guidance? You are among the most sophisticated advisers in this area and I am sure that it would be very helpful to us in our deliberations. But it may be a confidential document.

John Bray: It is not so much confidential as case by case, but in our written evidence we referred to a report that we had done which contains

many of the comments I am making, so we could send you the full copy of that report.⁵

Lord Thomas of Gresford: Do SMEs have a greater risk in employing overseas agencies and third parties than the international corporations? Of course, they do not have the resources of the international organisations.

John Bray: They actually have some advantages. One advantage is because they are smaller: the lines of communication are smaller but people in a senior position are more likely to know precisely who they are dealing with, whereas in multinationals there may be a disconnect in communication between head office and what is happening on the front line. Bridging that disconnect is one of our main concerns.

Mark Anderson: I feel that in some regards SMEs do face greater risk because often the easiest way for a small to medium-sized enterprise to sell abroad is to recruit a local agent. It will not have the resources of a large company, such as the ability to hire a local salesforce, nor will it be able to fall back on a well-known reputation and the weight of connection a big corporate name could bring. Therefore I think that SMEs are potentially exposed to greater risk.

Lord Haskel: Can you explain what you mean by proportionality? I understand when you say that you do not pay a large salary to somebody doing a small job. There is an element of proportionality in adapting to local conditions, for instance. Obviously, you will find different circumstances in some countries compared with others. Do you advise small companies to adapt to local conditions in that way? It may be getting pretty close to the bone.

Mark Anderson: We would see proportionality defined as proportionality to risk.

Lord Haskel: The risk of—?

Mark Anderson: The risk of corruption in your organisation or the risk of corruption affecting you. For example, if you were a small to medium-sized enterprise looking to export to a number of emerging markets and you were in a sector that required you to liaise with local government, perhaps to win licences, and a number of your customers in that country were also politically exposed persons or government entities, you would already be ticking quite significant risk boxes in a number of the areas where you would want to focus your efforts.

We have talked, for example, about the need to hire a local agent. You would want to invest in the types of due diligence exercises that John has talked about. You would want controls that would enable the escalation of decision-making on things like the signing of contracts to senior people within an organisation. However, you may find that because you do not have a large number of staff in high-risk roles, you could adapt the training

⁵ Note by witness. *This is the Control Risks [International Business Attitudes to Corruption Survey 2015-2016](#).*

programme so that only those who are in very high-risk roles have to go through a significant element of training. Perhaps you would not have to do that for people in another department who do not have to expose themselves to that level of risk. It is that kind of adaptation; it is not a cookie-cutter approach to the compliance programme because it has to fit the organisation and its risks. That is how we would define proportionality.

John Bray: I shall give you some examples from my side. Naturally we find ourselves talking about countries, and I am a country-risk person. However, in this context I am more interested in sectors and transactions. You focus on the sectors and the transactions that are most at risk. Without avoiding your question about adapting to the country, there is a key point to make here about professionalism. It is often easier and more constructive to play to professionalism, and [say] “that is the way people in our sector do it. We have to do it because it is our requirement” rather than to invoke the law. Although you can invoke the law and it is useful to do that, invoking professionalism is often better.

Over the years we have heard the words, “It’s the local culture, isn’t it”. Well, no, or at least not simplistically. In some countries, people have to pay bribes to get their children into school, but that is not the position of our clients. Even the smallest companies have options. It is also the case internationally that it is not only the UK that is being high-minded.

I have mentioned other countries that have been introducing laws, although it is not just laws, it is also about popular movements against corruption. If UK companies behave unprofessionally—let me put it that way—they are not just conforming to local custom; rather, in many ways they are making things worse, especially if they pay a large bribe to a corrupt politician that keeps them in power. Conforming to bad practice is not neutral, it is negative. A well-run international organisation has no business to be doing that. Again, that is for professional reasons; you do not need the law to tell you that.

Baroness Primarolo: I have two quick questions about SMEs. You referred to the common principles that would apply across lots of different areas such as money laundering. First, is a software package available to small and medium-sized companies that flags up the obvious things, leaving them to clip on only sectoral points or country-specific points?

Secondly, does your company have some form of basic toolkit that it can make available to its clients? If it does, would it be possible for us to see it if it is specifically to do with SMEs? There is a lot of information here, and I would like to know what else, apart from your good services, companies can get off the shelf to help them prepare for these issues.

Mark Anderson: Unfortunately, I do not think there is a single, all-encompassing piece of software that covers the requirements of an anti-bribery compliance programme. However, software tools are rapidly being developed that will tackle individual components. At the top level, there are governance, risk and compliance platforms that are used by a number of large organisations, but the cost of those is likely to be prohibitive for many small and medium-sized enterprises. However, if they determine

that, for example, the area of management and risk engagement with third parties is one of their high-risk areas, there are workflow solutions that enable you to encapsulate the communication, documentation and contracting between you and a third party that can engage with and conduct due diligence.

There is also a range of different data and software packages that will help you to undertake research into background and other types of third parties. PWC has a range of those tools, as do some of our competitors, and you can buy that type of data and those types of tools relatively cost-effectively.

On toolkits, we have some guidance that we publish, and we put out various papers such as the survey I mentioned earlier. I would be happy to share those with the Committee.

In addition, we work in conjunction with a number of NGOs that are active in this space. Transparency International is one, and we work alongside it on specific areas of guidance. Again, that work is publicly available. In particular we have released a piece on risk assessment, which as I have mentioned is the bedrock of all the programmes and is therefore a good place to start. That document is also publicly available. More recently, we have worked with TI on a thought leadership piece on third-party due diligence, which is the other major component of the high-risk area.

John Bray: On software, there are many different applications, one of which is training. The Institute of Business Ethics, for instance, has some training software.

Sticking with the area of training, there is a question for large companies of how to spread knowledge around to the ends of the earth. Some kinds of software solution can be helpful in that, but we would always say that for the high-risk jurisdictions and transactions, and for the more exposed people, you need face-to-face. I guess that illustrates a wider point about generic guidance being applied to individual circumstances.

On software more broadly, the range of applications is growing. That is not the main focus of this discussion and it is not my expertise, but we are increasingly making use of data analytics to look primarily for strange transactions by analysing large amounts of financial data. There is movement in this area, but it always has to be applied to the particular circumstances.

Q23 **Lord Grabiner:** A number of concepts in the Bribery Act such as adequate procedures and associated persons have been criticised because the suggestion is that they lack clarity.

Two points arise out of that. First, do you think that understanding of these areas has improved with the passage of time? Secondly, should we consider abandoning "adequate procedures" as a concept in favour of the slightly different concept of "reasonable procedures"? That is an example. One can imagine a situation where someone is charged with having inadequate procedures. Because the corruption has happened, ergo it follows that the procedures were inadequate.

However, if the test was one of reasonableness, you might reasonably be able to say, "My mechanisms were reasonable. They turned out not to be adequate, but because they were reasonable I ought to have full protection". Do you have a view about that? As a supplement, I understand—John Bray in particular may know something about this—that Australia and India are both preparing legislation in this area and they are planning to use the word "adequate" as opposed to the expression "reasonable". Can you also confirm that in your answers?

John Bray: I did my homework just this morning. India already has the legislation, and it has "adequate". Australia is at an advanced stage and it too has "adequate". I would not have come up with this if I had not been prompted. From my perspective—and you handed me the opportunity to say that I am not a lawyer—I can see how lawyers could see advantages, in a court of law, to "reasonable" versus "adequate".

From my perspective, there are two things. Our focus is on not getting to a court of law; it is on prevention and not being there. For these purposes, I think that "adequate" is fine. Secondly, in the Act itself—not under Section 7 but in another section—the word "reasonable" already appears: "a reasonable person in the United Kingdom". It also comes in various sections of the guidance. This is a non-legal perspective, but for me the broad concept of reasonableness is already there. You can argue about it in a court of law, and I can imagine how the argument would go, but for my purposes it is already there.

I have another policy concern about changing retrospectively. I would worry about anything that looked as though it was somehow watering down the Act. If there is a change, it should be in the guidance. It already says in the Act itself that the guidance can be reviewed from time to time. That is fine, although having said that I would also emphasise that the guidance is always going to be high-level and not very industry-specific, but it plays a useful purpose and we ourselves refer to it because of who it comes from.

Lord Grabiner: Well, the change would be prospective, but you are quite right that it would only be prospective; it would not catch people historically on a different test. Nevertheless, I take your point, which is that that would be seen to be a watering down of the legislation.

John Bray: I would worry about that, especially given that I think we all agree that the UK has demonstrably been seen as a trendsetter, a positive trendsetter. If it now goes backwards—you may not believe that this is actually backwards, but it could be presented in that way—I think the losses would be greater than the gains.

Lord Thomas of Gresford: May I follow Lord Grabiner's original line of thought? The question of whether the procedures are adequate or inadequate arises only if there are proceedings and investigations. Obviously, at that stage the procedures are inadequate if bribery has occurred, so a jury faced with that particular question is bound to conclude that the procedures were inadequate if they find that bribery has happened. Consequently, the defence of the company concerned is in a very difficult position in arguing that its procedures were adequate when they failed. I think that that does introduce an element of uncertainty and

unfairness. "Reasonable" is a much more objective test.

Lord Grabiner: It is a strict liability result.

Lord Thomas of Gresford: Yes, it is.

Mark Anderson: I would add that the concept of adequate procedures has become clear over time. I think there is general disappointment that we have not had more cases come through to prosecution, to be able to test the Act and the guidance in a court. Only the court will be able to test what "adequate" means. The Skansen case, unfortunately, on the facts, was not the best case to explore the concept, because the company had not done anything to update its previous set of procedures. That said, when the Act first came out a lot of companies, a lot of our clients, agonised quite a lot about what "adequate" meant. Over time, that has, through revision and updating of programmes, become a little clearer, but again it has not been publicly tested.

I agree that the term "reasonable", because it is much more familiar in law, could bring greater clarity. It also perhaps allows for differently sized organisations with different resources to determine what "reasonable" means. As you say, to some extent if a case comes to trial, arguably your procedures have already been shown to be inadequate. Similarly, a lot of people in my sphere of work were surprised that the Criminal Finances Act came through with a similar construct but with the phrase "reasonable procedures" instead of "adequate". There is a case for having harmonisation between the two.

Lord Hutton of Furness: Do you think that if we were to move to a different definition and use the term "reasonable", that would be widely perceived as a lessening of standards?

John Bray: I have expressed that concern, but that is an open question for me still.

Mark Anderson: Personally, I do not, because I think it makes sense to have a harmonisation of the two. Some could say that the term "adequate" suggests a bare minimum, whereas "reasonable" suggests a wider range of potential answers to a question based on circumstances, resources and proportionality.

Lord Hutton of Furness: You said there was a case for reviewing the guidance on what "adequate procedures" meant. Would you like to say a bit more about that?

Mark Anderson: I know that John will have a comment on it, too. There is a case for updating the guidance, in particular to cover some case examples that come up frequently with a number of our clients. There are some examples at the back of the guidance that give scenarios. Actually, I was going through them in preparation for this session and some of them seem very binary and quite outdated since they were first released. We will come on to the example around associated persons. There are a whole range of scenarios that that encompasses in the transactions and the third

parties that our clients engage with. At the moment, the guidance in that document is not sufficient.

Lord Thomas of Gresford: Of course, what is “adequate” and what is “an associated person” varies from case to case, does it not? You have told us that it is difficult to give your handouts, because they are case specific. Mr Bray, you have experience of Singapore, where there are no jury trials. Do they have something like “adequate procedures” in Singapore?

John Bray: They do not. Again, this is for the future: they have just introduced a deferred prosecution agreement framework. Singapore has only recently had its first major international case, which was jointly prosecuted with the US and Brazil.⁶ I think it has been said, although I do not have the details, that there is some question about whether the Singaporean law ought to be revised. Singapore is not a trendsetter on ways of dealing with international bribery.

Baroness Primarolo: May I go back to the question of adequacy? If there have not been that many prosecutions to test it, why do you suggest that we should consider changing to “reasonable”? We do not have adequate experience, frankly, of whether that test is working, particularly given that you said, John, in your answer to an earlier question, how important it is that lack of clarity helps to prevent, and is part of a prevention strategy: it makes companies perhaps be more cautious.

John Bray: To frame what I am saying, the emphasis of Section 7 for me is about prevention. I am not saying that lack of clarity is helpful. I would not phrase it like that. I would say that it has to be principle-based and not detailed and prescriptive. For an individual company, you can get quite detailed on your sector and your transaction, but at the government level, the guidance has to be principle-based. That was my point.

On your question about why, if there have not been many cases, this is a priority, I think I leave that for you. For me, it is not a priority. I can see the arguments. Harmonisation is a powerful argument. Is it a priority? I would question that, but I will leave the question with you.

Q24 **The Chairman:** It has been argued that some fraud cases are so complex that they should be tried without a jury. Is this the case for bribery prosecutions? Of course, it has been more than argued, because there have been discussions about this for decades, including the Roskill report, which recommended that there should be non-jury cases. But politically it has been found to be unacceptable by all parties. We would be very interested in your views about the possibility, and for the purposes of today’s session you can record what you want in your response. However, we had better move on to the fifth question, which will be put by Lord Empey.

Q25 **Lord Empey:** Should the United Kingdom consider following the example of the United States where an opinion procedure allows companies to seek government advice on the permissibility of particular deals in advance and as a result gain some degree of protection from prosecution. Of course, this contrasts with the former director of the SFO, who said, “They can

⁶ Note by witness: the US Department of Justice summary of the case is available [here](#).

bloody well go and get their own advice from their very expensive ritzy experts". The Committee would be interested in your response.

John Bray: I would throw back another question about exactly who gives the advice. It is not for us to say.

On the US Opinion Procedures, there is a quite considerable body of opinion which covers a range of issues. I have looked at it myself and there are some interesting cases on successor liabilities when you take over another company, as well as on gifts. I will sound a note of caution. There have not been any opinions since 2014 and there are some questions about how it works in practice. Practitioners say that it is quite cumbersome. Often when you need a decision, you need it quickly, but you will not get it. The advice is heavily constrained, so it is a question of, "On the facts of this case as we know it. It does not apply to anyone else because the facts are slightly different".

There is some concern, because people say, "When we ask a question, even if our name is not included in the results, others guess who we are. Do we put ourselves into the radar of the Department of Justice or the SEC?" My conclusion would be that all guidance is helpful, but the key question [which] is not for us to answer, is who would actually give the advice? I do not think it is a silver bullet, but it might be part of the framework.

Mark Anderson: I concur with John. The OPR system has been historically quite helpful, and we saw a string of publications under it in the early years of the enforcement of the US Foreign Corrupt Practices Act. In certain areas of application they have been really helpful to us and to a number of our clients, specifically around things like mergers and acquisitions, and when you are trying to obtain information from a target and there are certain circumstances where you cannot get hold of it.

An example is when the target is a public company and there are restrictions on the amount of information that you can obtain. Recently it has become less popular. That has been driven by the time it takes to get a response. I think there is meant to be a 30-day limit, but in reality it was taking much longer, as well as some of the concerns already suggested by John about what happens to the information and whether you are sharing things with the regulator in a format that does not protect you.

Whether it is the OPR system or another platform, I do think that there is a case for a platform for more dialogue between the enforcement authority and some companies. That is a slight departure from the former director of the SFO. A new regime is in place and, from what I know, Lisa Osofsky should be a force for change. As I say, there is a case for greater dialogue and a balanced set of tools in the armoury for prosecution.

Lord Empey: So you are lukewarm about the specific issue in the question of the US model, but you are not ruling out having some resources.

Mark Anderson: One of the benefits of the US model in the early days was that many of the practical application questions could be tested and published. As I mentioned earlier, because at the moment we do not have

a body of prosecutions and only a handful of deferred prosecution agreements, a lot of these questions are still unresolved. Some form of dialogue with a regulator where opinions could be shared would be helpful.

Lord Thomas of Gresford: Even though you are expensive, ritzy experts, you would find it helpful to have guidance from the Government.

Mark Anderson: Certainly greater guidance would be helpful.

Lord Thomas of Gresford: Along with examples.

Mark Anderson: Yes.

Lord Hutton of Furness: Are deferred prosecution agreements working effectively in relation to the Bribery Act?

John Bray: We have had only a limited number, so it is a work in progress. It is quite an important work in progress and it is not only us in the UK. I am part of an informal working group called Recommendation Six, which is associated with two members of the OECD High-Level Advisory Group. We have some recommendations that are meant to be international and they will come out at the end of October. We will be happy to share them.

I find myself again invoking principles as well as details. You have already discussed in the session with TI and Corruption Watch that deferred prosecution agreements are meant to be publicly defended as being legitimate and in the interests of justice. However, they are useful, and at the public policy level they are especially useful if they make it possible to resolve complicated cases quickly—that is the important adverb here—in particular if they help bring to light issues that otherwise would not come to light and if they are preventive. They are an important instrument.

From the company perspective, other words like “clarity” and “predictability” keep coming up. When you open negotiations, complete predictability is not necessarily realistic, because things may come out of an investigation that is still under way and you do not know what they are. Perhaps I can invoke the term “reasonable expectations” about what will happen. That is important, because you need to give companies honest and legitimate incentives to come forward. There needs to be a settlement on both sides that you can defend as being in the interests of justice as well as being legitimate. You need honest incentives for why companies should come forward. On that and on the limited number of cases, there is definitely a learning process going on. The jury is still out for now, but I think that we are moving in a positive direction.

Lord Hutton of Furness: Should DPAs be limited to cases where companies self-report?

John Bray: Self-reporting is very important, but the bottom line is that there are two things that are necessary. First, self-reporting is not in itself a condition that would lead to a DPA; it depends on what happens afterwards. Secondly, there could be a variety of circumstances in which cases come to the attention in this case of the SFO. If the company shows extraordinary co-operation, it should be taken into account. We should especially remember that when it is a large company, because the cases

are often complex and held in different jurisdictions. If in the course of the company's internal investigations it presents evidence which the SFO would not otherwise have discovered, I think it should be given credit for that.

Lord Grabiner: So you do not regard the DPA as a soft option.

John Bray: It must not be a soft option, because it really will not suit anybody's purposes if it is. It is a tough option, but it should be a considered, tough option that has benefits for all sides.

I should reinforce the point about toughness. One always looks first at the financial penalty. That is not the only cost. Again, in a large and complex case, the cost of investigations will be massive. They may easily be larger than the eventual settlement in management time. So I do not think any company would or should self-report lightly: the DPA is going to be a tough negotiation and a tough journey.

Lord Grabiner: You mentioned earlier that Singapore is in the process of introducing a similar concept. That is a very interesting point. Do you know how far it has progressed? Is it going to be on the same lines? What can you tell us about that?

John Bray: They progressed it very quickly—start to finish in just a few months—and it was in reaction to the case I mentioned. There was very little consultation and very little guidance. As for the summary of the case, I wrote a short piece about this on a blog article and there was a comment on the blog saying that, drawing an analogy with cooking, you can have a recipe but there are variations in different countries. Singapore is a variation on the theme. Australia might be a variation I would look at as an example.

Mark Anderson: Generally, the introduction of the DPAs has been a positive sign. It is early days and there have not been very many of them, but it is viewed as another tool in the enforcement armoury, and I think it is an important one to be used alongside the other tools that are available to prosecutors. There is a desire for greater transparency over the circumstances and terms under which DPAs will be granted.

On your question about self-reporting, again I do not think it would 100% need to be a prerequisite, but clearly it is an important factor. I think the DPA is really there to reward companies that are trying to do the right thing to correct some behaviour that has occurred. Clearly, matters such as the level of co-operation that they are providing to prosecutors and regulators will be a very important contributing factor.

Lord Thomas of Gresford: Has the publicity surrounding the DPA—for example, Rolls-Royce—increased the awareness across the board of the Bribery Act? You told us at the beginning that there is greater awareness today than there was four or five years ago. Does publicity help, or is it perhaps coming from you?

Mark Anderson: I think all cases, DPAs, prosecutions or otherwise, are helpful in furthering the knowledge, awareness and enforcement of corruption. The significance of the case, obviously the brand of the

organisation and its stature, and the size of the penalty were major contributing factors in making other businesses aware.

John Bray: I echo that. The balance between various kinds of enforcement and other things is important. I am repeatedly emphasising prevention, because I think that is the most important impact of the Act, but people are not going to take it seriously unless there is some plausible, genuine enforcement. I agree that, whether it is the DPA or another kind of enforcement, publicity is helpful. People listen to those events when they do not listen to us. Another point to mention, of course, is that the publicity has a reputational impact on the company, and that too is something that they fear.

The Chairman: We will have to bring this session to an end. Thank you both very much. If there is anything you wish to add, correct or amplify, as I said earlier please feel free to do so when you receive the transcript. I imagine you are both extremely busy, but it would be very helpful to us if you could provide us with any such further comments as soon as possible after you have had a look at the transcript. Again, on behalf of the Committee, thank you very much.

France Chain – Oral evidence (QQ 98-104)

Tuesday 16 October 2018

11.30 am

[Watch the meeting](#)

Members present: Lord Saville of Newdigate (Chairman); Lord Empey; Baroness Fookes; Lord Grabiner; Lord Haskel; Lord Hutton of Furness; Baroness Primarolo; Lord Stunell; Lord Thomas of Gresford.

Evidence Session No. 9

Heard in Public

Questions 98 – 104

Examination of witness

France Chain.

The Chairman: Good morning to you on behalf of the Committee. There are one or two points of administration. The session is open to the public. It is broadcast live and a transcript will subsequently be accessible on the parliamentary website. A few days after the session, we will send you a transcript of your evidence to check for accuracy. Indeed, if you wish to amplify any points you made or to introduce further points you thought of subsequently, you are more than welcome to do so. I ask only that you do it as soon as you can after receiving the transcript, which will aid us greatly in our work. You have received a number of questions, but before we get on to those, I would be grateful if you could briefly introduce yourself.

France Chain: Thank you, Lord Chairman. Good morning, everyone. I am a senior legal analyst with the OECD anti-corruption division and manager for country evaluations under the convention. In this capacity one of my main tasks is to overview how the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions is being implemented in law and in practice by the member countries. I am currently involved in a review of Korea and a couple of years ago I was involved in the latest review of the UK, the phase 4 evaluation, which was published in March 2017.

The Chairman: Thank you. How does the OECD view the UK's track record on prosecutions under the Bribery Act? How does it view the balance of corporate prosecutions relative to prosecutions against individuals under that Act?

France Chain: Before I answer, I have to read a disclaimer from a legal perspective that the views expressed here do not necessarily represent those of the OECD or of the state parties to the Convention. Nevertheless, they will be based largely on documents that have been adopted by these state parties and that are available to the public. Having said that, let me get on to the question.

The UK is clearly one of the big enforcers of the convention among the 44 state parties. On corporate prosecutions versus individual prosecutions, we have noted a balance in terms of corporates being prosecuted as opposed to individuals. I note that your question also relates to investigations and prosecutions under Section 6 of the Bribery Act. Indeed, that has been a point that the Working Group on Bribery—the conference of state parties—has pointed at repeatedly because Sections 1 to 6 still rely on the identification theory. It makes it much more complicated in practice for the prosecution to go after the corporates on the basis of this offence. This is probably why we are seeing more investigations and prosecutions under Section 7.

On how the UK compares with other countries, I would not necessarily look at US enforcement given the head start the United States has had with the FCPA, which has been in place for 40 years. But I looked at recent figures for Germany, another big European enforcer, and here the bulk is 65 cases, which is significantly more than the UK bulk of foreign bribery cases. That being said, the German report, which was published last June, also voiced some criticism, which I will not go into, but in terms of numbers it is a significant difference.

Lord Stunell: If I understand the figures correctly, the number of German cases is about 10 times that of the United Kingdom.

France Chain: That is correct, bearing in mind that the UK Bribery Act came into force only in 2011 and there were some serious concerns about pre-Bribery Act legislation, whereas the German law has been in place for a longer time. So there is a time factor as well.

Lord Stunell: So you would say that the culture of dealing with this is better established in Germany than in the United Kingdom.

France Chain: That is generally correct, although the German report did notice the difference across the different Länder, but that is generally correct, yes.

Lord Grabiner: Are those German figures for all bribery prosecutions or just the bribery of foreign public officials?

France Chain: It is just bribery of foreign public officials, bearing in mind also that Germany prosecutes under different offences. They are all foreign bribery in fact but they might be prosecuted under breach of trust or commercial bribery if it turns out that it is more practical to prosecute the individuals or corporates under these offences.

Lord Grabiner: It might just demonstrate that Germany has a bigger problem than we do, might it not?

France Chain: I will not comment on that. Certainly, some people take the view that if you do not have prosecutions it is because you do not have bribery, but one can draw one's own conclusions. Generally the OECD looks at the size of the economy to determine whether a country should have a significant number of foreign bribery cases.

Lord Haskel: And whether it does more business overseas.

France Chain: Yes, exactly. That is generally what we look at. In our reviews, one of the first things that we look at is the economic situation and the risks that are involved in it. So there is a greater expectation on, say, G20 countries as opposed to smaller economies.

Baroness Fookes: Turning to finances, is the enforcement of the Bribery Act resourced to the satisfaction of your organisation and are the funding models of the SFO and the NCA capable of delivering effective enforcement against bribery?

France Chain: First, I note that there has been a recent change—this April, I believe—in the funding of the SFO, which the Working Group did not address, so my remarks will rely largely on 2017 information. I will try to update it with more recent information. Clearly, the issue of resources for the SFO has been an area of concern for the Working Group, at least since what we call Phase 3 in 2012, and it was reiterated in the 2017 report. The resources for the SFO had already dropped by 2010, which forced it to rely on blockbuster funding, which was felt to be not very effective in retaining staff and ensuring a smooth running of operations but also gave rise to the possible perception that investigations and prosecutions could be influenced by the Executive, since there had to be requests from Revenue & Customs for additional blockbuster funding. In addition, where the NCA is concerned, and prior to that the City of London Police anti-corruption unit, whose investigations then feed into the Crown Prosecution Service prosecutions, the funding for the NCA was reliant on DfID money for foreign bribery cases, and because it was money from development aid it was supposed to be used solely for foreign bribery cases involving DfID countries—developing countries.

So there was a geographical limitation on the cases. In addition, the report noted that the NCA was generally perceived to be focusing more on what we call, rather unfortunately, passive bribery—there is really nothing passive about receiving bribes, but for lack of a better word – there is that perception. The figures announced in April, although the Working Group has yet to pronounce on them, are certainly a sign of movement in the right direction. They are, however, only for the Serious Fraud Office, which is great because right now it is pretty much the only law enforcement authority to have foreign bribery cases under its belt. But there are still concerns about the medium-range foreign bribery cases and how these might be dealt with by the Crown Prosecution Service given some decrease in its resources and, again, pending concerns about the how the NCA International Corruption Unit is funded.

Baroness Fookes: You are suggesting that more funding should be made available for both those agencies.

France Chain: I would say that the suggestion is that the SFO should not rely so much on blockbuster funding, for the reasons mentioned, and that there should be funding as well for the CPS and NCA for foreign bribery investigations and prosecutions.

Lord Thomas of Gresford: Would you say it is wrong in principle to have

blockbuster funding in that it gives rise to the perception of government influence on prosecution?

France Chain: We rarely make recommendations in principle. We rely on a case-by-case approach and are very conscious of what we call functional equivalence—respecting how countries function and not interfering in that. But concerns in all countries about the independence of investigations and prosecutions are a key focus of our reviews. In that sense—and that sense only—the blockbuster funding certainly raised concerns. To be fair, we did not suggest that in the past five years there had been any influence, we just raised an issue about possible perception. But, frankly, it can change because there is no rule guaranteeing that tomorrow such granting of blockbuster funding might not be influenced by considerations of national economic interest or international relations.

Lord Thomas of Gresford: Your second reservation, I think, was about the fact that it is not possible to keep a consistent team if you rely on blockbuster funding—you are changing your team and bringing in new people and losing experience, possibly, when that particular case is over.

France Chain: That risk was also pointed out to us by civil society representatives we met during our on-site visit in 2016.

Lord Haskel: Successive OECD reports on the UK’s implementation of the anti-bribery convention have called for improved co-ordination between the Serious Fraud Office and the Financial Conduct Authority when conducting bribery and corruption investigations. Has this position changed since the phase 4 report and, if not, how do you think this co-operation could be improved?

France Chain: Unfortunately, I am not in a position to say whether or not it has improved since the Phase 4 report because we have not had updates from the UK on this. We will have one in March 2019. The UK will come back to explain to the Working Group what it has done to implement this recommendation and all the other ones. At that point we will make an assessment. That is why I cannot really say what has happened since 2017. What I can say is that when we came here the last time, in 2017, we found a perceived disengagement from the Financial Conduct Authority, both with regard to the questions that we sent to it in writing and in the face-to-face interactions that we had. It did not seem very interested in the enforcement of bribery-related offences under the Act. That was strange, given that the previous report in 2012 saw almost the reverse, with limited engagement from the SFO and more engagement from the FSA, as it was named at the time. That is why we recommended that the FCA engage more greatly with the SFO. We noted that the tools were in place—memorandums of understanding—but in practice it did not seem to have much effect.

Lord Haskel: How do you think this co-operation could be improved—just by talking to each other?

France Chain: In the corporate world they talk about the top-down approach. At the end of the day it is for the directors of these agencies to get to the bottom of that issue and to work together.

The Chairman: The flavour of the month, not just in this context but generally, is to do this through memoranda of understanding. Do you think that is a useful way to proceed?

France Chain: I think it is. I believe there is already one and it is certainly good. We strongly believe generally that it is necessary to have a framework in place and you cannot really start without that. But it is not sufficient to have a framework in place. You need to implement it and act on it. I think that is what we saw missing last time: there was a memorandum of understanding, the institutional framework was in place, but nothing was happening.

The Chairman: Do you have any specific suggestions for improvement?

France Chain: It is a matter of priorities for whichever law enforcement authority you are talking about.

Lord Grabiner: When the OECD produced its phase 3 report, was that based on what I think you described earlier as a government communication to the OECD? Do you sit down with the FCA and/or the SFO and discuss the detail with them face to face?

France Chain: Yes. Very briefly, the Phase 1 reviews are desk reviews, where we review only legislation. This happens at the very beginning when the country joins the convention and we review its legislation. Clearly, that was a long time ago for the UK. Phases 2, 3 and 4 constitute a long process that involves both the questionnaire that is completed by the country but also a week-long on-site visit, during which we meet government officials, investigative and prosecutorial authorities and judges from all law enforcement authorities, including Scotland and Wales. We meet journalists, civil society, private companies, business organisations and private sector lawyers—a broad range. In Phase 4, we met the OTs and CDs as well.

Lord Grabiner: One of your criticisms, as I understand it, is that in a case where the FCA has decided to bring a civil process—because of course you understand the FCA has extraordinarily wide regulatory powers, including ultimately powers to suspend people from operating in the market—the SFO is apparently reluctant to issue criminal proceedings while the FCA is conducting a civil process. What is wrong with that?

France Chain: This was Phase 3. The situation changed in Phase 4 in 2017. The issue with civil settlements was that they result only in the confiscation of the proceeds of the bribery, with no punitive element—or at least that was the case for the foreign bribery cases in Phase 3. That was the reason, and other countries have had similar recommendations made by the Working Group in that respect. The sanctions for foreign bribery should be, as we have coined, “effective, proportionate and dissuasive”, and should include both a punitive element—in the form of a fine if we are talking about a corporate or imprisonment if we are talking about an individual—as well as the confiscation of any benefit derived. If you are missing one of the two elements, you are missing a significant part of the effectiveness of the sanction.

Lord Grabiner: So you do not regard the fact that you can be excluded from ever being involved in the financial services industry, not only here but almost certainly in any regulated jurisdiction anywhere in the world, as a sufficiently powerful remedy.

France Chain: We did not state that. What we said was that in foreign bribery cases, which for a large part concern not financial services but corporates operating, for instance, in infrastructure, telecommunications or pharmaceuticals, one, the sanction would not apply, and, two, it was not applied in foreign bribery cases; we were seeing only confiscation of the benefits with no other sanction. Again, that was the status at the time of Phase 3 in 2012, but in Phase 4 in 2017 that was no longer the case.

Lord Grabiner: I focused on the FCA because that is the regulatory body for financial services.

France Chain: Since Phase 3, there have been no foreign bribery instances dealt with by the FCA.

Lord Grabiner: What did you infer from that, if anything?

France Chain: What we inferred, based on our interaction with it, was a limited engagement, which we noticed both in our face-to-face discussions and in the absence of any investigations into foreign bribery at the time of Phase 4.

Lord Grabiner: Do you go as far as to say it is not doing its job properly?

France Chain: No, we would not go as far as to say that.

Lord Grabiner: What are you saying?

France Chain: We are saying that its engagement was limited.

Lord Grabiner: That is a very serious allegation, because its function is to regulate important, invisible export markets from London, which is an important part of what we do here. You said yourself that it is not sufficiently engaged.

France Chain: That was the finding of the Working Group, yes.

Lord Thomas of Gresford: The OECD has criticised Scotland's practices and frameworks for foreign bribery enforcement. It has stated that they should be brought into line with practices in England and Wales. Does the OECD still hold that view and, if so, what needs to be improved? The Scots have a civil settlement where all that is taken are the profits of a corrupt transaction, and you criticised that in your last answer. What is the situation now as you see it?

France Chain: In addition to what you have mentioned about civil settlements, there was also an issue about their transparency. That was another reason for the Working Group stating in Phase 3 and Phase 4 that civil settlements might not be the best option for resolving foreign bribery cases. What we also noticed when we met with the Scottish law enforcement authorities was a lack of resources, which meant that there

was a question about how effective the enforcement could be. I think we noted in our reports a potential loophole where companies might be created under Scottish law which could result in the creation of shell companies. That was the reason for making the recommendations.

Lord Thomas of Gresford: Could I extend your views to that of your views about the Crown dependencies and overseas territories? Does the OECD still believe that action is needed in those areas?

France Chain: I think that a large majority of the Crown dependencies and a majority of the overseas territories have now either ratified the convention or inserted a foreign bribery offence in their legislation. The Working Group on Bribery found that to be great progress in Phase 4. That was the legislative state of things. Also, for the first time ever a large number of them attended the onsite visit and showed great engagement in that capacity, which was encouraging. The issue that the Working Group on Bribery is particularly concerned about is international co-operation more than, say, companies from these territories starting to engage in bribery. They might be used as intermediaries, but it is really the international co-operation that can be provided. These overseas territories often require dual criminality, which means that until they criminalise a foreign bribery offence, if one of the parties to the Convention asks for international co-operation in respect of foreign bribery, they may not be able to provide it if they do not have the same offence in their law.

Lord Thomas of Gresford: Does that apply to the Turks and Caicos, and places like that? They do not have their own local, domestic law against foreign bribery.

France Chain: To be honest, I cannot remember which ones still do not have the foreign bribery offence, but that is the situation in certain OTs, as noted in the Phase 4 report.

Lord Empey: Is the OECD satisfied that the SFO, the NCA and other law enforcement agencies are currently well insulated from government interference in investigations or wider shifts in government priorities? If not, how do you think that this could be improved?

France Chain: This has been a long-standing issue in our reports. I will not mention again the issue of blockbuster funding because I have gone into that enough. I shall open the report just to make sure that I quote correctly what has been said. Article 5 in our Convention provides that investigations and prosecutions into foreign bribery should not be influenced by considerations of national economic interests and international relations, which naturally in a foreign bribery case are two major factors that can often arise. For that reason, and because there has been one case that was the subject of much interaction between the Working Group and the UK several years ago, several recommendations have been made in that respect to clarify that the factors indicated in Article 5 should not influence law enforcement. At this point, the recommendations have still not been implemented by the UK—again, as far as I know from 2017.

There was a 2014 memorandum of understanding which stated that the Convention is binding on the UK as a state under international law, but it does not state that it is binding on the prosecutors in making their decisions. One of the recommendations made by the Working Group was that this should be expressly clarified. In addition, the Working Group noted that the MoU applied to law enforcement bodies but not to the Attorney-General or other relevant parts of the Government. It noted as well that the Joint Prosecution Guidance was unclear in that respect. Finally, because I do not want to go into too much detail, it also noted that the use of Shawcross exercises was perhaps insufficiently transparent. That being said, these are all related to the legal and institutional framework, but the last report did not note any specific case where it saw undue influence from the Executive.

Lord Empey: Perhaps I can follow up on that because you are making recommendations for improvement, which I understand. Is that because of what you perceive to be potential issues rather than evidence of actual issues?

France Chain: Yes, that is correct. It is the systematic approach of the Group when we review Article 5 and how a country is implementing it. When a country has no practical issue, we note that. However, we know that it is of course subject to any change in government or a decision by a Government to use the law in another manner. For instance, I remember that in the Czech Republic in Phase 3 we made a similar note that at the time the Government seemed to be acting in a positive way against corruption but that the laws and functions were still in place in such a way that it could easily go in another direction with a different Government.

Lord Empey: Following the point that Lord Grabiner made earlier, what do you perceive to be the Government's interaction with you and the organisation? You said that you felt that the level of engagement was lower than you would have liked. Does that imply that they could not be bothered, that they were not interested or that they were concealing something? What did you interpret that as meaning?

France Chain: We do not engage in these evaluations in a suspicious fashion. When people are not engaged—we are talking about one authority because in general we have very good engagement with the UK—our conclusion is that there is a lack of awareness that is sometimes coupled with a lack of resources. Lack of resources was not the issue when talking about the FCA. In general it was a lack of awareness and training.

Lord Grabiner: Is it also possible that they do not agree with you?

France Chain: They did not say so.

Lord Hutton of Furness: Is Article 5 of the convention given direct legal effect in other OECD countries?

France Chain: Yes. An example is that the Dutch law enforcement authorities have a prosecutorial guideline which states specifically that the public prosecutor must comply with article 5 of the OECD Convention.

Lord Hutton of Furness: Is it a minority of OECD countries that give direct legal effect to the article?

France Chain: It depends on how the legal framework is set up. In some countries, such as in Italy, the prosecutorial authorities are completely insulated from government through the way they are nominated or promoted. In such a situation where the authorities are completely separate, you might not need a specific guideline. On the other hand, where there is some sort of hierarchical submission or possible permeability between the Executive and law enforcement, we then try to see how we can ensure that, if it applies, it does not apply in violation of Article 5.

Lord Thomas of Gresford: You said that this is in guidance. Is it in a statutory form? Is there a statutory duty?

France Chain: Yes, as concerns the Netherlands. It is called guidance but it is actually compulsory and in this case publicly available.

Lord Thomas of Gresford: Right, so you could start an anti-corruption Act with a statement of principle that covers considerations of national economic interest and so on.

France Chain: Absolutely. I think that that was the point in the recommendation in the MoU. Rather than a general statement about the convention being binding on the UK, a statement specifically to the effect of Article 5 would have been more appropriate. Again, this is a case-by-case approach. There is no one way for any country to do it.

Lord Stunell: Can you clarify that point? Are you saying that for the United Kingdom Government to have signed the convention and accepted the obligation, that does not provide a sufficiently strong link to the legislation and that you would like to see the OECD recommend that that link was specifically included in the legislation?

France Chain: Yes, because in the UK our understanding is that international conventions are not directly applicable into law; they have to be incorporated into national law, so that is why it was felt necessary to make this recommendation.

Baroness Fookes: Has this been a problem right from the outset of the Bribery Act 2010? Are you not suggesting that it should have been in that Act?

France Chain: No, not necessarily in the law, but in other documents or in the way that the institutional framework for law enforcement is set up. But, as I said in answer to the previous question, it is a matter of principle rather than a problem in an actual case, at least in more recent times.

Baroness Fookes: But should the principle have been established in the Act of Parliament? Is that what you are suggesting?

France Chain: No. The independence of law enforcement would, I imagine, rarely be set up in foreign bribery legislation; it would more often

be in accompanying documents or, as I said, in the way that the institution of law enforcement functions vis-à-vis the Government.

The Chairman: The point you are making is, in effect, very much wider than the Bribery Act, is it not?

France Chain: It may well be, but our mandate is to see how the Anti-Bribery Convention itself is implemented.

Lord Empey: A lot of these suggestions are preventive, really, against future-proofing it.

France Chain: The point of these evaluations is really to see that a country has in place everything that is necessary as provided under the Convention and related instruments, so that it can effectively prosecute foreign bribery. It is not meant to act post facto, otherwise, frankly, given the low level of enforcement in some countries, we would not be recommending much. It is also to make sure that everything is in place. It is valid for the law itself—criminalising foreign bribery—but also for how law enforcement functions.

Lord Grabiner: Are you familiar with the legal concept of the margin of appreciation?

France Chain: Yes.

Lord Grabiner: And you know that what that means is that the nation state that is party to the Convention has a degree of flexibility as to how it applies the convention domestically. Taking account of that, do you still sustain the various criticisms that you have made?

France Chain: I do not sustain any particular criticism.

Lord Grabiner: Well, the OECD does.

France Chain: The Working Group on Bribery has a body of case law and recognises a principle akin to what you are referring to, which is functional equivalence. Recommendations that we make are not intended to ask a country to change its legal system but to adjust within the powers that it has.

Lord Thomas of Gresford: Do you think the FCA would be more likely to engage if this principle were in statute in this country?

France Chain: The one about independence? We did not draw a link between the two.

Lord Hutton of Furness: It is less about independence though; in my mind, it is about what you said about considerations of national economic interest.

France Chain: Are we talking about the FCA or the independence factor?

Lord Hutton of Furness: I thought that Article 5 related to prosecutors not being able to take into account issues of national economic interest.

France Chain: Absolutely, but that pertains not specifically to the FCA but to law enforcement in general.

Lord Hutton of Furness: Would you say it was wrong in principle, then, for prosecutors to take into account the public interest in deciding?

France Chain: Not the public interest, the national economic interest. Public interest is a general test for prosecutors across a number of jurisdictions.

Baroness Primarolo: I am reflecting on what you have just concluded. Can we shift slightly to the question of deferred prosecution agreements? Do you consider that they are working effectively with regard to the Bribery Act 2010?

France Chain: Clearly, the number of cases resolved through DPAs is the majority of cases under the UK Bribery Act, so it looks like they have been working fairly effectively. The Working Group does not take a principled view to these pre-trial resolutions, if we can call them that. Some countries have them and some do not, although we are seeing a trend in adopting these mechanisms. The Working Group is undertaking a study to be published early next year of the roughly 25 systems that exist across our 44 member countries. With respect to UK DPAs specifically, the Working Group found that they were a pragmatic way to deal with foreign bribery cases. In general, DPAs should still result in effective, proportionate and dissuasive sanctions and should be transparent. In the case of the UK, given what was published by the SFO and the courts, the Working Group did not voice any problem with that. It noted that a number of corporates resolve their cases through DPAs, so it would follow up on how individuals were being dealt with alongside this.

Baroness Primarolo: So in terms of how the DPA is transparent and the principles of a fine, prevention and reputation, do you have a view on the importance of self-reporting within that process? Obviously the transparency co-operation is crucial, but do you see self-reporting as a crucial trigger?

France Chain: Absolutely. Self-reporting is, across all our countries, the most common way of detecting foreign bribery. One-third of all foreign bribery cases across the globe are detected by self-reporting. Of course, the US has a heavy number of cases in this comparative study. Self-reporting should definitely have some weight in the conclusion of a DPA. We have seen, however, that it cannot be limited to self-reporting and must be accompanied by full co-operation. We have seen the Rolls-Royce case in the UK, where there was no self-reporting but where the SFO and the courts validated the argument. The SFO argued that there was such a good level of co-operation that the fact that the company had not self-reported did not resolve in any aggravating circumstance. So, it all depends very much on a case-by-case approach. Again, this was one example, so it was hard to draw any conclusion, but the Working Group noted this discrepancy, which did not meet what was in the guidance. It did not make any remarks, positive or negative, but noted it as something to follow up on, to see how it evolves.

Baroness Primarolo: But the Working Group put due weight on the consideration that the company co-operated to an extent, with additional costs.

France Chain: Absolutely.

Baroness Primarolo: And, therefore, that should be taken into consideration.

France Chain: In any case I do not think that self-reporting should be sufficient; it needs to be accompanied by co-operation in the investigation.

Baroness Primarolo: Where do you put the deferred prosecution agreements in a hierarchy? Do you think that they should become the norm or do they still need to be unique, reserving prosecution as the ultimate outcome? Or did the Working Group not have an opinion on that?

France Chain: No. I do not think that we would ever have a principled view on this, because some countries do not have that in their system. We certainly would not recommend that they introduce it if they do not have it. These pre-trial resolutions work only if there is a real incentive in the form of self-reporting and co-operation resulting in mitigated sanctions or, sometimes, no debarment, which is a very significant sanction. It also works only if there is a real threat of enforcement: companies are not going to self-report if they do not fear that they will be caught out. It is a very balanced approach. It cannot work in a system where law enforcement is weak, because there is no interest in the company self-reporting or co-operating if they do not risk anything in any case. So it can work only in an enforcement framework that is strong.

What we hear is that is a beneficial way out. Foreign bribery investigations are very complicated. They involve complex corporate structures and they involve evidence that is abroad, so they are costly and long. Law enforcement sees a benefit in finishing them quickly and companies see a benefit. Just last week, a Canadian company was refused the equivalent of a DPA in Canada and the level of its shares went to its lowest point ever, so there is clearly a mutual interest. It also has a preventive effect in terms of developing a compliance and corporate culture. It seems like a win-win in countries that have strong law enforcement.

Baroness Fookes: If you are saying that, if it does not have such a system, a country should not introduce DPAs, why did you express the view that Scotland should acquire them?

France Chain: We looked at the UK globally and we saw differences in application. We did not say per se that Scotland should do the same as elsewhere in the UK; we said that Scotland has civil settlements and the Working Group has said previously that these are not satisfactory in terms of transparency and because they are only confiscation. For that reason, we said not that Scotland should do the same but that it should consider putting things on the level, so that it is the same for companies no matter which side of the border they are working. In the end, it is the UK that is party to the Convention and, to us, maybe because we are not from here, it seems strange that it is not functioning and that companies do not have

the same benefits or the same risks depending on where they are being investigated and prosecuted.

Lord Haskel: You compared us with Germany. How do we compare on deferred prosecution agreements, if it has them?

France Chain: I did not go into detail but, in fact, Germany was criticised for not having sufficient prosecutions against corporates. It has a bigger bulk of cases, but the German report, which came out in June, said that Germany should be doing more to prosecute corporations. They have a system of settlements that are not DPAs, which works in a manner that was not found to be sufficiently transparent by the Working Group. I tried to look at other countries—there are a lot of countries that are doing much worse than the UK—and I wanted to look at one that was in Europe with something akin in terms of a significant economic environment.

Lord Thomas of Gresford: But you would say about Scotland that the civil settlement, which does not involve penalty and has a lack of transparency, is a weak enforcement regime, would you not?

France Chain: The Working Group attaches a lot of importance to transparency, whether it is through court decisions or pre-trial resolutions, because it has an element of awareness-raising and prevention and helps us to assess how a country is performing so, yes, that is why we would say that.

Lord Grabiner: Some people say that DPAs are a soft option. I think the OECD position is that, provided there is transparency and they are properly done, that would not be the OECD's view. Is that fair?

France Chain: I think that is a fair representation.

Lord Grabiner: You say that notwithstanding the fact that, when a DPA is entered into, it carries no penalty. It carries a compensation deal, normally, to disgorge the profit that has been made. Typically the agreement would not contain an acceptance of a penalty on top. Do you appreciate that?

France Chain: No, the UK DPAs we looked at in Phase 4 had a punitive or confiscation element and, very often, compensation to the country of the public official.

Lord Grabiner: What about in the UK? Are you aware of DPA arrangements here that have incorporated something equivalent to a criminal penalty, effectively?

France Chain: Yes, all of them. Very often, they also cover some of the costs of the SFO, as we understand it.

The Chairman: There is a perception, real or imagined, by some that DPAs are a way for rich companies to avoid prosecution and are not so readily available to companies that do not have so much money. Is there anything in that perception?

France Chain: Generally speaking, DPAs or pre-trial resolutions work well and, when we talk to law enforcement and to corporates, to the mutual

benefit of both. There could be a question in the UK that, because of what I mentioned in my intervention about the identification theory, which is necessary under Sections 1 to 6 and not under Section 7, there could be a risk for smaller corporations to be prosecuted rather than offered a DPA because it would be easier to show that they have committed the bribery, so law enforcement would not have to settle—if I can call it that—for failure to prevent under Section 7.

Lord Thomas of Gresford: If the negotiation of a DPA caused economic damage to a company, that would offend your Article 5 principle, would it not?

France Chain: No, because when we looked at specific cases—one was Oxford Publishing—we noted that, in this case, there was only confiscation of the bribe but no punitive fine because of where the company was at, at that moment, and it was not criticised in the report. It is just that investigations and prosecutions should not be stopped or influenced by these factors; it does mean that you cannot take them into account in sanctioning.

Lord Thomas of Gresford: So you can take economic damage to a company into account in deciding whether it should have a deferred prosecution agreement. That would not be against your principles.

France Chain: No, I do not think so, though we have rarely encountered that.

Lord Stunell: How effective is the UK's Bribery Act in comparison with anti-bribery legislation in other OECD countries? Is the Act keeping pace with developments in other countries, such as France and maybe also Germany, in view of the statistics that you have introduced? Are there lessons that the UK could learn from anti-bribery legislation and practice in other OECD countries? You mentioned that next year there will be an OECD comparison report, so maybe you could give us a bit of a preview of that today.

France Chain: The comparison report, which I am not in charge of, is about resolutions specifically, so that is what it will compare, not all the anti-bribery legislation. I am also not an expert on Germany; it was not in my purview, though I did look at it before coming here to have a few ideas. But, as I said, Germany has been able to enforce because it prosecutes under a variety of offences, not just foreign bribery. That is another example of functional equivalence, where the Working Group said that it is fine: if it is working and the sanctions are effective, proportionate and dissuasive, then that works too.

The UK's Section 7 is probably of the most state-of-the-art in terms of foreign bribery legislation. On the other hand, reliance on the identification theory for the other offences is probably still one of the weaker points in the UK model. But Section 7 and the failure to prevent is being used as an example in another country. I mentioned that I am working on Korea right now and Korean guidance published by the Government to companies mentions two pieces of foreign legislation: the FCPA and the UK anti-bribery Act. That is a clear indication that it serves as a model elsewhere in terms of promoting compliance.

Lord Stunell: You said that this has just been introduced in France, but it seems to have a very rigorous regime.

France Chain: Yes, but France had a weak system until quite recently. It is true that the introduction of the “loi Sapin II” has changed the legal landscape. France has also brought more resource to the pôle économique et financier—the financial and economic crime prosecutors—to prosecute cases, which is yielding results. It of course also has the French anti-corruption agency now, which has some investigative powers as well as the power of controlling corporations to see if they have in place adequate procedures.

Lord Stunell: Does the OECD have an ideal model or does it take each legal environment separately?

France Chain: It takes every system separately to see how or whether it functions.

Lord Thomas of Gresford: When you refer to the identification principle, am I right that it means that you cannot prosecute the corporation unless it is shown that the participant was the guiding hand at that company?

France Chain: Yes.

The Chairman: Are there any more questions? If not, thank you very much for your most valuable assistance. I repeat that if you have anything further to add, amplify or correct when you receive the transcript, you are more than welcome to do so. I also repeat that if you can do so as soon as possible after you receive the transcript, that would aid us very much indeed. Again, thank you very much.

France Chain: Thank you.

Mike Betts and Commander Karen Baxter – Oral evidence (QQ 105-111)

Tuesday 23 October 2018

10.30 am

[Watch the meeting](#)

Members present: Lord Saville of Newdigate (Chairman); Baroness Fookes; Lord Gold; Lord Grabiner; Lord Haskel; Baroness Primarolo; Lord Stunell; Lord Thomas of Gresford.

Evidence Session No. 10

Heard in Public

Questions 105 - 111

Examination of witnesses

Mike Betts and Commander Karen Baxter.

Q105 **The Chairman:** Good morning to both of you. Thank you very much for coming to assist this Committee. There are a number of administrative points. You will, I hope, have received a list of Members' interests relevant to the inquiry.

The session is open to the public. It is broadcast live and will subsequently be available on the parliamentary website. There will be a verbatim transcript of the evidence, which will also be put on to the parliamentary website. A few days after this session, you will be sent a copy of the transcript to check for accuracy. If you find anything that needs to be corrected, it would be helpful if you could inform us as soon as possible thereafter. At the same time, if you wish to add to, clarify or amplify any points made during the course of your evidence, or indeed if you have any additional points to make, you are welcome to submit supplementary evidence to us.

Although the Committee knows who you are, for the purposes of the transcript I would be grateful if you could introduce yourselves.

Commander Karen Baxter: Good morning. I am from the City of London Police. I am the national co-ordinator for economic crime across the United Kingdom, which means that I help to co-ordinate the police response to economic crime on behalf of the Commissioner in the City of London.

Mike Betts: Good morning. I am head of learning and skills at the City of London Police Economic Crime Academy. I am a serving police officer and an acting detective inspector. I have been there for about four and a half years, and I head the development and delivery of bribery investigation training on behalf of the City of London Police.

Q106 **The Chairman:** Thank you. I think we can move straight on to the questions, which have already been submitted to you. Of course, you are

not confined to answering those questions if you think that there is anything else of importance that you should let the Committee know, and we may ask you further questions.

With that introduction, we start with the first question. What kind of bribery cases do the City of London Police typically handle, and what trends have you observed in the time since the Bribery Act has been in force? Has the Bribery Act made securing convictions easier?

Commander Karen Baxter: We have looked at the City of London and slightly more broadly across the 43 police forces, and we have a small number of bribery cases. Four cases have been prosecuted. The bribery that we have identified has generally come from other investigations into, for example, fraud, election fraud or insurance fraud. Also, bribery is reported locally from other government services, such as HM Revenue and Customs, which discovers fraud in its working arena but does not have the powers to progress it.

There is a sense that bribery offences, such as contracts for cash, are more prevalent than is seen across the official records in policing. That comes primarily from the recent Portsmouth study, which suggests that 54% of bribery cases are investigated by the police. Of these, around 71% are private-on-public offences: that is, private trying to bribe public, which obviously presents quite a significant risk. That said, the numbers that the City of London Police comes across are low, and in fact across policing the numbers for pure bribery and corruption offences are low.

Until this month, this information has not been routinely gathered by the Office for National Statistics. Just recently, on 18 October, a trial resulted in the release of information for the last year in relation to Sections 1, 2, 6 and 7 of the Bribery Act and in respect of misconduct in public office offences. As a result of that, we know that there were 106 misconduct in public office offences in June 2017-18. However, conversely, and to put that into context, only six cases of receiving a bribe were identified. Nine were cases where a bribe was offered and one related to a commercial organisation. That gives you some insight into both the City of London and the broader policing environment.

Mike Betts: From the training perspective, awareness of the Bribery Act is very helpful. It modernised the language in the previous legislation, which dated back to 1906 and 1916. Translating that for practitioners has been very useful. In our training programmes, an understanding of the elements to prove is clearly established under the Bribery Act. As a practical tool, the Bribery Act is efficient and effective, and our role in the academy is to translate the legislation into the practitioner's tool. Those who attend the training courses come away with a good understanding of the elements to be shown under the Bribery Act, particularly Sections 1, 2, 6 and 7. In my experience, policing accepts the Bribery Act as a useful bit of legislation.

General awareness is a difficult area, because there are many demands on the policing service. We offer specialist training to a niche number of

officers, which is well received. General knowledge of the Bribery Act across policing is perhaps not as great as we would like it to be, but for those who attend the training, the Bribery Act can be seen as effective legislation that can apply to a lot of the scenarios that we see within the United Kingdom and where we get UK citizens and businesses operating abroad.

The Chairman: Have you discovered anything that you would regard as a fault in the Bribery Act, or something that could be improved, from your point of view?

Commander Karen Baxter: On the requirements of authorisation, it might not be a fault, but it is perceived by some officers as bureaucratic and perhaps time-delaying. I would not go as strong as to call it a fault; it is more of a perceived barrier that may reduce usage. However, it does not impede usage and may be more a perception than a reality.

Mike Betts: One key area that we have difficulty with is when we are training officers and need clarity to explain what is meant by a commercial organisation. A lot of the activity that we see around bribery, particularly in the United Kingdom, relates to transactions between those concerned with the public sector. As there is a lot of private sector involvement in the public sector, it can sometimes be difficult to ascertain whether an organisation is truly a commercial organisation.

One of the aspects is that we do not have clarity on the commercial organisation as provided by Section 7. Clarity on that would be useful to us, particularly when you have a public sector organisation trading commercially, as you might call it, as they are competing for contracts. So clarity on commercial organisations would be really helpful for our practitioners.

The other issue is over Sections 1(3) and 2(3) relating to improper performance on its own. Some might say that this is where a breach in job rules may be sufficient to trigger the Bribery Act. Again, clarity on this would be useful, because in cases where people have breached their job rules to some degree, there seems to be a general reluctance to bring a prosecution. Maybe in Sections 1(3) and 2(3) there could be clarity about the breaching of one's job rules being improper, and whether that should trigger the Bribery Act provisions. We would say theoretically that it should, but in practice we are sometimes unable to progress it.

Lord Grabiner: Commander Baxter, on the figures that you very helpfully gave when we started a little earlier, there is quite a big discrepancy between misconduct in public office offences as opposed to the bribery ones. Should we assume that there must have been quite a number of malfeasance in public office cases that could have been prosecuted as bribery cases under the Act?

Commander Karen Baxter: At this moment, it is probably unfair to make that assessment. The good point is that we have started to gather the figures, which gives us clarity. I think there is a general sense among practitioners that, a bit like with muscle memory, people tend to go back

to misconduct in public office rules as opposed to using what is perceived as the newer legislation.

There is a sense that some cases that should have used the bribery legislation have not been progressed on that basis. But it is probably not feasible at this moment in time to say how we would break those down in finite terms.

Lord Grabiner: So aside from an understandable desire to rely upon existing knowledge rather than learning new tricks, so to speak, should we assume that the bureaucratic point, which we will come to later, is also a factor?

Commander Karen Baxter: It is certainly a perception. I do not want to jump forward to the other questions, but each bribery and corruption case is investigated across 43 respective forces, so we have disparate knowledge and responses. With 43 different forces you may have slightly different approaches. You also have smaller numbers of officers actually trained and able to respond. As a result, trying to bed in new legislation such as the Bribery Act has been somewhat more difficult.

As a national lead force for fraud and other economic crime, we have a degree of co-ordination to enable us to do that, but we do not do it for bribery and corruption. So in some ways, bribery and corruption has suffered from not having the benefit of a lead force intervention with each of the respective 43 forces.

Lord Haskel: Mr Betts kindly made a point about the differentiation between commercial and private prosecutions. In the numbers that you gave us, Commander Baxter, did you differentiate between the private and corporate sector?

Commander Karen Baxter: No, there would have been no differentiation. Section 7 clearly relates to commercial organisations, of which there was only one. The other offences were purely in relation to promising and giving bribes, or receiving bribes. It has not been broken down into private and public. We could probably find some further detail on those numbers if that would be helpful.

Lord Haskel: Do people hide behind the corporate structure, and do you find it easier to prosecute people as individuals, or easier to prosecute the company in order to get at the individual?

Commander Karen Baxter: I would probably pass that question to Mike, but I do not think it is just that people hide behind corporate organisations. They hide behind all large institutions, whether that be a public sector, corporate or political institution. People will use whatever they can to defer and deflect from an investigation into their alleged bribery and misconduct.

Mike Betts: The context around British policing and the Bribery Act is really useful. Across the UK policing service, we tend to deal with lowerlevel bribery and corruption. That includes primarily domestic corruption and

lower levels of corruption, particularly in small and medium-sized enterprises.

Larger-scale corruption with an international element is the domain of the Serious Fraud Office and the National Crime Agency's International Corruption Unit. We see a particular kind of bribery, which is primarily individuals corrupting a supply chain within procurement, typically in the NHS. Generally speaking, UK policing investigates individuals, but we might touch on smaller businesses. That is where we get involved in a Section 7 offence.

When we talk about bribery, it is important to understand the bribery seen by UK policing around the United Kingdom as opposed to the big international cases investigated and taken care of by other agencies. We are very much seeing a localised level of bribery: in individuals, within councils and within procurement, across the UK.

We try to share knowledge and support our colleagues through the Economic Crime Academy when they are investigating those kinds of bribery. However, as Commander Baxter says, that is not our key priority. Although we offer some support, we are there to provide a training function, training officers to investigate bribery and corruption, not to provide onward support.

Lord Gold: Mr Betts, when training on the Bribery Act, I am curious to know what you say about the adequate procedures defence for Section 7.

Mike Betts: It is an interesting area to train on, because we need to give certainty to those who are doing investigations. We have to try to translate the Bribery Act and the guidance on it for the practitioners who will be investigating other areas of criminality, whether it be fraud or money laundering, who might have a bribery case to do. We relate the adequate procedures to the MoJ guidance, so we go to the six principles of proportionate procedures, due diligence and the like. We have had some experience developing our knowledge of that. We were heavily engaged in British Standard 10500 and developed knowledge of how business would react and how those adequate procedures might be represented to us in a case. Again, there is no precise science behind those six principles, but generally speaking we have knowledge and have seen risk assessments and how industry will have due diligence.

We try to give the officers an example of what those six adequate procedures may look like to satisfy, on the balance of probabilities, that what they have done is sufficient to stop the bribe being paid. We look for top-level commitment, proportionate procedures and the risk assessment. The tangibility will always be the top-level commitment and the risk assessment document. We are training our investigators to look for those things and to take into account the operations of the organisation that we are investigating.

We have also been working with the Cabinet Office on the counterfraud profession. We co-wrote with the Cabinet Office the bribery and corruption

standards for HMG organisations. Again, we have built them on those six principles. Because the scenarios we see vary so much depending on the size of the organisation, we see a variable responses from organisations. Flexibility is built in through the Ministry of Justice's guidance, but ultimately we rely on the MoJ's guidance on adequate procedures and try to relate them to the scenario we see.

Also, a Section 1 or Section 6 offence will always trigger a Section 7 offence in our investigations. We are always minded to look at the commercial organisation and the individual. Again, it gets into our investigative mindset. We are quite au fait with and connected to the areas of government and business to model what adequate procedures might look like in our investigations.

Lord Thomas of Gresford: I was going to ask you about the counterbribery standards you developed with the Cabinet Office. What exactly are they and to whom do they apply? We have heard from Commander Baxter that there is a certain degree of difference of emphases in the 43 police forces. Can you help us on that?

Mike Betts: Yes. The Cabinet Office has just established accountable profession within government. It has set a number of standards for investigations and intelligence. One set of standards relates to countering bribery and corruption. The standards are applicable to those working across central government departments. For example, DWP, HMRC and the National Crime Agency are involved in the project and the SFO is a key partner. They articulate what an individual would require to be an effective investigator of counterbribery and corruption for those organisations. We are trying to raise the standards across government agencies to combat fraud related matters that incorporate bribery and corruption.

They are a standalone set of standards that relate to individuals and articulate the standards to be met if you are to be an effective investigator of bribery and corruption. They also set standards for organisations within government—for example, the National Health Service. They set organisation standards that map to the adequate procedures. We have taken the six principles from the MoJ's guidance that would apply to a commercial organisation. I would now map them to government organisations as well so that we see some strength in their counterbribery and corruption standards.

Lord Thomas of Gresford: Is there any crossover between these counterbribery standards and adequate procedures? You referred to that a moment ago.

Mike Betts: Yes, there is. They are mapped on those adequate procedures. As one of the authors of the standards, I was very keen to make sure that we took the MoJ's guidance and centred our standards for the Government on those so that there is standardisation of the language and best practice. When we talk about top-level commitment, it will be the same within government as it will be for a commercial organisation. We use the same language and the same principles, and we have mapped it from the

commercial organisations and the MoJ's guidance into government standards to make sure that everybody meets the same standards.

The Chairman: We can move on to the second question. We have already touched on it.

Baroness Fookes: Few bribery prosecutions are brought under the Act and the evidence suggests that other charges, as you have indicated, such as fraud or misconduct in public office, are being used instead. Does this concern you? If it does, how can we encourage more use of the Bribery Act? I imagine it would be through education and other means, but could you elaborate?

Commander Karen Baxter: It is useful to go through the whole cumulative process of where there are challenges in this type of investigation. First, it is a very private offence, where those offering the bribe and those receiving it are completely satisfied with that arrangement. Therefore, the victim, who is generally in another business or a member of the public, is often unaware that the bribe and an offence has taken place.

Therefore, the covert nature of the offending makes it very difficult to identify that a crime has occurred and where the evidence exists. It is likely to be underreported. These types of offences tend to happen with suspects who are quite powerful and wealthy, and at times have access to really good assets. As a result, the starting point for how these crimes occur is in a difficult arena.

Secondly, these crimes are often identified as a result of whistleblowers. While we will try to corroborate their evidence, it is often crucial to the investigation. The difficulty is that the whistleblower will often find themselves in an extremely vulnerable position, particularly with their employers. Often they will find themselves out of employment, castigated and ostracised, with their reputation in tatters. As a result, it is a highly emotional situation for a key witness to find themselves in. They are a vulnerable witness and we have to work with them. The emotional demand on the witness and subsequently on the police is a significant challenge. It is similar to other offences, but I do not think that people think about the emotional challenge pertaining to the witness in bribery and corruption cases.

The fact is that there is no lead-force investigative capability. Lead-force capability in fraud has helped us to co-ordinate our response and to lift the standards of fraud investigation. Our challenge in policing has been that competing demands, reduced resources and reduced budgets have resulted in chief constables across the 43 forces making very difficult decisions on those competing demands. In simple terms, that refers to the type of training that officers will receive on fraud and that broad area of economic crime.

Fewer officers were trained in the Bribery Act following its introduction. There was a slow start to those prosecutions and the knowledge base has been slow to develop. As a result, there has been continued use of fraud

by abuse of power. It is a bit like muscle memory: officers have used what they are used to in the past. That is without doubt a challenge, but it is particularly difficult in the current regime of finances and resources.

Another issue with the complex investigations that we have is that in the past when we were involved in a higher turnover of anticorruption investigations relating to foreign domains, we had greater exposure to court processes in the legislation. Overall, there was a rising tide with which we could lift the overall standards of investigation. As a result of that having changed recently, we continue to have fewer trained officers and, I suppose, to some degree less confidence in using the legislation.

We touched on the authority from the DPP and from the SFO. I think it is perceived by officers to reinforce the fact that it is a specialism, so if you are not turning over lots of these investigations, again you might go back to the older legislation that you are more used to. Again, it is a bit like the organisational muscle memory: we will use them as conduct offences.

Baroness Fookes: Would you, then, recommend the authorisation being brought down to a lower level?

Commander Karen Baxter: If there is a high number of offences—a high volume, a high turnover—and high exposure to the legislation, to courts, to stated cases, you learn much more quickly. The idea of a learning organisation occurs, and as a result your overall investigative standards rise. In this, the lower levels of investigation have meant, arguably, that the standards have diminished, and while we work very hard to provide training both within this jurisdiction and further, it is not considered mainstream policing. That goes back to the competing demands of counterterrorism, child sexual exploitation and other serious and violent crimes.

Baroness Fookes: I am still not quite clear whether you would recommend that authorisation being at a lower level, and, if so, at what level. Or should it stay where it is?

Commander Karen Baxter: In some respects, the removal of the authorisation would quicken the process and would therefore remove officers' perception of hindrance. That said, I would absolutely endorse the earliest collaboration certainly with the DPP/PPS—sorry, the CPS; I come from my Northern Ireland background there—because we have found with all types of complex investigation that early intervention with the CPS identifies critical issues that need to be resolved at the earliest opportunity.

As a result, particularly with disclosure, all investigations will benefit from that early intervention. It would remove the hindrance, so it is a necessity. I am not sure, but Mike might have a different view on that.

Baroness Fookes: Mr Betts, would you like to come in at this point?

Mike Betts: Yes. From talking to the practitioners engaged in the investigations, and those who are looking to take the investigations on, seeking consent is most definitely a huge barrier. You can get petty

corruption, you can be corrupt for £1 or £1 million, and it stops us using the legislation at the lowest levels, because the time and energy required to get the authority and the consent outweighs the investigative time, investigative resourcing and the like.

The Bribery Act is perceived to be for use only at the highest echelons, because of the consent that is required. Historically, we saw the same with the previous legislation, which followed the same model, and in my experience it is self-limiting. I have been a police officer for 34 years and have been involved in a number of bribery investigations. It is always seen as something that should be applied to very grand corruption, and it will not stem the flow of bribery and corruption if we do not deal with the lower levels of bribery and corruption by requiring somebody's consent to prosecute. The tendency will therefore always be to go for offences for which that consent is not necessarily needed, such as fraud by abuse of position or misconduct in public office. They are very good offences that do not require that consent. So in my experience with practitioners, requiring that consent is self-limiting.

Again, there is no great clarity as to why we would require somebody to consent to prosecute an offence that is not dissimilar to an offence under the Fraud Act or misconduct in public office, yet it probably stops us thinking about the use of it to stem bribery and corruption at the lower levels.

Baroness Foakes: Is it perhaps a hangover from an earlier time when only the Attorney-General could bring a prosecution?

Mike Betts: Most definitely. If you look at the history of the corruption Acts of 1889 and 1906, they all require the Attorney-General's consent. Again, if you want to use legislation effectively, it needs to be accessible to the practitioners, and requiring that second layer of authority is self-limiting and quite unusual.

Again, in the training on this topic, why one needs consent before a prosecution can be brought is a debatable point. For practitioners, as the commander said, it raises a barrier with regard to the Bribery Act, and, inevitably, overlaying another bureaucratic process makes it difficult to use at lower levels to try to stem bribery and corruption in any community, in any society.

Baroness Foakes: If you were given the opportunity, where would you like to place the authorisation level?

Mike Betts: I would put it where the majority of the legislation that we use puts it, whether that is the proceeds of crime legislation, the Fraud Act, misconduct in public office. We do not require additional consent under those Acts. The file goes to the Crown Prosecution Service, which then decides whether a prosecution should be brought. We do that in other areas of serious criminality. The Bribery Act stands out as something quite different, which is not helpful when training our practitioners to utilise it as a tool that is similar to any other legislation that we might use.

Commander Karen Baxter: That is absolutely right. I would, however, absolutely encourage early intervention by the Crown Prosecution Service. These cases tend to run for a lengthy period of time, into years, as do fraud cases on occasion, and the CPS's assessment at an earlier stage provides greater clarity as to the key lines of inquiry and where the case will go to. When we as police officers have to manage public funds for these cases, there has to be greater clarity about the potential success, the threshold for success, at an earlier stage.

Certainly within the City of London at the moment we have tried to bring in a much more robust assessment as to the likelihood of a case succeeding and engaging much earlier with the CPS. The benefits of that can be seen in other crime areas, such as counterterrorism, major investigations, murder investigations. We owe it to the public to have that collaboration and to understand that, when all of us in the public sector use public funds, we are doing so for the absolutely best outcomes, potentially.

Lord Grabiner: On the authorisation point, is there a distinction between what one might call domestic bribery on the one hand and the bribery of foreign public officials? Might there not be cases where there is a degree of what I might call sensitivity in relation to bribing foreign officials, which as an issue might not exist in a simple domestic case? At the moment, the legislation does not draw that distinction. Is there such a distinction?

Mike Betts: That scenario is absolutely correct. The Section 6 offence, bribing a foreign public official, may require additional thought and consideration. So the answer may lie with Section 6 requiring further scrutiny in order to look at the sensitivities involved in prosecuting such a case.

However, the Section 1 and Section 2 offences are a lot clearer and are similar to other offending that we see in the UK, so because we are turning to alternatives on misconduct in public office, or the Fraud Act, a lot of the offences that we see may attract Sections 1 and 2 of the Bribery Act and are probably not so different from the other cases that we are investigating. That is why requiring a higher level of consent to prosecute is more problematic for us in a domestic scenario. Maybe Section 6 offences would have the additional scrutiny of consent.

So the scenario that you present is absolutely correct: that the dynamics of the different types of bribery may require a slightly different consent regime. Certainly when you see the levels of bribery and corruption in a domestic circumstance, there seems little reason to require the consent. It appears only to be a hindrance to using the legislation more effectively and more widely, as perhaps was envisaged when it was initially passed and became law in the United Kingdom.

Lord Thomas of Gresford: Would that be your answer in relation to bribery of a police officer? Would you equate that with a lesser degree of bribery than bribery of a foreign official?

Commander Karen Baxter: If I may interject, I think we need to be really careful in differentiating. Clearly where there are jurisdictional issues, there are matters of national security, and that broader picture needs to be considered, particularly in relation to the bribery of a foreign official. So there is definitely something on that, and certainly legislation can be altered or refined to reflect it.

You raised the question of the bribery of police officers. Here within the United Kingdom, the impact that that can have on the trust and confidence of the public is, frankly, exactly the same or perhaps even greater. That is my reservation: that you would make a difference between Sections 1, 2, 6 and 7 offences. There is the question of exacerbating conditions, which for me would be a much broader and better approach.

Lord Thomas of Gresford: I am not sure I follow what you are saying.

Commander Karen Baxter: I think there need to be exacerbating conditions. If you look at matters that exacerbate in relation to national security—that is, on a national basis—in some cases the bribery of a foreign official might go completely unnoticed. It might not even make the news or touch the media, and it might have little or no impact on the population of the United Kingdom. Quite often when people hear about the bribery of a police officer, that has an impact, certainly at a local level and potentially at a national level within the United Kingdom. Looking at one case as against another, I do not think it is as clear as it could be. If we are prosecuting a foreign official, there are other, broader issues, such as critical national security, that need to be considered.

Lord Thomas of Gresford: I recall a case of bribery of someone in a foreign bank based in the City of London which enabled people to come from Holland, break into all the codes and steal millions—I cannot remember precisely how much, but I think it was about £40 million— which was sent all round the world within a very short period of time. I do not know whether you are familiar with that.

Commander Karen Baxter: I am not.

Lord Thomas of Gresford: It was some time ago. Bribing someone to get access to computer codes is as serious as bribing a foreign official.

Commander Karen Baxter: Therefore, saying that authorisations are needed in this part of the offence but not in another might be a bit of a blunt tool. It is more a question of considering exacerbating conditions and taking a more refined approach.

Lord Grabiner: On the police officer case—I am putting words into your mouth, and I would not dream of doing that—I think you are basically saying that in your view it is not necessary for there to be an authorisation to pursue a police officer for bribery.

Commander Karen Baxter: No, I do not say that there should be any authorisation. I think that case should be prosecuted. The impact locally on the public can be significant, as they place a lot of trust in policing.

Lord Grabiner: But if you are talking about a case in relation to some foreign Government, there might be some perceived sensitivity in relation to it, and that might well justify a senior authorisation.

Commander Karen Baxter: It is not so much about the perceived sensitivity; it is about the national security risk for the country, and I think that needs to be considered more on occasion.

Lord Gold: May I clarify one point with you, Commander Baxter? You said a little earlier that in certain cases you would like the Crown Prosecution Service to come in at an earlier stage. Is there some constraint on that happening now?

Commander Karen Baxter: No, but I am thinking about good practice. When there is a requirement for the DPP and the SFO to have that authorisation, it means that a process of engagement is built into the investigation. Having learned from other parts of crime investigation, we definitely see the benefits of engagement with the CPS at the earliest opportunity, particularly with complex cases. These cases tend to be extremely complex, with jurisdictional issues and other matters.

Lord Gold: I understand that, but my question is whether you are prevented now from bringing in the Crown Prosecution Service.

Commander Karen Baxter: No, we are not prevented from doing that. It is more that we should actively progress that type of intervention at the earliest opportunity in the engagement.

Lord Gold: You could authorise or instruct people to do that now, could you not?

Commander Karen Baxter: We could, but there is no national lead force. However, we can encourage it across 43 forces. We have not mandated for it as a system in policing, but in any complex investigation we would encourage engagement at the earliest opportunity.

The Chairman: That brings us to the third question.

Q107 **Lord Gold:** What mechanisms do UK law enforcement agencies, such as the City of London Police and the SFO, currently have for sharing information or intelligence in respect of suspected bribery, and could these be improved? We know that the OECD's phase 4 report mentions certain mechanisms. We have been told about the Joint Financial Analysis Centre and the Bribery Intelligence Clearing House. It would be helpful to have a little more information from you about what these bodies do and whether they are effective.

The Chairman: We could probably combine this question with the fourth question, which Lord Haskel will put, because it raises many of the same points.

Q108 **Lord Haskel:** In the City of London Police's written evidence, it was suggested that a central reporting mechanism for bribery should be considered and that it should have an "analytical capability" to help to

detect the early signs of corrupt conduct. What should this look like in practice? Could it be modelled on Action Fraud, for example?

Commander Karen Baxter: To answer both questions and give you some clarity, Mike will start with the JFAC and I will then come back to the National Economic Crime Centre and the Action Fraud question. I will hand over to Mike for the first part of the question.

Mike Betts: Currently, intelligence sharing on bribery-related matters takes place primarily between the National Crime Agency and the Serious Fraud Office, as well as other partners of Five Eyes—Australia, Canada and the like. They have an international bribery task force which is part of that intelligence sharing. The issue is primarily international bribery. The OECD inspects the United Kingdom, looking very much at international bribery. A lot of the focus that we see and a lot of the conversations relate to UK businesses and UK nationals overseas— internationally.

The intelligence sharing between the agencies that I described previously is concerned primarily with international aspects of bribery and corruption. The missing aspect is domestic corruption. Within policing we do not have any effective mechanisms for sharing intelligence about bribery beyond those that exist for other areas of criminality, where the Police National Computer would normally be used. So there is no domestic sharing of intelligence on bribery that involves UK policing beyond making contributions where there might be an international flavour. The international aspects of countering bribery for the UK are fairly well catered for in my experience, but the domestic picture is unknown to us.

We have a really good view on a daily basis on how fraud is being perpetrated in the United Kingdom: where the threats are, where the risk is and where the harm lies. In relation to bribery, we do not currently have that picture, because, as Commander Baxter has described, we have no lead agency within policing to look at the domestic picture, so there lies our intelligence gap. We are also very victim-focused.

In relation to bribery, we usually have suspicions about the suspects, but we do not know what crime has been committed, so the investigative mindset is quite different. We have allegations relating to individuals, but we do not know what crime is being committed. That is quite contrary to the way that we would normally investigate crime in the police service. We would have a victim, report the crime and the investigation would commence.

We potentially have a lot of intelligence around the United Kingdom on domestic corruption, but it is not particularly harnessed in a way that any one police force can see it and tap into it. I would say that the existing mechanisms are effective. They deal primarily with international corruption, and we have responded well to the OECD and to the scrutiny of how we do business internationally.

Domestically, the picture has not been articulated particularly well. The spotlight has not been on what happens within the United Kingdom and

our response to it. One might say that that allows the growth of corrupt activity, as we are not really focusing on those aspects. We do not have a system similar to what we have for fraud. Fraud is well catered for: we see the national picture, we gather the intelligence, we build our packages and we commence the investigations. In relation to bribery, we do not currently have that capability.

Lord Gold: If one were to try to create the right environment, as you have described, for fraud, would that require legislation or would it just require someone pulling it together and doing it, maybe in the Home Office? I am not quite sure.

Commander Karen Baxter: It is probably worth discussing the National Economic Crime Centre, which is due to be launched at the end of the month. I mention that at this point, because a number of the issues that Mike has identified have already been identified in relation to fraud and economic crime more broadly.

The impetus behind the National Economic Crime Centre is that it will harness the assets, legislation and powers available to a range of public sector investigative bodies, including the SFO, the Financial Conduct Authority, the police and HMRC. By bringing all those together and harnessing them, there would be a better response, particularly to higher-risk fraud. For example, we would hope that the highest-risk frauds would be dealt with and considered within that domain.

The NECC would not, however, consider the lower-risk types of fraud investigations. Each agency involved in the NECC is responsible for overseeing that type of investigation through. The NECC will, to some degree, look at the high-end domestic aspects of fraud investigations. Whether it would take in bribery and corruption has to be considered. That is about public interest by default: if there was a case of high public interest, it may well come within the NECC's responsibility.

Beyond that, as Mike says, there are no central conduits for the intelligence checks. It has been identified that we are probably not considering linked incidents by one offender or a small group of offenders. That is certainly why the NECC has been established. At the moment, it is provided with analytical support and data exploitation. Those are built into that process, which will assist in better understanding fraud. I suggest that, to some degree, we will be able to avail ourselves of that understanding when it comes to bribery and corruption.

We have learned much from being the lead force on Action Fraud. We certainly have a better understanding of the risks and issues. From the database, we now have a better understanding of the main types of fraud that occur. As a result, if we apply the same principles, we may also be better able to understand bribery and corruption. On Action Fraud, we do not just provide a pursue—that is, an arrest—option, we also look at how we prevent, how we protect the public and how we prepare businesses better not to become victims of bribery and corruption. Action Fraud provides a much broader service than just arresting the perpetrators.

Another issue is that this has taken a significant amount of infrastructure, resourcing and investment. A new database has recently been introduced for Action Fraud, which has been a terrific investment. When we recently looked at bribery and corruption, we made an application through the Home Office for around £1.2 million to extend the Action Fraud database and reporting mechanisms to include bribery and corruption.

Unfortunately, that was not successful. It was aimed at providing a phone and web reporting mechanism, which would have provided an additional triage and analysis service. That would have helped us to provide a national investigative response—a small response of probably around seven people, but a response nevertheless to the domestic aspect of bribery and corruption. It would have allowed us, and could allow us in the future if the finance were there, to have a small unit with specialist training and expertise. It would allow us potentially to lift the standards across the entire police service of the United Kingdom.

We are currently the lead force for fraud, but we do not have that role for bribery and corruption. However, we provide a significant amount of support, peer review and sharing of good practice around fraud. It is not a perfect system, but it helps other parts of the police service to lift their overall standard of investigation. If that were applied to bribery and corruption, there is no reason why we could not implement it and have the same types of outcomes, but there is a need for infrastructure, investment and resourcing.

Lord Haskel: You mentioned the database. Would most of the investment be for that?

Commander Karen Baxter: I will speak slightly in conceptual terms. The database that we have is very much around Action Fraud at the moment. We would need to consider how it could be adapted to cover bribery and corruption. Those issues are all surmountable—we can deal with them—but it is not just about the database. A key issue, as you pointed out, is the analytical interpretation of data. We have high levels of data within Action Fraud. I believe that could be refined to give us some technological solutions.

The key strength of all that is understanding the strategic threat of bribery and corruption to the United Kingdom and, equally important, identifying the tactical targets who need to be proactively pursued for arrest and prosecution. Both of those are completely reliant on analysis. Therefore, it is not just about the database; it encompasses the response to and the analysis of the information and data.

Lord Haskel: Is analysing the data part of the training that you give?

Mike Betts: Yes. The purpose of the City of London Police Economic Crime Academy is to take data from Action Fraud, so that we can see the typologies of frauds and how the offenders perpetrate their crimes and so that we can learn from the operation investigation teams and put that into learning products.

We want to learn quickly from what we see in the national picture and the national threats to make sure that the response is as effective as it can be, particularly because fraudsters change the typologies regularly, to seek out weaknesses within systems and processes. This is why the City of London Police are unique in having intelligence-gathering capability, the operation and investigation teams and the Economic Crime Academy.

As the commander said, we focus very much on prevention and protecting society in the economic crime sense. We build in prevention and detection based on what we see from what is reported through to Action Fraud and then from the analytical work that is done to see where the hotspots are and how we can educate communities about the threat. That absolutely goes into the training products as soon as we have the information.

Lord Haskel: We are all learning in that area.

Mike Betts: Absolutely. It is a quickly changing picture. Bribery, particularly the Bribery Act, has a bit of an identity issue, because it has not been pushed down to the lower echelons to be used as a practical tool by all those conducting police investigations. That is demonstrated in the figures on misconduct in public office. If we analysed those figures, I am sure that some would come under the Bribery Act. There is a lack of accessibility for policing practitioners, because of the nature of the consent regime and the focus on grand international corruption, rather than the everyday corruption that you might see in society.

Q109 **Lord Grabiner:** The decision has been taken to move responsibility for mid-level foreign bribery cases from the City of London Police to the NCA. Has this been a success? Have the City of London Police retained any responsibility for foreign bribery cases?

Commander Karen Baxter: I will answer the second question first. The City of London will complete the remaining cases. There is a wind-down arrangement and we will see sole investigations in March 2019.

Revisiting what I said earlier, when we previously handled overseas anticorruption there was a high volume of cases that resulted in a higher number of officers being repeatedly tested within the legislation and exposure to court. There was a high level of learning. Unfortunately, with the decrease in the volume, that level of learning has diminished for us. For example, beforehand we had 13 officers involved in those types of investigations; now we have two. That is simply as a result of the demand moving elsewhere and we will appropriately resource it. The unfortunate consequence of that has been that it has not been a success for us for maintaining that high level of expertise.

One of the other issues is that we have developed very strong relationships with partners in more than 30 countries and we enjoyed a high level of success. In losing that we have also lost to some degree that expertise and engagement on a global capacity and unfortunately the learning from other jurisdictions.

Another issue is that in some respects, as Mike has clearly articulated, we have a difference between domestic corruption and the international level of corruption. There appear to be two different responses at a UK level in understanding the information and the intelligence.

Arguably for us in policing, having two different systems has reduced the level of information and understanding at an international level, which has an impact at a local level on domestic corruption. It has diminished our expertise, and probably diminished our understanding to some degree, because of the linkages abroad. Many of the suspects abroad will be British and will have those links to that domestic aspect of the economy. In simple terms, for us it is not perceived to be a success in policing terms, but on the broader level the NCA has taken that forward and it is probably something that it would have a view on and that you might wish to address with it.

Lord Grabiner: So it might have acquired the expertise that you have lost, so to speak?

Commander Karen Baxter: Exactly. It has taken on that volume and it might have acquired that. I believe that the Economic Crime Academy has trained the NCA officers in investigative skills. We continue to provide that training elsewhere across the globe. I stress that, in policing terms, we have not seen it as a success. That loss might have been lifted elsewhere, but that would be a matter for the NCA to comment on.

Mike Betts: We are currently engaged with the National Crime Agency to deliver its bribery and corruption investigation training. We try to work closely with it and to learn from its operational experience to bridge the gap relating to building that capacity and capability. We own that mandate under the *UK Anti-Corruption Plan*, so we have the mandate for delivering the law enforcement training relating to policing. We also offer that to the National Crime Agency. We have carried on with that commitment to share best practice on how to investigate bribery and corruption to the best effect..

Q110 **Lord Thomas of Gresford:** The City of London Police observed in its written evidence that the dissolution of companies and the transfer of assets prior to a company self-reporting bribery or to the conclusion of an investigation is being used as a strategy to avoid punishment under Section 7 prosecutions. How commonplace is this and what can be done to prevent it?

Commander Karen Baxter: This comment might, on reflection, not be entirely accurate. When this was written there was quite a high-profile case in court that was subject to significant media attention. Therefore, what was written was more a response to the perception of the discussion ongoing at the time.

It is one case, so I would be reluctant to say that it is a trend, but it certainly generated some significant media discussion on the capacity of the company to move assets or to move or close part of or all of the business

prior to a self-referral. When that happens, because the company in that case no longer exists it is very difficult to recover any of the assets and therefore return them to the victim. For clarity, it was one case. At that time, it seemed to be playing out quite a bit. That has not been seen to be repeated at this stage.

Lord Thomas of Gresford: This was the Skansen case.

Commander Karen Baxter: Yes it was.

Lord Thomas of Gresford: Was any attempt made to freeze its assets or to prevent transfer of funds?

Commander Karen Baxter: Yes. I can get you further information specifically on the Skansen case, but as far as I am aware steps were taken in response, as you suggest. Unfortunately, there was no capacity to recover outstanding assets, but I can certainly supply the details to the Committee.

Lord Thomas of Gresford: Would it be an early move in an investigation to freeze assets in a bribery case?

Commander Karen Baxter: One of the issues here, which was discussed in response to one of the other questions, is that there is a difficulty in understanding exactly where the information is held in a company and then how to access that information without tipping off the company. It has to be done in a way so that we can apply for warrants and get those assets frozen. That is one of the critical challenges with bribery and corruption, as with all covert investigations. That balance is tricky.

We also need significant legal assistance in the specialist area of application to the court. If we get it wrong or it is completely inaccurate, regardless of how the investigation plays out we have a company whose share value and reputation will be affected if we get that wrong. Therefore there is a real need to get it right in the first instance before we even get to the doors of a court. Mike might have something further from the practitioners' side.

Mike Betts: We have learned from this experience in the investigative mindset and training. We are trying to work with Companies House and the government agencies responsible to try to stop companies dissolving if we think it might happen. We are working more closely with partners in government. This is the value of the educational piece and being able to learn from cases we see. It is now embedded in our training to say, "Actually, this might be a tactic the company could use and these are the methods that you might consider to stop that happening".

There is early engagement with Companies House and with BEIS to try to talk to investigators and say that we think something might be happening, so could they support us to try to stop the dissipation of assets relating to the company. For an individual we will always think about asset confiscation and restraint at the earliest opportunity if we think they are going to dissipate their assets.

Lord Thomas of Gresford: But your investigation has to reach a certain level before you do that.

Mike Betts: Yes. The difficulty that one described around commercial organisations is that we never know whether it is a bad apple or the barrel is bad. The approach into the companies can be somewhat difficult, because we want to work with the commercial organisations. We want them to demonstrate adequate procedures and to isolate individuals who have undertaken the corrupt activity, if possible, but approaching the companies can be difficult until we know that they have adequate procedures in place.

Ascertaining what their adequate procedures look like is very chicken and egg. The approach to the commercial organisations has to have a lot of consideration, because we do not want to treat them as a witness if they could be a suspect. It takes a lot of consideration of their particular status. The Section 7 offence uniquely brings this difficulty to policing when it comes to treating the commercial organisation. Do they have enough to stop the bribe being paid or not? Again, that can be an interesting area of investigation for us in that context.

We learn from our experience. It demonstrates how we in policing try to deal with fraud: we take the learning, put it into our training and educate our investigators. For bribery, we have learned from the inquiries that we have seen, but we have been cut off from the domestic picture to a degree. The legislation is not accessible for the volume of priority bribery and corruption we see domestically, rather than more serious or complex cases.

The Chairman: It seems that you have largely answered question 7. We are running a little shorter time, so if you have anything further that you would like to add on that question, do so when you have had a look at the transcript.

Finally, it would be of enormous help to us, because we are receiving quite a lot of evidence, if you could respond to the transcript with any corrections, amplification or additions as soon as you can.

It therefore remains to say thank you very much indeed, both of you, for what I personally regard as extremely valuable evidence.

Hannah von Dadelszen and Mark Steward – Oral evidence (QQ 112-118)

Tuesday 23 October 2018

11.40 am

[Watch the meeting](#)

Members present: Lord Saville of Newdigate (Chairman); Baroness Fookes; Lord Gold; Lord Grabiner; Lord Haskel; Baroness Primarolo; Lord Stunell; Lord Thomas of Gresford.

Evidence Session No. 11

Heard in Public

Questions 112 -118

Examination of witnesses

Hannah von Dadelszen and Mark Steward.

The Chairman: On behalf of the Committee, I welcome you. We are grateful to you for sparing the time to assist us in our inquiry into the efficacy of the Bribery Act 2010.

There are one or two administrative points. The inquiry is open to the public, broadcast live and available subsequently on the Parliament website. A verbatim transcript will be made of your evidence, which will be put on to the Parliament website. It will be sent to you within a few days to check, not just for any corrections that you may wish to make but for any amplification of the evidence you have given or indeed for any further points that you wish to emphasise or make to the Committee.

We of course know who you are, but for the purposes of the transcript I would be grateful if each of you in turn could explain your position and role.

Hannah von Dadelszen: I am head of fraud at the Serious Fraud Office. In effect, that means that I am head of an operational division. I am a lawyer by profession and I have a background in bribery and corruption and in fraud prosecutions and investigations.

Mark Steward: I am the executive director of enforcement and market oversight at the FCA. I am also a lawyer, for what that is worth.

The Chairman: Thank you very much. You have received the list of questions. In giving your answers, do not necessarily be confined to answering the question, but please make any points that you think it important for the Committee to hear.

I will ask the first question. What are the respective roles of the SFO and the FCA with respect to enforcement of the Bribery Act? Has Section 7 made a difference to the SFO's ability to prosecute companies?

Hannah von Dadelszen: I will give an answer, and perhaps Mark will jump in at the conclusion.

The SFO, of course, has a significant role in the investigation and prosecution of offences under the Bribery Act. We engage the Act when we get information that gives us cause to suspect that offending has taken place. We then embark upon an investigation, and under the head of our office we can also progress the prosecution.

On the effectiveness of Section 7, it is certainly my view that Section 7 has made a huge difference to our ability to prosecute these types of offences efficiently. I have been at the office for over 10 years, and during that period I have seen a huge increase in the bandwidth that we have with corporates.

In times gone by, we did not really have the type of engagement with them that we have now. That is a very good thing for us, and for the City and country more broadly. In effect, it is incentivising good corporate governance. That must be one of the most significant aims of this piece of legislation, and I see it happening.

The Chairman: How many cases of bribery are currently active?

Hannah von Dadelszen: At the moment, the office has roughly 70 cases on its books. About half of those are bribery and corruption cases. Of course, there is some crossover, because where one finds bribery there is often fraud, and vice versa. But it is roughly a half and half split.

The Chairman: What is the ratio of individual cases and corporate cases?

Hannah von Dadelszen: I do not have the exact figures with me. Obviously we are predominantly there to deal with serious and complex casework, so a lot of the cases that land on our books are corporate cases. A significant number of our bribery and corruption investigations are into corporates. At the same time, this can incorporate investigations into individuals, because we need to look at the conduct of individuals for the corporate liability to flow thereafter.

The Chairman: Has the Bribery Act increased the number of reports you get on bribery?

Hannah von Dadelszen: I absolutely think it has had a huge effect in increasing that number. The whole idea behind the Bribery Act was that corporates would be motivated to look after their own houses, and that where they discovered wrongdoing they would then be incentivised to come forward and talk to us.

Of course, we have the deferred prosecution agreement regime, which has complemented the various sections of the Bribery Act. I am very comfortable with the scheme that the Bribery Act has given us, and I am comfortable with the premise that it has improved the ability of prosecutor and investigator to deal with this type of casework.

Mark Steward: First, we are not a prosecutor under the Bribery Act. Our function is quite different from that of the Serious Fraud Office. At the same time, it is complementary.

We are a financial services regulator with obligations to set standards and to supervise and enforce those standards against 56,000 firms in this country. Under the Financial Services and Markets Act, we also have responsibilities to reduce financial crime in our markets by those firms.

From the start, our key function in authorising firms is to make sure that they have sufficient systems and controls in place to ensure that they do not become involved in any kind of financial crime, including bribery and corruption. Our standards are designed to reduce the incidence of financial crime and to prevent it. Those standards also require firms to report any instances of financial crime to us, including bribery and corruption, which we would pass on to the SFO, as well as any instances where their systems and controls may be deficient in preventing such financial crime.

We issue guidance to firms to enable them to design their systems and controls to ensure that they can prevent adequately. Our guidance includes information about governance and management, the assessment of bribery risks, policies and procedures, relationships with third parties and third-party payments, gifts and hospitality, staff recruitment and vetting, training, remuneration structures and the reporting of incidents to us.

Reporting is quite important, because under our principles for business firms are obligated to report things to us, including any bribery or corruption issues that they might come across. We will also take enforcement action in relation to firms that have deficient systems and controls. We have done that on five occasions, most recently in 2015 when we imposed a fine of £72 million on Barclays Bank. We have five investigations on foot that have a bribery or corruption aspect to them.

To give an answer that is a bit like the one that Hannah gave, when you investigate there is often a mixture of circumstances that give rise to concerns. Where there are bribery and corruption issues, there might also be other system and control issues—in particular, money laundering issues. We have over 60 current investigations on foot dealing with money laundering concerns where there might also be a bribery issue, although as yet we do not know.

In a nutshell, those are our functions. We are a regulator with systems and controls in relation to bribery rather than a prosecutor of bribery.

Lord Thomas of Gresford: Do you refer all bribery and corruption or do you deal with some of it yourself?

Mark Steward: We have standing arrangements between ourselves and other agencies, including the NCA, the City of London Police and HMRC, to discuss these matters to ensure that we pick up what we should out of the work that we do. We also have standing arrangements for our staff at the operational level to talk to one another about cases that they are progressing, particularly as circumstances change, and of course we also have very good liaison with the SFO at a senior level, the director level.

Lord Thomas of Gresford: Just to give us some idea, how many cases in the last 12 months would you have referred to the SFO?

Mark Steward: There is referral and there is discussion. We will start something because we have an interest in it to pursue, and it might be an interest that the SFO also wishes to pursue. It is not a case of us giving something up; it is a case of the SFO's prosecution responsibilities and our system and control responsibilities working in a complementary way.

Lord Thomas of Gresford: What are we talking about? Is it 10, 20, 30 or 100 cases?

Mark Steward: It would not be 100, but it would be in the tens.

Lord Haskel: Does part of the guidance that you give to financial services companies ask them to push the guidance along the chain, so that, for instance, banks are encouraged to pass it on to their customers? One thing that we have found is that there is difficulty in getting smaller or medium-sized companies to become aware of the guidance regarding the Bribery Act.

Mark Steward: Our guidance is primarily designed to prevent the firms that regulate becoming involved in any financial crime and preventing financial crime. Clearly, if they spot something happening in other firms that they deal with, we would be very interested in hearing about that. Whether they are able to advocate our guidance to firms that we do not regulate is a matter for them rather than for us. I am not sure that our powers reach that far.

Lord Haskel: Do you encourage that?

Mark Steward: To pick up the point that Hannah made, the climate around the Bribery Act among the firms that we regulate has changed dramatically since the Act was enacted in 2010. So to the extent that the firms that we regulate are fully aware of their responsibilities, are engaged with the guidance that we have issued, are putting systems in place and control the training of their staff, clearly that must have a knock-on effect beyond the borders of those firms. But I am not sure that I can say whether they are actively engaged in and advocate the same controls and systems to firms that they deal with that we do not have any powers to regulate.

Baroness Fookes: Turning to the financing of your respective organisations, are the funding models in place capable of delivering effective enforcement penalties for bribery in the UK and indeed by UK companies abroad? Perhaps you can answer that first and then we will have a look at the core funding issue.

Hannah von Dadelszen: As an office, we have recently had our funding confirmed and consolidated. We now have an annual budget of roughly £53 million. That has been a very effective tool for us because it has secured funding to allow us to plan and develop our casework for the coming years.

As an office, we have never turned down a case because we have not had enough money to deal with it, and I do not anticipate a scenario where that would ever happen. If we did not have sufficient money to progress a case within our existing funding, we would have to go back to the Treasury and lay out the business case for more funding.

I think we are currently sufficiently resourced for the remit that we have and the casework that we do, but that is not to say that there are not other challenges that we have to deal with in the course of planning and prioritising.

Baroness Fookes: There is, of course, a system for asking for extra funds for particularly expensive and difficult cases.

Hannah von Dadelszen: There is, and we have not lost that in the consolidation that we have recently been given. We have still been left with the option to go back to the Treasury for those really big cases, but it has removed the divide that we have traditionally had.

You alluded earlier to blockbuster cases and the more core-funded cases. From the operational perspective of someone who was essentially running the shop floor, it was very difficult to work on what were specifically designed to be blockbuster cases and the core-funded cases. I could not move staff or resources between them. Having one budget makes it enormously easier to use the resources more effectively and efficiently.

Baroness Fookes: I think you have made it clear that you are not influenced by outside sources, but can you confirm that?

Hannah von Dadelszen: Yes. Obviously it is very important that as a prosecutor one is independent of political pressure. One thing that we consider vital to our office is that we retain that independence. That means that we are not an office that is incorporated into another bigger organisation, that we operate as our own being and that we make decisions in accordance with the statutory guidance and our own criteria for case acceptance.

One thing that I suppose would always be at risk if one were to incorporate fraud and bribery investigations into a bigger scheme is that there would inevitably be things that are perhaps perceived as more serious priorities—things that involve risk to life and limb: that is, counterterrorism and other extremely serious criminal cases. If one is looking at using resources, there is always a case to be made that those cases have priority.

On ring-fencing the work of the SFO, we retain the priority within our sphere and within our designated funding model, and we are not at risk of suffering leakage into other areas of very important crime that needs to be resolved.

Baroness Fookes: And you have never come under pressure from, how shall I put it, government sources where something is particularly sensitive?

Hannah von Dadelszen: No, I have not. I have always felt that I have been very supported in casework decisions and taking those decisions independently. The model that we have is that the Attorney-General superintends our office, so the Attorney-General, as an elected Member of Parliament, knows about the work that we are doing but does not make operational decisions on our cases. That enables us to retain the independence that is important as a prosecutor.

The Chairman: Mark Steward, what is the position with the FCA?

Mark Steward: We are funded quite differently from the SFO. We are not taxpayer funded; we are funded by a levy on the firms we regulate. That means that we have a very different funding model. Do we have enough? There is never enough to do all the things that you would like to do, but, yes, broadly speaking we are funded sufficiently to perform the functions we have under the Financial Services and Markets Act.

On cases of enforcement, I mentioned that we have over 60 current investigations involving money laundering. About five have specific bribery or corruption issues to do with systems and controls. That is a significant increase on the numbers of cases dealing with these types of issues compared with previous years. We are taking a very clear stand that we need to do more to ensure that our markets and the firms we regulate are as free from financial crime as possible and that the systems and controls we expect them to have in place are at the highest possible levels.

Baroness Fookes: As you say, your funding is different because it is raised from the companies you operate with or over. Is it up to you what those fees or charges are?

Mark Steward: Yes, with consultation with the industry. They are not set by anyone else.

Lord Haskel: If you have a particularly difficult case, can you ask for more?

Mark Steward: I do not think that it works quite like that, but to reassure you, I do not think that point has ever been reached in history of the organisation.

Lord Grabiner: You mentioned the fees. You also impose, or have the power to impose and on a typical year will impose, significant fines. Do the fines go to the consolidated fund, or do you have recourse to the fine pot, so to speak, as a resource?

Mark Steward: The fines go into the consolidated pot.

Lord Grabiner: Does the consolidated fund go to the Treasury, or does it come back to the FCA?

Mark Steward: It goes to the Treasury.

Lord Grabiner: More's the pity, you would say. So you do not have recourse to any of the fine pot for the purposes of your own funding?

Mark Steward: We do not have direct recourse. There is a mechanism for calculating a kind of payback to reimburse some of the investigation costs that we incur, but all the money goes to the Treasury.

Hannah von Dadelszen: Similarly with the SFO, penalties on DPAs again go to the central Treasury pot. We can recover our costs under those agreements, but they do not come to our fund.

Mark Steward: I should add, just to labour the obvious point, that in setting the fines we impose, the only issue in our minds is ensuring that the fine provides sufficient general deterrence. At no stage in that process do the Government's coffers or our coffers come to play.

Lord Grabiner: As an abundance of caution, I should declare that I am regulated by the FCA because I am a director at Goldman Sachs, although I do not think that you personally regulate me.

The third question is this. The FCA can choose to fine companies based on their conduct with regard to bribery and corruption risks and without recourse to the Bribery Act. How are these decisions taken, and does the FCA co-ordinate these activities with Bribery Act prosecutions pursued by the SFO and other agencies?

Mark Steward: Let me start with the last part of the question first. It is fair to say that in most instances where we have found a deficiency in a firm's systems and controls, be it in relation to bribery and corruption, money laundering or any other aspect of financial crime, there is often no crystallised risk underlying that—actual bribery, corruption or fraud that might have taken place. Sometimes there is, but often there is not.

For us to be able to take action relating to the system or control, all we need to prove is that the system or control is deficient in some material way. We do not need to discover that that has led to some crime being committed. Clearly, where we have systems or controls that give rise to those sorts of criminal offences, we liaise with relevant authorities that might have jurisdiction over those criminal offences themselves and vice versa. For all sorts of crimes, for example, we might have a conversation with the Met, the City of London Police or the SFO to ask: "If you're looking at these people and they're doing such terrible things, who's banking their money?"

That might pose a question that we then ask those firms: "What systems and controls do you have to satisfy yourself that the money you are banking is legitimately sourced and coming from the right place?" So there is a much more nuanced relationship between us and criminal prosecutors on the crystallised risk that might underlie the system or control deficiency.

The first part of your question was about the process for deciding on the fines we impose. We have a fining policy, which is published. It is the result of consultation with the industry and the market, including Goldman Sachs, which was no doubt involved in making submissions relating to that policy.

The policy sets out the process that we follow, which is not dissimilar from the sentencing guidelines that courts now use relating to the imposition of fines without a maximum limit. I will not go through the process, but it is a published policy. We use it. We come up with a number that we think represents a sufficiently general deterrent. It is not specific deterrence; general deterrence is the object of our financial penalties policy. In most cases where the firm is the wrongdoer, the firm will agree to that penalty to take advantage of a 30% discount for—

Lord Grabiner: For a plea of guilty, for want of a better expression.

Mark Steward: It works in the same way as a plea of guilty and it is the same kind of discount that someone would get for a plea of guilty in a criminal court. If that does not happen, the matter is out of my hands and goes to our Regulatory Decisions Committee, which is a sub-committee of the FCA board that is chaired by someone completely separate, with a panel of non-executive employees of the FCA, which then conducts a procedural fairness process with the party concerned over the facts that might be in issue, as well as their consequences, whether they give rise to an offence we can penalise and what the penalty should then be.

So there is a group of people who have custody of that process, and they go through a statutory procedural fairness process. They will also apply our fining policy. That is not necessarily the end of the process. If the affected party is not happy with the outcome, they can seek a full merits review of the decision in the Upper Tribunal, which is an open, court-like tribunal process.

Lord Grabiner: That is very helpful. Thank you. Can you give the Committee a flavour of the strength of your regulatory powers in dealing with a case that might equally have been the subject of a criminal prosecution under the Bribery Act? I suspect the behaviour that might attract that charge could also be behaviour that was the subject of FCA regulation.

We will come to another question this morning with regard to that question. There is some criticism of the FCA possibly not co-operating enough, for example in the eyes of the OECD. I do not want to you to deal with that point at the moment, but can you give us a flavour of the strength of the powers available to you under the legislation for dealing with a case that could otherwise be the subject of a bribery charge.

Mark Steward: Where the firm is the subject of a process, we are able to impose unlimited fines for deficient systems and controls. We are not able to do what the SFO can do, which is actually to prosecute bribery under the Bribery Act. So there are two very different things.

To an extent, there is potentially an overlap, because if the SFO was to prosecute, the firm would have a defence of adequate procedures under Section 7 of the Bribery Act. Those adequate procedures would no doubt be the same systems and controls that we have jurisdiction over. Clearly, in instances where the SFO is dealing with a firm that we regulate, there will be a very high level of interaction between the FCA and the SFO to ensure, first, that our respective investigation processes are not duplicating themselves and, secondly, that there is consensus over decision-making on who does what and when.

Lord Grabiner: And you could deprive a firm of authorisation, and individuals.

Mark Steward: Where the individual is involved, yes, and in a very severe case we could de-authorise the firm.

Lord Grabiner: And that could be applicable both here and, in effect, abroad?

Mark Steward: Yes.

Lord Gold: It is conceivable that the Section 7 defence would apply because the court finds that adequate procedures were in place, but still it falls foul of those regulations that the FCA in effect polices.

Mark Steward: From an academic perspective, that might be the case. The difference between adequate procedures and what we require under our principles, which is reasonable systems and controls, is a very interesting point. In practice, we would work very hard to ensure that we do not end up with outcomes that are embarrassing.

Lord Thomas of Gresford: We have information that in one case you imposed a fine of nearly £7 million. I can understand the process in Scotland, where they have civil penalties to take away the profit that somebody has made through bribery. But you will impose fines simply on inadequate procedures, I gather.

Mark Steward: That is correct.

Lord Thomas of Gresford: Can you give us a broad idea of the principle on which you would fine somebody £6 million and somebody else a rather lesser sum of £315,000?

Mark Steward: I would refer you to the penalty policy that we have in place, which has a number of steps that one takes in order to arrive at a conclusion. Step one will generally involve looking at whether or not the misconduct at issue has given rise to some benefit or profit that needs to be disgorged.

Step two will look at the seriousness of the conduct and will use the relevant income of the business in the period where the misconduct occurred as the denominator, if you like. The percentage of that income becomes the starting point for calculating what the fine should be.

Then there are various other steps that do the sort of thing you would expect a rational fining policy to do: that is, taking aggravating circumstances into account that might require some kind of recognition in the figure as well as taking into account whatever the person may have done that is creditworthy. This should be taken into account in reducing the fine in order to incentivise good behaviour. We see this all the time.

I do not know which case you are referring to, but no doubt a number will have passed through this process. The use of income as a starting point where we do not have relevant profit or benefit is a rational place to start and one that is the result of consultation with the industry as well.

Lord Thomas of Gresford: Does the future viability of the company and the possible loss of jobs come into the calculation of your penalties?

Mark Steward: Our policy countenances the fact that the purpose of the fine is not to bankrupt a company or a person, so the answer is yes.

Hannah von Dadelszen: Those principles are broadly consistent with the corporate sentencing principles within the criminal law. Certainly, when the

SFO deals with criminal cases and potential deferred prosecution agreements, we are always mindful of the concept of disgorgement or confiscation, or the general concept of essentially removing criminal benefit via whatever mechanism is appropriate.

Mark Steward: Perhaps I can add that the principle of imposing fines for significantly deficient systems and controls is designed to create a force field in which firms that we regulate will operate to the highest standards. Systems and controls are designed to prevent the very things that the SFO is set up to prosecute. It is enormously important not to lose sight of the purpose of the systems and controls.

Baroness Primarolo: Perhaps we can pursue the question of co-ordination between the SFO and the FCA.

Successive OECD reports on the UK's implementation of the anti-bribery convention have called for improved co-ordination between the SFO and the FCA, particularly when conducting the bribery and corruption investigations. You have touched on the fact that bribery and corruption comes within financial crime, which is within the remit of the FCA.

Can you tell the Committee, following the phase 3 and now phase 4 criticism, what action has been taken to improve this co-operation?

Mark Steward: Following the phase 3 report, the existing MoU between the FCA, the SFO and other parties—including the NCA, the Crown Prosecution Service and HMRC—was put in place. That MoU was updated again last year. It represents quite a formal mechanism for co-ordination in relation to bribery and corruption matters. But underlying that we have conversations all the time with the SFO across a broad range of matters of mutual interest, both at director level and at staff level, as I have mentioned already.

Both the SFO and the FCA are now partners working with the NCA, HMRC, City of London Police and other police agencies in establishing the National Economic Crime Centre, which is in the process of being established. So some significant steps are being taken. I do not read the phase 4 report of the OECD as criticism. I see it as encouragement that we should always be trying to do more, not that we have not been doing enough. I do not read it that way.

We are doing more, and more will come particularly from initiatives such as the National Economic Crime Centre, which is a very important development.

Baroness Primarolo: But on 16 October, in giving evidence to this Committee, the OECD's representative again reiterated the FCA's "limited engagement"—I am using their words. While I appreciate the point you are making about processes, it is a question of engagement in that active sense. Can you help the Committee?

Mark Steward: It is very difficult to give a sense of engagement, because it is continuous and ongoing all the time. I read the evidence given to you by the witness from the OECD. I will say this about it: those comments were not made to us before the phase 4 report was published. They were

not made to us in the conversations and discussions that we had the OECD prior to the phase 4 report. Those comments were not made in the phase 4 report and they have not been made to us since the phase 4 report was published.

We are writing to the OECD to seek clarification of these comments because they come as some surprise to us right now, given all the information that has been given to the OECD by us, the SFO and the other participants in the OECD phase 4 report process. The fact that these comments are not in the OECD phase 4 report itself is of interest.

I also note that the witness appeared to say that she was not speaking for the OECD, so her comments were her own opinion. They do not appear to represent the OECD's actual view. However, as I said, we will write to the OECD, because these comments came as somewhat of a surprise; they came out of the blue.

The Chairman: Do I gather from all that that you do not accept the comments?

Mark Steward: I do not accept them.

Baroness Primarolo: The comments were made to this Committee. We would quite like to know about any progress you make in clarifying the intention of those comments. That might help the Committee's deliberation.

The Chairman: It would be very helpful if you could keep us informed of any progress in your discussion.

Mark Steward: I will make one comment. We have a terrific relationship with the OECD and it performs a very valuable service. I read its comments in the phase 3 and phase 4 reports, and to an extent my first reaction when I read the evidence that you received was more akin to encouragement to do more rather than criticism. We accept that and have every intention of doing more.

Hannah von Dadelszen: The SFO supports the FCA in the comments Mark is making. We have always had a good relationship and we work closely. There is always room to do more and to do better, and we want to be part of that landscape. We are obviously all now working towards the implementation of the NECC, which becomes live on 31 October. That will provide a whole new mechanism for us to collaborate on these issues.

Lord Grabiner: For my part, the criticism made at the hearing last week did not have much of an impact on me. I did not take it seriously. I would adopt much the same approach that you have just given in your answer. There is one specific point that the OECD's working group on bribery made, which I will ask you to comment on. It said: "the SFO and FSA should conduct coordinated enforcement actions where appropriate" as the "FSA's fines ... may not fully reflect the gravity of the criminality in a case". Could you comment on that?

Hannah von Dadelszen: Perhaps I can comment and Mark might also comment.

If the FCA's and the SFO's actions can take place concurrently, it is not an either/or scenario. We frequently see in the cases we deal with the FCA dealing with one side of it and the SFO dealing with the other. Of course, we are both subject to different regimes and different tests. We are looking at the criminal standard and Mark is looking at different issues relating to conduct. It will sometimes seem as though there are decisions where one party is doing something and the other not.

Why is that the case? There are reasons for it. The dialogue we have means that we generally have a broad sense of the work that the other is undertaking. We attempt to co-ordinate those actions where possible. We will be looking at the criminal side and the regulatory side concurrently.

Mark Steward: I endorse Hannah's comments. An example of what we can achieve working together that occurred in the context not of bribery but of market abuse was the fraud issue at Tesco stores, where the SFO brought a DPA proceeding against the firm and we brought market abuse proceedings relating to investors who had suffered loss or damage.

Lord Grabiner: Is this the auditing point, bringing the profits forward?

Mark Steward: Yes, but that had two effects. First, there was the fraud issue within the firm and, secondly, there was the market issue. We had complementary roles to play and we co-ordinated to ensure that justice was done. On the specific comment to ensure that criminal wrongdoing is effectively expiated and that people are made accountable, we wholeheartedly agree.

Lord Gold: How are decisions taken with regard to who is offered a deferred prosecution agreement? I declare an interest, which is that I have been advising and continue to advise Rolls-Royce. The Committee will be very interested to know why a DPA was offered to Rolls-Royce, although it did not self-report.

Hannah von Dadelszen: There is obviously very complex analysis of the Rolls-Royce case.

If I could address the general question, DPAs are obviously a mechanism made available to us by Parliament. They will not happen in every case, but in appropriate cases they are something that we consider. How do we know what an appropriate case is for a DPA? The guidance provides quite a detailed scheme of structures in respect of which a company can get a DPA. Lots of those behaviours focus on the company's attitude to the investigation.

We hear over and over again talk about co-operation. The decision is never taken lightly or early in an investigation. We need to look at what has happened to determine whether a company is appropriate for a DPA. We do not just get reports from corporates and rubber-stamp them; we will investigate ourselves. We will interview the witnesses and talk to the company regularly. We will ask, "Can you supply us with these documents? Can you supply us with these email contents?" All that conduct can add up

to a picture where we think, "That's a pretty co-operative company. It is trying to make good on the wrongdoing it has uncovered, and we think that a DPA might be a good mechanism because incentivises the good behaviour that we want to see from corporates".

Turning to the limb of your question about how a company can not self-report and still get a DPA, the judge was very specific about the extraordinary co-operation that we received in that instance. I have some figures here, but without referring back to them in detail I think that the company handed over to our office in excess of 250 witness interviews that it had conducted, as well as 40 million documents, and it met with us regularly.

Our requests were onerous and highly annoying, and it met them. You do not see that sort of conduct every day. It did not self-report initially, but since then it has disclosed a lot of material that we would not have uncovered in a perhaps more adversarial forum, and those factors led us to the DPA outcome.

The Chairman: There is a perception among some that, to put it bluntly, DPAs mean that if you are a rich enough company, you can avoid being prosecuted.

Hannah von Dadelszen: It is not about the money; it is about doing justice to the situation. There is certainly no mechanism in the Act or the guidance that says that it is simply a matter of handing over enough money to achieve this particular outcome. We are interested in the corporate's behaviour: how it deals with us and its attitude to criminal wrongdoing. So I certainly would not accept that criticism at all.

The sentencing guidelines, which govern the way the financial penalty is assessed, will take into account the financial status of a company. If it does not have a lot of money, that will be assessed during the DPA. It would not prevent the corporate from receiving a DPA.

Lord Stunell: Just to take that a step further, it is not necessarily a case of whether or not companies are rich; it is a question of whether or not they have complex structures. It might be quite a simple matter to nail a sole trader or a smaller firm but much more complex with a company such as Rolls-Royce.

Hannah von Dadelszen: That is undoubtedly true, but I do not think it is a criticism that can be laid before the DPA regime; it is a criticism of the position as regards corporate criminal liability. Of course, the SFO has long lobbied for a development in the area of corporate criminal liability. Our position has been that we have a very sensible failure-to-prevent offence for bribery under Section 7. That regime has been adopted in a tax arena in that the facilitation of tax evasion carries with it a failure-to-prevent offence both domestically and overseas.

What is the impediment? Why should we not also have that for broader economic crime? For me, as head of an operational division dealing with these issues, that would certainly be a very effective tool in enabling us to

get into some of those corporates and to have with them the dialogue that we are able to have in a bribery or HMRC tax environment.

Lord Stunell: So do you think that there is scope for the Act or perhaps company legislation to be changed so that individuals can be pursued in these cases?

Hannah von Dadelszen: Individuals can already be pursued. I do not think that is particularly the issue. I think we need the failure-to-prevent model that currently exists in Section 7 to apply more broadly to wider economic crime, such as Fraud Act offences, money laundering offences and FISMA offences. That would obviate some of the concerns that this Committee might be feeling about smaller companies experiencing a greater risk of liability than the big companies with interminable structures, which means that we cannot get corporate liability at the highest level.

The Chairman: You have drawn attention to the great assistance given by Rolls-Royce, which of course has a lot of money and many ways of helping you. What about companies that are less well resourced? Do you take that into account?

Hannah von Dadelszen: The Act requires us to do so. The Act, as currently drafted, refers to “adequate procedures”. There is no specific rule about what is adequate, although there is some guidance from the MoJ. Of course, what is adequate for a large multinational company will be completely different from what is adequate for a smaller, one or two person corporate. The short answer is, yes, we absolutely do take the size of the corporate into account.

Lord Grabiner: The other criticism that we have received is, to put it bluntly, that the DPA structure can be used as essentially—for want of a better expression—a soft touch. What do you think about that? It is a slightly different point from the financial resources point.

Hannah von Dadelszen: Yes, I understand the criticism and I have heard it in other forums as well. It is very important that as prosecutors both the SFO and the CPS maintain the integrity of the DPA brand. It should not be watered down and given to companies run by those who are not truly good corporate citizens who have made good on the wrongdoing and are co-operating with the authorities. I can see that if it were used in circumstances where a company had not been forthcoming, that would be a valid criticism, but certainly from my office’s perspective, we have always been very keen to ensure that we give DPAs to the right companies and that we send the right message to the market.

Lord Grabiner: I suppose that you would also rely on the judicial function.

Hannah von Dadelszen: Absolutely. It is not just for us.

Lord Gold: Specifically not speaking of Rolls-Royce, how significant is it in the decision to grant a DPA that there has been a change of material personnel in a company?

Hannah von Dadelszen: Again, it is difficult for me to give a one-size-fits-all answer, but I would have thought that quite a lot of housekeeping in relation to personnel issues would be fairly essential when there had been an endemic culture throughout a company. If particular individuals remained on the board or in other senior positions within the company, that would certainly be something that the SFO would seek to ask questions about and satisfy itself that that was the right thing to happen.

Lord Thomas of Gresford: How does the SFO deal with cases where there is the potential for other jurisdictions also to take action? Does it ensure that individuals or companies are not prosecuted for the same conduct in multiple jurisdictions? What mechanisms does the SFO have for co-ordinating its investigations and prosecutions with other jurisdictions, such as Scotland or the United States?

Hannah von Dadelszen: Almost all our cases have an international element, and that can be one of the criteria that makes a case susceptible to acceptance by us. We have a lot of experience, and I would say that we are actually very effective in our international engagement.

The example I would point the Committee to is Rolls-Royce, where there was a concurrent disposition of the issues relating to conduct in Brazil, the US and the UK. We were able to co-ordinate with those overseas authorities and ensure that everything was dealt with concurrently. For a corporate, that is a very good outcome. A corporate does not want to be fighting different battles in different jurisdictions ad infinitum. Our ability to say that we can engage with those overseas law enforcement agencies and bring everything under one head is a very big carrot for us in bringing in corporates.

The protection of double jeopardy in this country has a long history. We would certainly be very concerned about that if we were looking at exactly the same conduct that had been disposed of overseas. In other jurisdictions, obviously different laws apply. Certainly within the EU, there are currently mechanisms for dealing with potential double jeopardy issues. In our relationships with other countries, there are various treaties and platforms upon which we can raise issues relating to double jeopardy.

Lord Thomas of Gresford: What is the mechanism with the United States, for example? Whom do you talk to? Who takes the decision?

Hannah von Dadelszen: I do not want to give away all the mystique around this sort of thing, but we have a very close working relationship with the DoJ. We will often have discussions, essentially primacy discussions, to decide who might take the lead on certain aspects of the investigation to ensure that we do not infringe on the principle of double jeopardy. There are also primacy provisions within the EU—platforms to ensure that certain countries can take the lead in certain areas.

My experience has been that, although all these formal structures exist and are important, it is also really important that as an office we communicate with other law enforcement agencies and have relationships with them. In the past, we have sent a secondees over to the Singapore Attorney-General's chambers and we have built up a relationship there. We have

also sent secondees out to Sri Lanka to help with its law enforcement mission. We have other similar effective relationships with European countries, and those personal relationships go a long way towards resolving these primacy issues.

The Chairman: That brings us to the end of this session. On behalf of the Committee, I thank you both very much for your most valuable evidence. When you receive the transcript, please make any corrections, amplifications or other points that you wish to make as soon as possible and send them back to us, because we have quite a large amount of evidence to assess. Thank you both very much indeed.

Hannah von Dadelszen: Thank you for the invitation.

Cecilia Müller Torbrand, Mark Jackson and Tim Springett – Oral evidence (QQ 119-126)

Tuesday 30 October 2018

10.30 am

[Watch the meeting](#)

Members present: Lord Saville of Newdigate (The Chairman); Lord Empey; Baroness Fookes; Lord Grabiner; Lord Haskel; Lord Hodgson of Astley Abbots; Lord Hutton of Furness; Baroness Primarolo; Lord Stunell; Lord Thomas of Gresford.

Evidence Session No. 12

Heard in Public

Questions 119 -126

Examination of witnesses

Cecilia Müller Torbrand, Mark Jackson and Tim Springett.

The Chairman: On behalf of the Committee, good morning to you. You will have received a list of Members' relevant interests. The session is open to the public. It is being broadcast live and will subsequently be available on the parliamentary website. When you receive the verbatim transcript of the evidence, please check it for accuracy. At the same time, if you wish to amplify any points or if there is anything new that occurs to you, please feel free to add them to the transcript. All I ask is that if you could do that as soon as possible, that would be helpful, because we are receiving a lot of evidence. Although members of the Committee are well aware of your various backgrounds, for the sake of the transcript would you explain briefly your position and relevant interest in the subject matter of this inquiry?

Mark Jackson: I am the CEO of the Baltic Exchange, which is a long-standing City institution. We are primarily a membership organisation. We currently have about 650 corporate members and around 2,650 members, and that membership is now international. It used to be just London and UK-based, but our global footprint has been growing over the past 10 years, pushing out into Asia and South America.

On the membership side of things, we provide guidance to our members on the commercial aspects of shipping. We are very much about the commercial impact of regulation and trading practices. We do not set the regulations, although occasionally we lobby on them. Rather, we are very much about trying to translate them into the costs that our members have to bear. We have a Baltic code of practice, which has built up over the years. We are also a benchmark administrator, so we formally collect prices and publish them in indices. There is also a futures market where futures are traded and settled against those indices.

Cecilia Müller Torbrand: I am a director of the Maritime Anti-Corruption Network, which is a global network that has been operating since 2011. We have over 100 companies globally, taking up the fight against corruption in the maritime industry. Companies are members of our network. We have various ship owners, port agents and cargo owners to ensure that we capture the entire value chain in tackling corruption.

Tim Springett: Good morning. I am the policy director at the UK Chamber of Shipping with particular responsibility for employment and legal matters. The UK Chamber of Shipping is the national trade association for companies that own and manage ships and which are based in the UK or have a UK presence, along with other organisations that support our overall aims.

We currently have a membership of around 150 companies, of which approximately half are ship owners and ship managers. We lobby on behalf of the industry and provide advice both collectively and individually to our members. On this particular issue, we have produced a publication entitled *The Bribery Act 2010: Practical Guidance for the UK Shipping Industry*.

The Chairman: Thank you. You have been sent a list of questions that we will put to you in turn. However, I should emphasise that you are in no way confined to the subject matter of the questions if there are other points that you wish to make during the course of giving your evidence.

Seven years after the Bribery Act came into force, how often do you think British exporters have encountered bribery in their day-to-day operations within the UK and overseas? Have UK exporters and their subcontractors developed effective anti-bribery policies as a result of the Bribery Act?

Tim Springett: It depends on what we call bribery. If we are talking about classic bribery, which is UK shipping companies offering inducements to obtain business, we make it clear in our guidance document and in all our pronouncements that that is not acceptable and that it is a clear breach not only of the Bribery Act but of the anti-bribery laws that preceded it.

If, on the other hand, we are referring to the types of payments and gifts that are routinely demanded of ships in certain parts of the world, often accompanied by menaces, it depends on the areas where particular ships are operating. All sectors of the shipping industry are represented at the UK Chamber of Shipping. Some domestic craft such as cross-Channel ferries practically never encounter such demands, while others that trade worldwide, particularly in corruption hotspots, will face it on a routine basis.

Mark Jackson: I can confirm the high-level view on this. It is exactly these facilitation payments which have been the main problem that is encountered almost every day. At the beginning, it was a problem for companies trying to work out how they were going to deal with these, because it was putting them at a commercial disadvantage.

The biggest thing that moved away in certain of the hotspots was the large payments of circa \$20,000, \$30,000 or even \$40,000, which could buy your place in the queue. You might get ahead and queue-jump by paying. Those disappeared very quickly. Over three years, we saw people back away from them, and in fact the industry welcomed that. It did not like

paying them in the first place. It was hard for a company to tackle the issue on its own.

Now, as a collective group, there is a much bigger voice. The smaller, low-level payments of less than \$1,000, along with cartons of cigarettes and alcohol, have been harder to deal with, but I would say that predominantly there is zero tolerance on that side of things, especially as Europe came into line. The UK was exporting in a gold-plated way and observing how things should be done, and slowly people have started to follow that.

I will hand over to Cecilia on the problems that arise in enforcement and that side of things.

Cecilia Müller Torbrand: It is important to start off on a positive note. Some 90% of all cargo today is transported on ships. The maritime industry is an enabler of the world's trade. However, before going into the specifics, it is also important to say that most people can agree that corruption is bad. I would not say that everyone agrees, because if that were the case we would have no corruption.

However, corruption means different things to different people. I am talking about the risk of corruption. For a big multinational, the corruption risk may be operational as well meaning the risk of investigation, prosecution and so on under the UK Bribery Act and other legislation. For Governments, it can mean a hindrance to social and economic development. There are trade-offs to call. It is difficult for small and medium-sized companies to get their cargo out and to expand their business internationally.

For many small and medium-sized companies, corruption today, especially for shipping, is really about the well-being of the seafarer. In some parts of the world, seafarers globally face this problem 24/7. We are seeing threats and harassment, so corruption is still very much out there in countries that are prone to it.

These small and medium-sized companies are not focused on the UK Bribery Act itself; they are focused on what corruption risks mean for their business and for the seafarers who are out there. Examples can include multiple government officials coming on board several times a night, doing checks hour after hour on the nuts and bolts of the vessel, which means that they can stay on board for a long time until they allegedly find something. That is one part of the problem.

The other part of the problem is exactly as the gentlemen have put to you today: the integrated tradition of gifts and hospitality—what we call facilitation payments. That is still very embedded in many cultures today.

MACN has an anonymous incident reporting mechanism whereby a company, whether it is a member or not a member, can report a corrupt demand. We only document what was demanded and the type of official who demanded it, and since we started we have collected reports on more than 25,000 corrupt demands being made at ports to shipping companies globally. Set against the 20 million port calls made by the shipping industry in a year, that is just the tip of the iceberg, but it still speaks to the fact

that this is still very much a problem faced by shipping companies across the globe.

The Chairman: Would any of you put forward the idea that there should be some exception to the Bribery Act for what would generally be described as facilitation payments: that is, payments made to get somebody to do what that person should be doing anyway? Would you be in favour of any such exception?

Mark Jackson: Certainly for our membership, it is one thing that people skirt around, because it has taken a while to embed into the culture that this is what they are trying to achieve. Some of the cases that have been highlighted are more about a ransom. You are not actively setting out to do this; you, or the crew, are being held to ransom over it. It is about that sort of participation.

At a low level, it would make people's lives a lot easier if there was some guidance. I think the American military says that it is \$50 a year for a particular supplier. That is extremely small, but certain guidance would be useful on what a small amount is, recognising that it is a token, almost like a bonus for good work rather than actually requiring it. From the Baltic Exchange's perspective, we are certainly not championing this. It is more that these are comments that we have received from some of our members.

Tim Springett: I largely agree. There are different types of facilitation payments. There is the one that one might pay in order to jump a queue; perhaps one has a cargo of perishable produce and there is value in getting clearance more quickly.

What the shipping industry routinely faces is demands that are more akin to blackmail than to facilitation. The definition of bribery in the Bribery Act is that it is an inducement to someone, such as a public official, to act improperly. The improper act is actually the demand that is placed on the ship's master, often accompanied by the threat, implicit or explicit, of, at the very least, a delay to the ship, or, at worst, a large fine being imposed, or the failure to perform a function, such as handling the ship's ropes, which can put the ship in danger. If the ship is in danger, the crew and the cargo are in danger.

The problem that we had in putting the guidance together—we wanted to give our members as much comfort as we could—was that the furthest we could go was to say, "Follow the procedures that we've laid down here. Try to avoid acceding to the demand. If there's really no way of avoiding it, record it and report it". But we could never get to the stage where we could say, "If you do all this, you won't be prosecuted". The possibility of prosecution is always there, and the most we could do was to say, "In our view, the chances of a prosecution being considered to be in the public interest are so small as to be, as near as damn it, ignorable"—if that is a word.

It is not so much a change in the law that is required as some sort of guidance or practice statement that acknowledges that this is a problem

that needs to be tackled with long-term, concerted, collective action over a considerable period of time. Putting the fear of prosecution on to ships' masters, who have quite enough to worry about in any case, is not a proper response by itself. It needs to be accompanied by something else in order to give them that degree of comfort.

Lord Thomas of Gresford: You have not suggested that there is a practice of a shipping company offering inducements to exporters or importers to choose their particular line as opposed to somebody else. Can we put that to one side, or does that happen?

Mark Jackson: I would certainly put it to one side. It tended to happen historically in securing long-term contracts. A lot of commodities are now moving into more index-based, more transparent pricing, and the transparency that is available on the pricing makes it harder for that type of thing to happen. Before, that type of payment could be bundled into the lump-sum costs, and it was hard to determine what the payments were for. Today, there are a lot more benchmarks and transparency, on everything from how much it costs, to running your ships, to crew costs. That type of information has flushed it out.

In general, the change in the law was the biggest impetus with regard to this type of practice, which was already dying out anyway. As I said before with regard to the smaller payments, people did not like having to make them; they did not like having to go into some sort of auction outside the core trade anyway. Once there was an Act that allowed you to say, "Right. I'm now complying", it made it a lot easier for people to change.

Lord Hutton of Furness: You have all described a pretty grim scenario in which facilitation payments, corruption, extortion are widespread in the shipping industry.

Mark Jackson: In certain hotspots, yes.

Lord Hutton of Furness: But that is where the ships go to, is it not? So it is a pretty corrupt industry. We have had very clear legislation on the statute book for many years in the UK that makes it unlawful to make facilitation payments. Do you think the legislation has had any impact at all on this corrupt practice across the industry, and are you aware of any UK companies that have been prosecuted under the Bribery Act for making facilitation payments?

Cecilia Müller Torbrand: I would like to reflect on the UK Bribery Act implication, and respond to the question about how the legislation is set up, which speaks to both your questions.

It is very important to remember that the UK Bribery Act is not unique. Facilitation payments are illegal in most parts of the world, so it is not as if the legal framework is any different from what we see globally. What has been important in the development of the UK Bribery Act and how it has been enforced has been the UK Government's focus and communication: "This is a very strict. We're going to enforce, we are going to prosecute companies". That was the big difference between the UK and other countries, where there is legislation but it might not be as strictly enforced.

That is a very important element not to forget, because companies were adhering to anti-corruption compliance programmes way before the UK Bribery Act entered into force.

It is also important to recognise how shipping operates. Shipping is heavily regulated through international laws set up by the International Maritime Organization, which are implemented at the national level. By their nature, when ships go into ports there are multiple interactions with government officials. Ships have to pass through immigration authorities, health authorities and environmental authorities. Shipping is global and operates in many different jurisdictions. There are multiple government interactions and its operation is widely dispersed. Compared to some companies that might have their management on site, a shipping company may call in at one country at one point but two days later call into another country. Having unified regulation is therefore really important for shipping. Thirdly, shipping captains are very much alone. The head of operations may be a long way away from the captain who actually has to stand their ground.

It is not necessary to focus only on the enforcement of the UK Bribery Act; it is equally important to look at the support that we can give to seafarers, not only in what companies can provide but in what Governments can do. Hand in hand with the continuing enforcement of the UK Bribery Act, it is really important that we also see government support. That still tends to be a very sensitive issue.

MACN operates by helping companies to get on board with their anti-corruption compliance programmes by giving them tools that are fit for purpose and providing best practice on how to fight demands. Companies do an amazing job. They set up placards, they refer to the head of legal support, they instruct their captains on the different tips and tricks. There can be two people on board wearing uniforms and they might even remove the chairs when government officials come on board. There is a lot of good action and best practice out there.

Lord Hutton of Furness: The situation you are describing seems to be one in which the legislation that we have enacted here in the UK seems, in your words, to be almost irrelevant to solving the problem of facilitation payments if it can be tackled by other means. You are quite right to say that we have had legislation for decades to deal with the problem, but we are still confronting it on a daily basis in most parts of the world where British ships are travelling.

Am I right in assuming that the solution to this problem does not lie primarily in the legislative route, but rather through other means and measures that are more within the control of the companies themselves? There is no really established culture within the shipping industry for tackling corruption. If there was, we would not be describing this problem.

Tim Springett: That is developing. It cannot be denied that the Bribery Act 2010 concentrated minds. We have had concerned members calling us for advice. Cecilia will tell you about that when the MACN was being established. I think it was in response to the UK Bribery Act, or does it predate that?

Cecilia Müller Torbrand: We have to bear in mind that the world has not changed just because the UK Bribery Act has entered into force. Corruption is out there every day and affects many businesses, not only shipping.

Coming back to the issue of support and why it is so important to have many different elements for tackling corruption, the intention behind the Act was to combat corruption, and that intention needs to be supported by other measures. One element is, of course, to work with the private sector to make sure that we push operators into implementing anti-corruption programmes and performing better. They must tackle the demands and take up the fight against corruption. Legislation, with its threat of investigation and prosecution, is one tool, but there are others.

Seven years on, we still see the support of the UK Government missing. MACN takes up discussions with Governments where we see corruption. We will sit down with Ministers of transport and directors-general of shipping and say, "There is corruption in your ports". However, in that dialogue we still stand extremely alone. We are told by many countries that the issue remains too sensitive to talk about. If you really want to implement the intention of the Act forcefully, that must go hand in hand with other types of support. That means embassies supporting UK companies by taking the fight out there where we can see corruption. They must participate in meetings and be present as a Government to make sure that companies are equipped to do the right thing. That element is still missing seven years after the Act entered into force.

Baroness Fookes: Do you feel that the Ministry of Justice guidance attached to the Bribery Act is clear enough? Does it address the main problems?

Tim Springett: On this particular issue, that of demands for payments and gifts in ports, the six principles set out in the guidebook were an example of good practice to follow, and we picked up on those in our own guidance. Paragraph 46 on facilitation payments acknowledged the problems for commercial organisations operating in some parts of the world and in certain sectors. It states, "The eradication of facilitation payments is recognised at the national and international level as a long term objective that will require economic and social progress and sustained commitment to the rule of law in those parts of the world where the problem is most prevalent. It will also require collaboration between international bodies, governments, the anti-bribery lobby, business representative bodies and sectoral organisations". But that is as far as it went. It recognised the problem and set out what needs to happen to overcome it.

Baroness Fookes: Does it not tell an individual organisation what to do when faced with it?

Mark Jackson: The guidance is set at almost at too high a level to be of practical use to the smaller, less sophisticated freight market players. They lack access to specialist legal advice in the day-to-day running of their businesses, and they find it hard to transpose the guidance into their daily actions. More prescriptive guidance, including case studies covering some of the complex or marginal breaches, would be useful to these smaller companies.

Baroness Fookes: Would you like to see simplified language and a format that is more suitable to smaller businesses?

Mark Jackson: If you can come up with specific case studies, the language will become apparent. Simpler language in the form of case studies is always wanted for the smaller end. Nobody is arguing about the bigger end. The problem is how quickly we can change the smaller facilitation payments. How does that culture push out? It is the interaction between shipping, ports and the land. It is not shipping in itself; it happens at the point of interaction. That guidance would be very useful in certain case studies.

Baroness Fookes: So case studies would be really helpful to you.

Mark Jackson: I think so, yes.

Lord Haskel: Do we really know about these facilitation payments? They are obviously small. You say that they are being reduced in the big deals, but obviously facilitation payments are being made all the time. Are they reported? Do we know what is going on? Would it be helpful to publicise them so that people know what is happening and they would be forewarned? Alternatively, do they just know from experience? Would a bit of sunlight help in this?

Cecilia Müller Torbrand: MACN does that. We have an incident reporting mechanism so that companies can report to us, whether or not you are a member of MACN. We use the data to analyse the different demands, whether they are going up or down, and bring it back to Governments.

Over the years since we started, we have built trust in the industry to make these reports to us, because it has seen that something comes back. That is the critical part. If I put a private sector hat on, I know that people say, "We are asked to report to a number of different forums, but what do we get back?" In order to make improvements, it is important that people get something back, so we send something back to these companies, helping them to see where the hotspots are and where there is an increase in reporting. That enables them to prepare better for their operation to tackle this demand. That is a crucial way of working with data and actively encouraging a continuous fight against this demand.

Lord Grabiner: A couple of references have been made to hotspots. Maybe we could shed a bit of light here. Could you tell us where these hotspots are?

Tim Springett: The Suez Canal is an obvious example. It is nicknamed the Marlboro Canal, because the pilots routinely expect to be provided with cartons of Marlboro—200 cigarettes—which they normally sell. We have heard reports of ships either being negligently piloted through the Suez Canal or perhaps even being deliberately damaged by pilots if they have not received these things.

Lord Grabiner: Are there other examples?

Mark Jackson: There are South America's grain-loading ports—places where you get seasonal commodities coming out and there are big queues to pick them up. There is also the Black Sea. Traditional eastern bloc countries used to be more like this, but they are becoming less so.

I would like to pick up a little on the previous question. This is trickling down. As I said, it is now the smaller companies that are really suffering. The bigger companies have zero tolerance. If they are getting requests from their agents, they no longer use those agents; they have ceased those contracts. The companies with zero-tolerance levels are UK or European-based. The trouble is that many ships are still controlled from other jurisdictions. It is slightly detrimental to these companies, but the bigger ones have the spending power to ensure that they are not blacked out of the port, so they can carry on trading.

What we are starting to see from our membership is that this is trickling down and the smaller companies have the real problem. They do not have that spending power, so they are in effect more susceptible to the ransoms that are sometimes put forward.

Lord Empey: The phrases "routinely demanded" and "with menaces" have been used. What representations are being made to the Governments of the countries where these ports are located, and by whom? Could you also elaborate on how you would define "menaces"?

Cecilia Müller Torbrand: That is part of our collective action programme.

To come back to the hotspot locations, MACN has, with our incident reporting mechanism, asked our 100 companies what the critical countries are today for where they do business, where business will be in the coming three to five years, and what type or level of corruption they face in these locations—severe, medium or petty. We want to engage with Governments on this agenda. We have these meetings with Governments and we would like more UK presence in these meetings. We discuss what is happening at the ports and what the trade obstacles are. We do not name and shame countries as such. We do not have a list that goes out. We engage with Governments.

Areas of interest are, as confirmed, the Black Sea, west Africa and parts of south-east Asia. We see corruption globally, but those are the geographical areas that we can point to. The Suez Canal was blamed in the media a few years ago—it was called the Marlboro Canal. It is important to remember that MACN has taken significant steps in the canal. The companies that use our "Say no" campaign are now going through the canal without being harassed for payments. That is a good example of companies taking on the fight.

Lord Grabiner: Is the hotspot wrongdoing being conducted by local government officials or by local gangs outside the control of the relevant Government?

Cecilia Müller Torbrand: Local government officials. You see the interaction in the process of a vessel clearing procedure.

On your question about how we work on that, it is important to remember that it takes two to tango—or even three—and to come up with a solution. There are crooks in the private sector and in the public sector. In order to tackle this demand, I do not think that more guidance is the right way forward. Case studies are difficult, because it is very different if you are ship owner, a cargo owner or a manufacturer; it is difficult for the UK Government to come up with case studies that apply to all the sectors.

It is important that we start having these discussions with Governments and bringing the issue to their backyard. We can do that with the right support. We can say, “This is what the industry is doing. These are the problems we see. These are the steps that the industry is taking to mitigate this risk. But we can only get so far without tackling the demand side. This is how many corruption cases we have had in your ports. What will you do to tackle that?” In many places, this goes straight to their interests: ease of doing business and improving trade. It is not difficult to link corruption challenges with something that the Government care about.

But we also need a third party there. We need Governments such as the UK Government, who are lead drivers of such legislation, to be there in those conversations, supporting businesses and saying, “We, too, are there to give support and make change happen”. We also need international organisations such as the UN to help us to facilitate those conversations. We have been successful in taking those conversations to certain countries, which I can name, because we have good co-operation from them: Nigeria, Argentina, Egypt and India. We sit down and have that conversation with Governments, but we need more support in order successfully to continue that dialogue and create change.

Lord Empey: Could you give us examples of what menaces are routinely directed at some of the ships and their crews?

Tim Springett: If, for example, gifts are not provided to the ship handlers, they could refuse to grab the ropes when they are thrown ashore to tie the ship up. That can cause the ship to drift, which is dangerous to the ship, its crew and its cargo. Other examples include when port state control inspectors come on board to check for compliance with international standards. They may identify bogus deficiencies or impose vastly disproportionate penalties for very minor deficiencies that could easily be corrected but are magically made to go away in exchange for a backhand. Those are the sorts of practices. At the least damaging, it can delay the ship. More seriously, it can cause considerable expense and, at the extreme, cause danger to the ship, its cargo and its crew.

Lord Hutton of Furness: You have described pretty frankly the scale of the challenges that the industry is facing. In fact, the maritime industry has been described as the most corrupt industry in the world. What do you think are the biggest challenges in anti-corruption prevention facing the shipping industry today?

Cecilia Müller Torbrand: This goes back to some of the other conversations that we have had. If you train your front line to be compliant with anti-corruption laws, you will be asked three questions. What is your competition doing? What are other Governments doing about this? Can the

world really change? That is the mindset of those on the front line, to which you have to respond.

Coming back to what Mark said, if a UK-based or UK-linked company says no, has strong anti-corruption standards, and the captain keeps seeing other industry players not adhering to the same behaviour, the challenges will never go away.

Collective action and having industries coming together is a very strong incentive, regardless of whether you are in shipping or in other industries. As long as there is engagement with an industry that does not uphold the same standard that you are trying to uphold because you are based in the UK, there will, first, be a potential competitive disadvantage, as well as the difficulty of eliminating the practices.

Again, coming back to the intention behind the Act, it is to eliminate corrupt behaviour, also on the government side. Therefore, on the UK Bribery Act and its guidance, many companies would benefit from having a stronger legal incentive to join forces, to make sure that the industry comes together, as we have been doing successfully in MACN—we are now over 100 companies. You take up the discussion with your peers, you find out what the specific issues are and you go into action. Given how the guidance is written today, the incentive for collective action is not clear.

Lord Hutton of Furness: What would that legal incentive be for the collective action that you have just described?

Cecilia Müller Torbrand: Part of building an anti-corruption compliance programme is engaging with your industry to tackle this issue jointly.

Lord Hutton of Furness: What role does prosecution have to play in that?

Cecilia Müller Torbrand: It is part of building a compliance programme. If you are faced with an issue, you go through the adequate procedures but you also engage with the industry. If you are not strong enough to combat these issues alone, have you done it through industry? If you have, you will be in a stronger position to genuinely fight corruption.

Lord Hutton of Furness: Individual companies, though, have had a great deal of success. Maersk, for example, reports that it has reduced almost to zero the incidence of facilitation payments. Why are not more companies doing what Maersk has done?

Mark Jackson: Part of the answer is to do with the answer I gave before, which is that a company the size of Maersk has a big reach across the different sectors that it is involved with. Therefore its purchasing power, where it interacts with a port, touches many different levels, whether it be containers, bulk cargos, or energy such as oil and gas. Big trading companies, such as big grain trading companies—American, German—have zero tolerance. That is what I have been trying to say: these big companies are very much on the zero-tolerance side of things.

That is where the success of this Act has gone: in the adoption at that level. Now, we are talking about how we push that assistance down the

chain. It is about asking how you can help these companies so that they are not so disadvantaged or are not shut out of certain agencies at a lower level.

Lord Hutton of Furness: The focus of this Committee is on the UK Bribery Act.

Mark Jackson: Yes, absolutely.

Lord Hutton of Furness: It is about efficacy post-enactment. Are you all saying to the Committee that you think the Act has had a positive effect? I am getting rather a mixed message about that.

Mark Jackson: From my side, I think it has had an extremely positive effect, so much so that, certainly from a trading perspective, it is embedded. We now have second generations of people in charge of the desks. This was hammered into them when they came on board as juniors; they were the ones who were out there negotiating, talking, doing the grunt jobs, and they were on the front line seeing the communication. They are now the boss, and for them it is not even questioned; it is almost like they did not know what it was like before. That type of change is very evident.

The initial, difficult period was the first three to five years. Now, people change suppliers. There is also external help. TRACE International, for example, is going out and helping you to do your due diligence on your third-party suppliers. That is a really useful organisation, and others are now moving into that space. That global adoption by the marketplace is allowing it to go down to the smaller companies as well, because they are providing that compliance structure now—for a fee, but they are doing so so that you can have more confidence in the suppliers that you are using having zero tolerance.

Baroness Primarolo: So you are saying that because of the action of the large companies that can use their commercial strength to have zero tolerance, there is no displacement of the activity to increase the pressure on the smaller companies—that it is actually having a systemic effect on squeezing corruption out of those areas.

Mark Jackson: This is more from my personal experience; I worked for a Greek ship owner for 20 years. I would say that in general the levels have come down. Let us say that you are talking about four cartons of cigarettes. It might be half a carton now. Generally the amount has come down, because what people think they can get away with has certainly reduced.

On the zero tolerance side of things, if you know that the big competition is doing it and they are publicising that this is their action, you have more confidence yourself. However, we keep going back to this being a response to some sort of ransom. At the end of the day, there is still interaction with a master on his own. Sometimes the time zone is completely different and he has to start making quite difficult decisions. Again, it is about getting that culture on to the ship. Maersk has quite strict policies, and a lot of other big ship owners have the same thing.

It is about getting the message and training out to the crew about how to deal with it, which you talked about earlier. It is about giving that support at that level and saying, "You know what, it doesn't matter. Wait half a day, or wait this amount of time".

Cecilia Müller Torbrand: I used to work as a senior compliance officer at Maersk, so I was part of setting up that compliance programme. I am not going to comment on individual efforts, but I can say that the UK Bribery Act really triggers a collective action approach. Companies, large and small, are coming to us and saying, "We genuinely want to fight this".

The UK Bribery Act has been successful in triggering not only a box-ticking compliance exercise but a genuine effort to address this problem. The question is then how you do that. You have to open Pandora's box. You have to go into what the challenges are, what we are doing today, how we commit, how we work from here. That is a discussion that every company needs to have, regardless of whether the Bribery Act has been in force for seven years or 15. That is the journey that you have to take.

We were eight companies when we started the network in 2011. We are over 100 companies today, and we have applications coming from across the world from big and small corporations. It speaks for itself that anti-corruption laws are becoming ever tighter, and not just with the UK Bribery Act; we recently saw Canada enforcing a similar Act.

Do we think that we see strict anti-corruption provisions? I think that companies are listening to those provisions and are genuinely making efforts to fight corruption, but that goes hand in hand with the issue that corruption will not disappear overnight just because we have stricter enforcement; we also have to work in the countries.

Lord Thomas of Gresford: Do I understand you to say that your organisation gets involved in making submissions to the Governments of the areas where there are hotspots and that you would like UK Government support in getting into the ministry of trade or whatever it is in that foreign country to make your representations to them?

Cecilia Müller Torbrand: Yes. There is a lot that the UK Government, similar to other Governments, can do to help drive that agenda. When we meet the Minister of Transport or the director-general of shipping, we are often alone because we face the argument that it is too sensitive a matter and we cannot talk about it. If we genuinely want to drive change, we have to move beyond what is considered sensitive and talk about the consequences of X, Y and Z for their country's financial development and growth and ask how we on the UK side can support these conversations in countries. Tremendous progress could be made if we saw that support.

Lord Thomas of Gresford: And you would look to embassies to get that support.

Cecilia Müller Torbrand: Absolutely, yes.

Lord Hodgson of Astley Abbots: I have a question about the hotspots—about changing them and about whether we might be going backwards

rather than forwards.

There has been a lot of talk about the relative success in stopping the drug trade through the West Indies. However, that has displaced it to west Africa as a route to Europe, which has led to an increase in the level of bribery and corruption in west African countries, which has obviously affected shipping and airlines across the piece.

Have you come across examples like that where activities of law enforcement have inadvertently squeezed the balloon in one place and puffed it up in another?

Tim Springett: That question was alluded to earlier. Corrupt port officials and so forth know that they are going to get no joy out of the big companies, so they are targeting the smaller ones. It is very difficult to tell, because the actions of the larger companies and the work that MACN has been doing have added to the general view that this sort of corruption will no longer be tolerated by the industry.

But it also comes from the shipping companies. Our own guidance emphasises that what is needed is a strong company culture that does not accept facilitation payments. It used to be accepted that in order to get your ship through the Suez Canal or into certain ports, corruption went with the territory: you had to provide gifts. One thing that the Bribery Act has achieved is that it has focused the minds of people in the industry on the damage caused by this sort of corruption. If it is not addressed it will only get worse, and there are costs for industry because of its continued presence.

For a lot of the time, masters are in a very lonely position on board their ships. They get their instructions not only from the ship operator but from the charterer and flag and port state control officers. They often find themselves between a rock and a hard place. Accounts that I have heard from retired masters show that they knew that wherever they went they would routinely have to provide gifts in the absence of support from their company management ashore.

That is something that we have tried to tackle, as Lord Hutton alluded to earlier. Our guidance emphasises the importance of commitment at the top in shipping companies to an anti-bribery and corruption ethos and the provision of support to any master who finds himself in that position. They may have to make an instant decision: which law do you want to break? Do you want to make a facilitation payment, which is a technical offence under the Bribery Act, or do you want to break the international collision regulations by not having the ship tied up properly and seeing its ropes caught up in the propellers?

Lord Grabiner: Does the master's contract, or as the case may be the charter, in its basic standard form contain provisions regulating the responsibilities of the master in relation to bribery or deals of that kind?

Tim Springett: That would normally be in the master's standing orders from the employer, which would be the shipping company.

On contractual relations with the charter—

Lord Grabiner: Forgive me for interrupting, but are you saying that that contract would contain regulations on the ship master's obligations in relation to bribery, before you get to the charter?

Tim Springett: If it accords with what you put in the guidance, it would.

Lord Grabiner: Does it? That is what I am interested in.

Mark Jackson: For UK shipping itself, I would say yes. When you start to talk about the flags of other nations, the whole relationship with the crew will most probably have come through a crewing agency. The actual contract is between the master and the crewing agency and then with the owners. It will be there somewhere, but it is embedded and can be quite distant. The master picks up his contract, and if it is one of the global ones I would not say that that is the case every time.

However, we come back to the orders of whoever has become the temporary owner of the vessel. If they are a UK company, they will put particulars about that into their voyage instructions. They may say, "If you breach this, you will in effect be put off the ship". It comes down from that perspective and it tends to be highlighted when the vessel goes into hotspots. It will not be in every instruction, because it is embedded and they know where certain trades are going. If you routinely put it in there all the time, as with much else that is routine people tend to forget about it. However, this is very much highlighted when people go in. That is part of the proactive case for managing these voyages commercially.

Cecilia Müller Torbrand: We can confirm that when the cargo owner takes a vessel to certain destinations, it is definitely highlighted. We are seeing that agents have started to highlight this for the master. They are saying that, according to their company policy, nothing can be given when the ship calls into port. You start seeing a chain of effect going all the way from the cargo owner to the ship owner and then to the agent, who will say to the captain that if there are any potential requests for souvenirs or gifts, that conversation cannot be facilitated because he is bound by the company's firm anti-corruption policies. We are starting to see that throughout the value chain, and it is extremely important.

Mark Jackson: That is definitely a positive. Where we are now compared with where we were when the Act came in shows that we have gone far down that road. We have seen a very good change take place.

Lord Stunell: Under Section 7 of the Bribery Act, commercial organisations can be guilty of failing to prevent bribery if an associated person carries out an act of bribery. How do shipping companies monitor this and how far down the supply chain can that be taken?

Cecilia Müller Torbrand: The most critical or high-risk stakeholders are the port agents. They are the ones who stand in the ports and are supposed to facilitate a conversation between the captain and the government officials. In some countries, they may be the only ones who can speak the captain's language as well as that of the local officials.

The high risk definitely rests with the port agents. That is why MACN works to keep the port agents as part of the network. It is really important for us to have port agents on board. Again, there is a constant conversation between the cargo owner, the ship owner and the port agent. That is because if the chain is broken, the risks are high. We have a big group of port agents in our network to facilitate the conversation so that they can talk about their interests and their challenges. Companies appoint agents either themselves or the cargo owner may appoint them.

In either case, we encourage those agents to be vetted. My opinion is that port agents in the industry are vetted as regards anti-corruption laws, sanctions and so on. I should add that there are thousands of local port agents out there, and not all of them have the same strict anti-corruption standards as some of the global players. Again, it is for the ship owner to make sure that those players are educated. It is not just about giving them a piece of paper setting out a long anti-corruption provision; they should also be given guidance on what it actually means for them. We work a lot with our ship owners to ensure that if an anti-corruption provision is put in front of a port agent, they must make sure that he knows what it means when he is interacting with the captain and the port officials.

Mark Jackson: As I mentioned before, there are organisations coming up that are trying to put themselves into the accreditation spot. An agent will say, "I am submitting myself to quarterly reviews on our policies and statements with regard to bribery and anti-corruption". We in the Baltic Exchange are in the process of revising our code, so that when people become members of the Baltic Exchange they are signing up to this ethical way of doing business. It now includes a section on bribery and corruption.

Part of this is how to distinguish yourself from the rest of the world, so that when people see you coming they know that they are not going to get anywhere. It is about being able to send the message out rather than people having to learn it only through your actions. We are now at that stage. People understand that it is going on. Now, they see you coming and they say, "Okay, we're going to back off". So you tend to end up with agents and companies who recognise the fact that, "Those people want the business, so we are going to comply". That is how it is trickles down.

Lord Hutton of Furness: Is this new for the Baltic Exchange?

Mark Jackson: It is not a new change, because our code was very broad before. We would talk about an ethical way of doing business and in effect doing things in the right way. Now we have changed, and with regulation and certain laws that apply in different countries we need to provide much broader guidance. The language of our code was very much about what we expected our members to do. We are now in the process of writing the code so that it can be adopted by other jurisdictions, aiming specifically at the transactional and commercial side and saying that members need to comply with the code. We are now going out to regions and saying, "This is how we think people should be acting commercially". We hope to start pushing that out by the end of Q1.

Lord Stunell: I just want to pick up the point about the different

jurisdictions, charterers and ownership. Does whether a ship is UK-registered or registered under a flag of convenience make any difference to what you are saying?

Mark Jackson: If you are based in the UK, it does not matter where your ships are registered. You have to comply with UK law.

Lord Stunell: Do you think that is understood by ship owners and so on?

Mark Jackson: Absolutely, yes.

Tim Springett: I would agree with that. Our members run ships under a variety of flags and several companies run mixed-flag fleets. They all understand, as UK-based entities, which they have to be in order to be members of our organisation, that the Act applies to them and to their contractual relations.

With regard to Section 7 of the Bribery Act, there is a whole spider's web of contractual relations that involve the ship, the master, the crew, the port agents, port health authorities, medical services, customs, immigration, stevedores, repairers, equipment suppliers, chandlers, pilotage services and tug services—just to give a few examples. We have not gone down the road of trying to differentiate between which of those are associated persons and which are not. Instead, we say that the company should undertake a risk assessment to examine the potential for corruption to take place in any of those relationships. As Cecilia has said with regard to port agents, we must consider the ability and the willingness of these parties to uphold anti-bribery and anti-corruption procedures in line with the company's own policies.

Lord Thomas of Gresford: In the competition for business among these port agents, presumably a reputation for being against bribery is important.

Cecilia Müller Torbrand: Yes, and upholding the same standards.

Coming back to the question, it is easier for companies to have one applicable standard. If you are a port agent and you work with different standards, on one day you have to adhere to the Bribery Act and on another you have to work with another one. That does not help them, because they are still the people who have to deal with port officials. Who are you representing today? Is it okay or not okay to do something? They have a lot to gain from having the same standard and position regardless of who they are representing and regardless of what type of government officials they are facing.

That applies in the same way to shipping companies. Because shipping is global, no one has analysed the different anti-corruption laws to say what is legal or not. If you sign up to an anti-corruption compliance programme today, you look for the strictest law because that is what you will need to adhere to. Many will look at the UK Bribery Act and say that it is the standard that they need to work to, because you cannot have different standards in a global operation. That again is a positive aspect of this, and

the UK has been successful in creating a standard so that companies that are doing it are doing it globally.

Lord Stunell: So they will work to comply with the toughest standard globally. Is that what you are saying?

Cecilia Müller Torbrand: Yes, because different standards depending on where you are would create confusion. It is easier to make sure that this is the standard that people are going to work towards. It is easier to give instructions to the front line and to third-party representatives.

Lord Stunell: And you do not spend so much money on bribery.

Cecilia Müller Torbrand: No.

Mark Jackson: As I said before, that is one reason why the Act was a good catalyst. People recognise that it will save on costs. Costs might go up initially because of the amount of compliance and the risk assessments, but it works through the system, and I would say that some companies are now benefiting from lower costs as well as from a lot more certainty.

The Chairman: We are running a little short of time. The fifth question is about how the shipping industry deals with countries where demands for facilitation payments are more common, but to a very significant degree you have covered that. However, as I said at the outset, you are more than welcome to add to what you have said when you have had a look at the transcript.

Lord Grabiner: I respectfully agree, but there is one point I would like to raise in order to get it on the record. I shall try to summarise what I understand to be the view of you all. Do you say that there is no material difference between a facilitation payment and bribery, leaving aside the example of where it is de minimis, and you hope that there would be prosecutorial discretion so that people are not prosecuted for what might be called a trivial facilitation payment?

Leaving that kind of case aside, is your position that we should not legalise facilitation payments? Currently, they are treated as pure bribery under our own Act.

Mark Jackson: I do not think that they should be legalised. You put the question before in relation to the study, but it is as simple as that: you should not legalise them at this point.

Tim Springett: As I said earlier, there are different types of facilitation payments. The type we find ourselves dealing with here are not what I believe are classic bribes because they are paid in response to a demand or a threat. The moot point is which party is committing the offence. Blackmail must be illegal in most jurisdictions. Complying with a demand for an unwarranted gift or payment can be seen as a facilitation payment or as a small-scale bribe. We want them be eradicated because they are damaging to our industry by adding costs. It is not just a case of avoiding prosecution; it is about making trade flow more freely and ensuring that our ships' masters are not put into invidious positions.

Mark Jackson: This is about recognising one-off instances. If it was not the law, it might promote regular payments again, and that would always happen. People would still expect them at that level. Making it illegal says that while there will be instances where it happens as a response to a threat, it is not systematic. That is one reason why it should not be changed.

Lord Hodgson of Astley Abbotts: My question has been answered in part. It asks what the Government could do to assist shipping companies in understanding and complying with the Bribery Act. We have had a lot of examples of that. After listening to your interesting evidence, you seem to be saying two things. One is that smaller shipping companies find it harder to comply because they are under greater pressure. However, what I had not understood at all is that the master is often between a rock and a hard place because of the different people he has to answer to.

Is there any value in such a ship's master being able to apply in some way to the Government for pre-clearance—a safe harbour provision—so that people could begin to see where the hotspots are and to appreciate the pressures that such masters are under? That would lead to greater understanding on the part of the Government of how this Act is actually working at the sharp end.

Tim Springett: On pre-clearance, any procedure that removes a potential demander from the captain's line of vision is a positive step, because it takes away one potential demand for a facilitation payment or an unwarranted gift. It is something that companies are looking at very intently. Understanding the pressures that ships' masters are under is extremely important. As I mentioned earlier, they get their instructions quite legitimately from a number of different sources and sometimes they can conflict.

You may have a charterer who is very insistent that the ship must not be delayed in any circumstances. However, if that means acceding to a demand for a facilitation payment, that would go against their own employer's procedure. He or she needs to have confidence in the employer that they will be supported if they stand up to the demands of the charterer. They need to know that the company will say, "No, we are not engaging in this sort of corruption. We are the most reliable carrier that you could have chosen". In that way, the company will be supporting the ship's master. It is important that the position of the ship's master is properly understood.

Cecilia Müller Torbrand: Ten or 15 years ago, a lot of companies had compliance programmes, but they were more about window dressing. With the Act, we can see that people are more genuinely taking on the fight. It is not an easy one, and the worst thing that you can do is roll out a zero tolerance policy without talking to those on the front line and trying to understand the issues. That is something we have moved away from. It allows ships' masters, even when they have done something wrong, to report back to the company.

That should be encouraged. If someone has made a mistake because they were being woken up four times a night—behaviour that is close to

harassment—companies must enable the conversation that ensures that the ship’s master is not blamed for his practices. He should be able to report back to the company so that it can take action on a different level, thus removing the fight from the individual ship’s master and an individual government official.

A lot of good steps can be taken. A subject for the near and further future is that of manual interaction procedures. It is a challenge in the ports. We have done a mapping exercise and we found that in one port it took more than 142 signatures to get the cargo and the vessel cleared. That is 142 manual interactions with different government officials. In order to take on that fight successfully, you have to make sure of clear reporting lines so that the company can engage in the discussion and take as much responsibility and stress away from the captain as possible. That is the first thing to do before discussing other measures.

The Chairman: I am afraid that we have run out of time, which leaves unanswered the seventh question. How does the Bribery Act compare with equivalent legislation in other countries? Are there other approaches, either in legislation or enforcement, which the UK could learn from? Do you have anything to add in response to that question or indeed to any of the other matters we have discussed? If not, on behalf of the Committee, I thank you all for your extremely valuable evidence.

Brook Horowitz, Phil Mason and Dominic Le Moignan – Oral evidence (QQ 127-134)

Tuesday 30 October 2018

11.30 am

[Watch the meeting](#)

Members present: Lord Saville of Newdigate (The Chairman); Lord Empey; Baroness Fookes; Lord Gold; Lord Grabiner; Lord Haskel; Lord Hodgson of Astley Abbotts; Lord Hutton of Furness; Lord Plant of Highfield; Baroness Primarolo; Lord Stunell; Lord Thomas of Gresford.

Evidence Session No. 13

Heard in Public

Questions 127 -134

Examination of witnesses

Brook Horowitz, Phil Mason and Dominic Le Moignan.

The Chairman: Welcome to you all. I am sorry that we are running a little late. The session is open to the public and is being broadcast live. A verbatim transcript will be made available to you shortly. At that stage, we would be grateful if you make any corrections and amplify or add points to your evidence and to do so as soon as possible because we have a lot of evidence to try to assimilate. For the sake of the transcript, perhaps I may ask each of you to describe your position.

Phil Mason: I am the senior anti-corruption adviser for the Department for International Development. I have been in the role since 2000 when the Minister Clare Short set up the anti-corruption work to be done in the department, so I have watched the long evolution of HMG's approach to international anti-corruption.

I have a threefold role in the department. I help our country offices who are delivering development help and assistance in country to understand the threats and challenges that corruption presents and to solve them. In the UK, on what has been described as the supply side, my team funds the work of the International Corruption Unit in the National Crime Agency dealing with corruption, bribery and illicit flows related to developing countries.

We also play a role, alongside other Whitehall colleagues, in the international representation of the UK in relevant international fora such as the UN, the World Bank and the OECD, which aim to have the policy dialogue that shapes global norms.

For the avoidance of doubt, the one role I do not play in the department is what could be called the risk and control function and stewardship of DfID funds, investigating alleged corruption in DfID systems. That is the responsibility of our risk and control and counterfraud teams.

Dominic Le Moignan: I am the director of government projects at GovRisk. We work on a range of projects relating to integrity. We have held a number of training sessions for UK organisations on compliance with the Bribery Act. We work on implementing projects for the UK Foreign and Commonwealth Office in foreign markets, particularly in Latin America, assisting them with legislative reform, capacity building and strategy related to combating financial crime and corruption.

Recently we have also worked with the DfID-DIT Business Integrity Initiative on producing guidance for UK exporters to foreign markets to assist in supplying content for the DIT website. In that work we conducted a number of user interviews with UK exporters to discuss the challenges that they face going into particularly high-risk markets.

Brook Horowitz: I am the CEO of IBLF Global, a not-for-profit organisation that is a spin-off from the Prince of Wales International Business Leaders Forum. We focus on the anti-corruption agenda in emerging and developing markets. We try in particular to work with businesses and governments in those countries to try to find solutions, through collective action, to the problem of corruption.

The Chairman: Seven years after the Bribery Act came into force, how often do you think British exporters encounter bribery in their day-to-day operations within the UK and overseas? Have UK exporters and their sub-contractors developed effective anti-bribery policies as a result of the Bribery Act?

Brook Horowitz: I should like to preface my comments by saying that the written evidence that we have already sent to the Committee and which we propose to put forward today is based very much on our personal experience of working in some of these markets. As Dominic has just mentioned, over the past few months we have been working on a joint engagement in DfID's Business Integrity Initiative cross-government scoping project. I want to mention that project, because it has given us some useful evidence that we would like to share with the Committee.

The focus of the project was to take the great.gov.uk website, which is an export promotion site that is being managed by DIT, and work on the part of it that is an online advisory service for companies, which is known as the export journey. We sought to add to the export journey element advice on how to deal with the corruption issue. That is an example of the Government trying to provide support in particular for the kind of SMEs that would use this service.

With the help of DfID and DIT, we went through an exhaustive process of learning the exact information needed to go on to the site. In the course of that work we interviewed around 20 SMEs face to face and in video recordings, during which we asked them questions about how they have reacted to the Bribery Act. We found that, first, these particular companies did not often encounter bribery in their work. They were all operating in quite corrupt countries but they were not in-country; rather, they were selling through local agents or distributors. They did not frequently come up against the corruption problem.

Larger companies, from our experience working around the world, have developed effective anti-bribery policies. They have put compliance programmes in place along with codes of conduct. They have instituted training and have adequate procedures, but while the smaller companies that we talked to seemed to be aware of the Bribery Act and knew that it was about bribery, we did not get the feeling that many of them had read the detail or the guidance. Things like adequate procedures, training and how they could defend themselves legally against a possible prosecution were beyond their understanding.

Dominic Le Moignan: I definitely agree that through our consultations with much larger organisations we have found not only that they have incorporated elements of the Bribery Act but that they have done so within a much wider corporate governance framework in order to be able to trade. Exactly as Brook mentions, visibility of the Bribery Act was quite high among the people we spoke with, but often when we drilled down into the detail and into whether they had fully understood what was in it, they did not know what they did not know. Quite often there was confusion as to what determined whether something was a bribe, particularly in relation to facilitation payments and agents whose guidance they would trust when going into a foreign market.

The SMEs were increasingly receptive when they were given more information about what is required in order to comply with the Act, particularly the mitigation strategies available to them to protect themselves from them, and they showed significant signs of increased confidence about going into those foreign markets. The more they were aware of the risks and the mitigation strategies, the greater their confidence in going into those foreign markets.

Phil Mason: Perhaps I can set some context for why we feel that this matters to us in DfID. We have felt that it matters for many years, because we know how damaging, devastating, bribery and corruption are for development. We know that poor people in developing countries spend a larger proportion of their household income on bribery. They have to pay much more of their livelihood to get services that should be free.

We think that the Bribery Act is a precious asset for the UK. It sends a very clear signal about our standards and values and the level of integrity that we expect in order to operate. We have uncovered lots of evidence, which we are very happy to go into later, on the reality that it is in the interests of business to have integrity. We know that sustainable, predictable, reliable business is more likely if it is complied with.

We know that SMEs suffer in particular from the types of challenges that have been mentioned. They are more vulnerable because they have less room for manoeuvre. They may rely on only one or two contracts in a particular market, and bribery makes that more difficult. As Brook has said, the material is out there, but we do not think that SMEs can access it very easily.

We do not, as a matter of policy, look at this as a trade-off between having good integrity overseas or having commercial success overseas that we

have to balance. We think—I will come on to our business integrity initiative later—that there is a way in which business integrity can be seen as the pathway to commercial success. But we recognise that that means that government in particular needs to help in that process.

We feel that the Bribery Act—particularly the three seminal points that always matter to us: the extraterritoriality, the no escape clause for facilitation payments, and the corporate offence—puts us on a level of standards that are the envy of the world. But it is important for us as a Government to be able to do our development business, helping developing countries to encourage their citizens and officials to improve their performance on corruption, which affects poor people in particular, particularly officials who extract small payments from citizens every day.

It is important for us to be able to argue that case credibly with those Governments, and it undermines our case if at the same time we appear to be asking for companies to be allowed to go into the very same markets with the very same Governments and doing exactly what we are criticising local officials for doing against citizens. That is why we feel that holding the line on no tolerance of facilitation payments is the right way to go.

We can come on to the conversations about whether, and where, you draw thresholds, but our belief is that it is still an abuse of public office if a public official tries to extract money from somebody. We have often heard the distinction being made that bribery is for acts that should not be done and that facilitation payments are just for acts to speed up things that the officials should do, but at the core of this is an abuse of the public service ethos. That is the element that we want to try to preserve.

Lord Empey: Clearly when the department sends out aid it will very frequently be to underdeveloped parts of the world and areas that may not have the sophistication, and very frequently, presumably, you use smaller carriers to deploy products that are designed to help in certain circumstances.

Previous witnesses have indicated to us that there are hotspots around the world and that smaller shippers tend to be much more vulnerable than the big international companies. Is that your experience, and have you had to intervene or fail to use a shipper because you felt that they were complying with the demands and menaces that are applied in some of these parts of the world?

Phil Mason: I would draw a distinction between the delivery of aid and the other interests that you have heard about. Clearly DfID, as with other government departments, has a very strict and strong risk and control framework for all our suppliers. Our suppliers can operate in that haven because it is aid-funded activity, and if they have a problem they report back to the department and the department looks into that particular supplier issue, so we do not see the same challenges that are faced by the small supplier, for example. They are embraced by the same control assurances that any other supplier for DfID has.

As I said at the beginning, I am not the risk and control person, but we do not expect the controls on the supply agent who delivers our aid to differ from that.

Lord Haskel: Can we now come to the reality? Has the Bribery Act deterred British companies from exporting abroad or otherwise harmed their competitiveness in relation to companies from countries with less stringent anti-bribery measures? Is bribery more difficult to deal with in more competitive overseas markets, or where products and services are less differentiated?

Dominic Le Moignan: One of the key considerations is that it is not a matter of competitiveness when organisations fully understand the Act. Lots of organisations understand that there is quite a lot that they can do, such as putting prevention measures in place.

A lot of the feedback has been that, for a UK company operating in overseas markets, there is a brand of UK plc that comes with an understanding of the way in which UK companies conduct their business in relation to compliance with the Bribery Act and operations. That feeds into the quality of service and a number of other things, and exporters who have operated in countries in the Middle East or Africa, in particular, as well as Governments and the companies that will interact with them, find that there is definitely a benefit to being a UK organisation in those markets for those reasons.

Brook Horowitz: On the issue of UK competitiveness in export markets, I fear that the corruption is sometimes used as an excuse for UK exports not getting into the markets we want them to. I would suggest, after the discussions I have had with British companies, that corruption is not their biggest problem. There are many other issues that we could look at, but presumably those are beyond the scope of this Committee. British companies in Africa, for example, find it a difficult place in which to compete. That is not necessarily because of corruption but because of competition from China. It comes in as a kind of state company—“China plc”.

We know how the Chinese have managed to get into certain countries. It is not a question of corruption and bribery, although that might be part of it. Rather, it is to do with an offer that a country simply cannot refuse. Many developing countries are now indebted to China, which shows the extent of Chinese exports and investment. It is probably difficult for the UK to compete with that in this day and age. Whether you call it corruption, some kind of contravention of WTO rules or just a new way of doing business in the modern world, I am not sure. However, it is the kind of difficult area for British companies that want to compete in developing countries.

Phil Mason: During the consultations that Brook and Dominic helped us to run in the lead-up to understanding what business wanted from the Business Integrity Initiative, we did not receive any complaints from UK companies that the Act is penalising them. In fact, in many ways they said the reverse: the strength of the Act required them to put proper systems

in place and made them think about corruption. It changed their attitudes towards bribery.

In a way it has provided a level of protection against bribes being solicited. The National Crime Agency has a little credit card which people can show to others and they can say, "I just cannot pay a bribe because I will be subject to enforcement at home". Many companies say that they draw a reputational benefit from being associated with a UK that takes such a strong approach. Companies feel, particularly with low-level officials, that it helps them to defer and deflect small payments.

We heard one anecdotal account of an Asian business that had established a UK operation for its exports to Africa in order to reduce the pressure on its staff to pay for routine regulatory practices. Our evidence shows that the reputational element of this is coming to be seen as a significant business asset.

Lord Hutton of Furness: You said that you have anecdotal evidence of this. Either there is evidence or there is not.

Phil Mason: It was a story that came through in the consultation. A company representative told us that they had seen a business advantage in setting up a UK company.

Lord Hutton of Furness: That is quite strong evidence. It is not really anecdotal.

Phil Mason: It was a story that was given to us during one of the consultations.

Others have mentioned that there can be the impression out there that the UK has gone way beyond everyone else in not allowing facilitation payments, but I think you have seen evidence from the OECD showing that of the 33 members of the OECD convention, some 25 make no distinction between bribery and facilitation payments. The UK is not an outlier in that respect. Everyone is tussling with the challenges that such payments represent.

Brook Horowitz: I would like to add a point that comes through clearly. UK companies with very competitive products that are very successful in export markets are often quite high tech. They may even have a niche or position in their global market that is unassailable. Companies of that kind are competitive because of their products, pricing and delivery, and they simply do not need to make facilitation payments or join in any other kind of bribery.

Lord Haskel: So facilitation payments play a small part in this. You think that British companies are doing pretty well without making them.

Brook Horowitz: Yes, for the ones that are good and competitive. As you heard in the previous session, facilitation payments may be particularly prevalent in the process of getting a product to its market: that is, the shipping and customs part. The quality of the product and the service the company provides are irrelevant in that case.

Facilitation payments relating to the physical logistics of the product are another matter. But when it comes to a foreign Government or a customer of a British company in another country making the decision to go with that company, on the whole I would say that British companies that are competitive will not need to pay any kind of bribe or make facilitating payments.

Baroness Primarolo: Dominic, you said that it is one thing to know that the Bribery Act exists, but as regards the responsibilities set out in it, companies do not know what they do not know. Could we ask you to comment on the use of foreign agents by small and medium-sized companies when they are looking to conduct business abroad? Do companies fully understand their responsibilities in using foreign agents? Do they know that they will still be held fully to account? How do companies tackle these issues?

Dominic Le Moignan: This is a matter of great concern. The UK has only a limited number of cases, but in the US, through the FCPA, out of 260 cases some 236 involved intermediaries. As we have mentioned, many larger companies have the required systems in place in the form of robust frameworks and processes, along with plenty of training all the way through their supply chains. However, smaller companies are very vulnerable, particularly because they trust that the agent is doing everything in their power.

What came out of our consultation was that a director or a CEO sitting in the UK has a strong compass on ethical governance in their organisation. While the Bribery Act has provided support for such organisations in the way Brook has mentioned, they have always had a culture of integrity from the top. The Act has provided the backbone and support to back up that existing culture. However, smaller companies are especially vulnerable because they do not quite understand the difference between the accepted culture of some of these payments in certain markets and the lengths they need to go to by way of contractual obligations and the provision of training through their supply chains and value chain. A lot of work needs to be done to support SMEs that are tackling these obligations. It is often also a cost issue that must be set against the many other challenges they face going into foreign markets. Greater support for them in the compliance area is necessary.

Baroness Primarolo: Could you give an example of how greater support on compliance could be provided? Obviously, monitoring the conduct of the agents acting on behalf of the company will become increasingly difficult. How can companies do that effectively? What can be provided for small and medium-sized concerns?

Dominic Le Moignan: Many small and medium-sized companies that have not experienced bribery just do not think that they are going to do so. They think that because they have been operating and it has not come to it, they do not see it as a huge threat. As a consequence, they do not invest in prevention strategies or look at markets in that way.

Our user interviews show that the assumption is often made that because internally companies have a zero tolerance for bribery or corruption, they

think that that is how their supply chain is automatically going to act as well. They need more resources in order to scope the particular markets they work in. Many suppliers offer these services in a sophisticated way to larger organisations at a cost. However, those services are not as readily available to SMEs due to their resource limitations.

Brook Horowitz: The issue of third-party supply chain providers, agents, distributors or whatever you call them, is not one just for British SMEs; it is also a huge issue for the global multinationals. We know that the multinationals have in place the resources, systems, people, compliance mechanisms, lawyers and training programmes, but, even so, let us get down to the basics. The distributors and agents are local agents and are the products of countries where there may be weak rule of law and an ethical system that is quite different from our own. You can tell them until you are blue in the face about the terms of the UK Bribery Act, but they are not going to understand it until the multinational enforces some kind of policy.

It works if the MNC plays a quasi-regulatory role. It puts its own rules in place so that when a distributor bribes a foreign official on behalf of the company, if they are caught doing so the MNC will cut the business and throw them out. That is the game-changer, but until it happens, quite frankly, it is all about talk and theory. That is basically the same issue that we talked about earlier as regards the Bribery Act: until it is enforced for small and medium-sized enterprises, it is highly doubtful that they will fully understand what it really means.

You have the Government needing to enforce the Bribery Act for British SMEs that are exporters and you need to have those British exporters enforcing the quasi-regulatory rules of the company concerned in markets in China, Vietnam or Nigeria in order to make this really happen. They have to be prepared to cut the business if the behaviour in those countries is not up to the standard.

Phil Mason: We commissioned two pieces of evidence-gathering from our U4 DfID anti-corruption centre, a multi-donor centre that looks at these issues. We would be happy to increase the Committee's pile of evidence by sharing them with you. They came up with some interesting metrics on the impact of bribery and corruption on business success and trade flows within the broader picture.

One of the intriguing things that caught my eye, which is potentially counterintuitive, is that studies show that firms that choose to pay bribes often end up encountering more hassle than less. You end up dealing with more opportunities for bribery, because someone has clocked that you are willing to pay. They will invent more stages for you to go through. Companies may often try to find a way of using a short-cut to get around the regulatory maze, but they end up being highlighted as firms that are willing to be suborned. They find themselves spending more time and money and making less profit as a result of engaging in the bribery activities in the first place. That was an interesting reflection that we had not seen before.

Lord Grabiner: The next question is: what are the Government doing currently to assist exporters in understanding and complying with the Bribery Act? Are those efforts sufficient, and if not, what more could be done to help? Are businesses themselves taking an active interest, and if not, why not? This is right in the territory of all three of you.

Phil Mason: Indeed it is. I would like to introduce the elements of our Business Integrity Initiative. However, as outsiders, perhaps Brook and Dominic can describe what they think the current HMG offer looks like. They have had many conversations with businesses.

Brook Horowitz: We have submitted evidence to the All-Party Parliamentary Group on Anti-Corruption. The Government are doing quite a lot on trying to enforce the Bribery Act. While we can see that happening, we think that the kind of additional support which Cecilia talked about in the last session could probably be boosted a little.

The Business Integrity Initiative that Phil will talk about in a few minutes is a very good example of something more that is just beginning now. We see in a positive light the cross-government approach that started in 2015 and culminated in the UK anti-corruption summit. That was very important for projecting the idea of UK leadership in this area. Also, various strategies have come out of the cross-government approach.

Perhaps I should leave it at that for now and then we can talk about some of the new ideas that we would like to propose.

Lord Thomas of Gresford: You are talking about a quasi-regulatory regime being imposed by a firm in this country that uses overseas agents. Are there any guidelines about that for SMEs and large businesses in the government initiative?

Brook Horowitz: I am not aware of any in the existing government initiative. I should also point out that we were all involved in the great.gov.uk website and the export journey.

Let us take what was in place before we started playing around with it. It was a very useful trade and export promotion site that said to companies, "Go forth and multiply. Make an impact on the world, and here are some tips about to do that". What was patently missing from that was any kind of balanced risk management advice. I have to say that I thought that the risk management advice we put in was a little one-sided. We focused on anti-corruption, human rights and the slavery Act, but that was what we were commissioned to do by DfID, which took the lead on the project.

Quite frankly, to present a balanced view to companies you would probably have to put in more information about the other risks they might come across in export markets. Nevertheless, it was a good start, and for the British Government it really is the way to go.

Lord Thomas of Gresford: There is a risk that companies might themselves be liable under the Bribery Act for the activities of a foreign agent unless they have procedures or what you have referred to as a quasi-regulatory regime.

Brook Horowitz: The answer to your question is, yes, there is advice for British companies, but as far as we know it is just what we have put into the website. However, the larger companies definitely understand the issue. British multinationals meet with their counterparts in other countries all the time. United States companies have a long history of creating compliance and training programmes. A lot of work is going on. There are many toolkits from different sources out there that are set out in nine online pages.

Lord Thomas of Gresford: The small business that wants to export will no doubt be told at some point, “You will need an agent in that country otherwise you will get nowhere”. I am interested to know whether there is advice on being careful about how you choose on the basis that, if you are not careful, you as a company could be liable.

Brook Horowitz: That is exactly the advice we have put on to the DIT website.

Dominic Le Moignan: There is a lot of information available online about due diligence checks, particularly for agents. However, the feedback suggests that, while the material is out there, it is hard to find and you have to sift through a lot of other things to get to that useful guidance.

What also came out of the consultations was the potential use of embassy posts in foreign markets, but many people spoke about the differences in capacity because some embassies are very short-staffed. Even so, quite a few talked about the very good support and guidance they had been given.

Connected with that is that SMEs in particular want to have confidential conversations with companies that have already done business in a certain market. They have gone in before and learned the lessons. SMEs would like to have access to business experts of that kind, potentially through our embassies. The larger organisations often talked about keeping what is almost a black book so that they can be confidentially informed internally about the risks they might face in high-risk markets. SMEs would like to be able to pick up through collective action, embassy posts or DIT some of the lessons that have already been learned by British businesses in those markets. There should be a way of facilitating that information-sharing in a confidential setting.

Baroness Fookes: Did I understand you to say that officials in some embassies are more helpful or knowledgeable than others?

Dominic Le Moignan: No, it is just that some embassies have larger staff and therefore have people either within the embassy or from DIT who are experts in the area. There might be an ambassador and a deputy head of mission in some of the smaller jurisdictions who have to conduct a wide variety of different activities. We think that there is an opportunity for embassies to play an increased role along these lines.

Brook Horowitz: The feedback from companies is that the difference between the larger and the smaller embassies is quite considerable, probably for the reasons that Dominic has set out.

One of the proposals we have made through the APPG on anti-corruption and other fora is that the Foreign Office could set up some kind of anti-corruption expert network so that one person in every embassy is knowledgeable about this area and is keeping up to date. I know that the Foreign Office has made efforts to do this already. We were involved in a project two or three years ago. It is important, because companies are out in the field and they come across the situations we have talked about. What they need is help there and then. The best and easiest place for them to go to is the embassy, but if they have to go through someone who is more interested in trade promotion than dealing with the difficult issue of anti-corruption, they may feel that they are not getting the help they need.

Baroness Fookes: We ought to be encouraging the FCO.

Lord Grabiner: Is this a resource issue?

Brook Horowitz: Yes. I do not say that you must have a dedicated person in an embassy, because it may not be a day-to-day issue for British companies. However, they need someone in the economic department or the DIT representative, or maybe even a recognised person from the NGOs outside, who operates independently of the embassy but is friendly towards the British business community. That person may know how to speak the language of business and would be a useful addition. It is a question of resource in the end, along with the problem of training.

Baroness Fookes: Perhaps the FCO could take more of an interest in this than is currently the case. At any rate, perhaps it ought to revamp the practical arrangements.

Brook Horowitz: The FCO has made a good start, but I will point to a big resource for this kind of thing, which is the UK Prosperity Fund, a cross-government fund that is managed by the FCO. When it was set up a couple of years ago, anti-corruption was up there as one of the five pillars of the fund. The business environment and anti-corruption were one of the key buckets.

We get a lot of our work through and are funded by the fund, but at the moment I have kind of lost track of exactly how much money the Foreign Office is really putting into anti-corruption. It seems to me that things are going on and it would be interesting to put the money where the mouth is in order to make this kind of thing a little more transparent and visible.

Baroness Fookes: Do you think that the Foreign Office should be asked about this pretty firmly?

Lord Haskel: There was a time when embassies would have a local lawyer on their books. If you had a corruption problem, they would ask the lawyer to take the matter up.

Brook Horowitz: I am not sure that that is still the case. Is there a local legal counsel in each embassy?

Lord Hutton of Furness: I would ask each of you to give your own view about this. You have mentioned a number of government departments

during the course of your evidence. We have heard about DfID, DIT and the FCO. In your experience of dealing with government, who is in charge of the anti-corruption policy?

Brook Horowitz: I think Dominic should answer that.

Dominic Le Moignan: I am prepared to give my view, but it would be from an outsider's perspective.

Baroness Fookes: No one appears to be in charge.

Brook Horowitz: There was a lot of movement on this. Leading up to the anti-corruption summit, there was certainly Cabinet Office ownership of the anti-corruption policy. Those of us working in the anti-corruption environment felt that that was a promising development. However, the nature of corruption means that it is cross-cutting. It is problematic in companies and in government as well. Who would take the lead on it?

Lord Hutton of Furness: Presumably someone has to, do they not? It is all very well being cross-cutting.

Brook Horowitz: To be fully effective it has to answer questions such as mine: how much is the prosperity fund really investing in anti-corruption activities both here and abroad? If we take the fund not just for the Foreign Office but for DfID, DIT and so on, somebody has to know about that. You have probably interviewed most of the key people in government who are involved in anti-corruption. You must know who is in charge. We are just outsiders and we cannot tell you.

The Chairman: If we find out, we will let you know.

Phil Mason: Speaking as someone on the inside, we are very clear in the department about who is in charge. We made a transformation three or four years ago when we created the Joint Anti-Corruption Unit, which sat inside the Cabinet Office. It was led by the anti-corruption champion. You heard earlier from the current one, John Penrose.

The joint unit is designed to bring together, when necessary, the different views about the anti-corruption world in a coherent way. There are different views in Whitehall. It is a truism of bureaucracy that where you stand depends on where you sit. Different departments have different views on these issues. JACU has created the ability for us to broker those considerations inside Whitehall at, if you like, the apex level.

That does not mean that JACU does everything and there is something of a division of labour in this. For example, the Ministry of Justice retains responsibility for looking at the Bribery Act; DIT retains responsibilities, as does the FCO. However, when it comes to a coherent view on what HM Government need to think about, JACU is now our apex body that tries to provide a focus.

Lord Hutton of Furness: That is a great answer, and we have heard from John Penrose, who is a very capable person indeed. How do officials hold themselves accountable to someone who is not a Minister?

Phil Mason: The inter-ministerial group, the body that meets to address these sorts of issues, is jointly chaired by John Penrose and Ben Wallace, the Security Minister. Ministers are holding themselves to account through that structure. You will be familiar with the subsidiary set of official-level co-ordination processes underneath the inter-ministerial group.

Lord Hutton of Furness: Is Ben Wallace in charge?

Phil Mason: Ben Wallace and John Penrose jointly chair the ministerial drive on anti-corruption.

Baroness Primarolo: One is a Minister and can therefore be held to account, and the other is the champion.

Phil Mason: Ben Wallace would be that person as co-chair of the IMG.

Lord Hutton of Furness: So it is not a Secretary of State

Phil Mason: Each Secretary of State has their own responsibilities within their subsidiary responsibilities, so the Secretary of State for Justice speaks on behalf of issues related to the Bribery Act, for example. That is how it works.

Baroness Primarolo: Or how it does not work.

Lord Grabiner: Should the UK consider following the example of the United States where an opinion procedure allows companies to seek government advice in advance on the permissibility of particular deals and thus gain some degree of protection from prosecution as a result of a form of safe harbour mechanism that we currently do not have.

Dominic Le Moignan: I have a few brief comments to make on this. This has tailed off in recent years in the US. I understand that they had up to a maximum of four a year, with only 61 since 1980.

The challenge, particularly for the UK, is one of capacity. If this was to be offered as a service, I am sure the floodgates would open for it. It would depend on the capacity of the law enforcement agencies to respond to it effectively. I think it would be a challenge. The point is that they would have to know all the facts in order to give a judgment, which would obviously require significant time and resources.

Lord Grabiner: The fact that you say that the expectation is that the floodgates would open is slightly worrying, because it suggests that there is a lot of concern and an unsatisfied demand for these problems to be resolved.

Dominic Le Moignan: When there are concerns along these lines, organisations have a number of different avenues to use internally. The challenge might be one of looking for immunity on something, so there is the possibility for it to be abused. That is a potential danger.

Lord Grabiner: Immunity would be stronger than getting legal advice.

Dominic Le Moignan: Or more cost-effective.

Lord Grabiner: It would certainly be that.

Phil Mason: From the Government's perspective, it is clearly outside my province and comfort levels to give advice on these issues. I know the kind of people who would be giving that sort of advice: they are our law enforcement and prosecution agencies. As Dominic has said, careful consideration would have to go into giving steers one way or the other.

In our system, it is the courts and juries that make judgments about whether a particular circumstance makes a payment a bribe under the Act. I think there would be some nervousness about this, particularly if there was an expectation of providing a safe harbour in the sense of, "Once we have told you that we are going to do this, it somehow gives us a protection". To us that misses the point. It is not about avoiding prosecution under the Bribery Act; it is actually about avoiding bribery. This could send us down a different avenue.

At some point, I would like to talk about the bribery elements of the Business Integrity Initiative, because I know that the Committee will be interested in that. At a convenient moment I can explain what we are doing.

Lord Thomas of Gresford: We have covered this question to some degree. Given that the Bribery Act makes no allowance for facilitation payments, how can exporters deal with situations where they might face what are sometimes subtle forms of coercion to pay bribes? Is it enough to be able to explain the requirements of the Bribery Act in those situations?

Brook Horowitz: Businesses can be confronted by someone who is soliciting a bribe and they may have very few alternatives. I remember when I worked for a US multinational in Russia and we had precisely this situation. The customs agent would say, "You did not put a dot on the 'i' on one of the papers. It has been here for three days and these are the penalties". Quite frankly, companies will normally agree to pay something, and it probably would not be so illegal because they will have been given an invoice. It is not an unofficial payment, but you can bet your bottom dollar or rouble that it was most certainly an unorthodox situation created artificially by someone who was making a fast buck.

Unfortunately, companies come up against these situations. It is not a question of just saying no, which was the internal advice that the company in question used to give its employees: "Just say no". It was very simple. Actually, it was more about 50 ways of saying yes and trying to negotiate something that looked legal and where the payment was minimal.

The other way of looking at this is to consider 50 ways of saying no. You could refer to the UK Bribery Act by saying, "My hands are tied and you must understand that I will go to prison if I give you a bribe". I do not suppose the person soliciting the bribe would be very sympathetic, but they might understand that kind of language.

There are other ways of pushing back. We have given advice in the DIT-DfID project and a G20 project that I was involved in a couple of years ago by creating a toolkit for small and medium-sized enterprises. There are

things that can be done and you can kind of bureaucratise the decision. You can say, “I must talk to my boss about this, and I’m sorry but I will have to get back to you”. That is an artificial push-back. The person soliciting the bribe may understand that they are not going to get much joy out of you, because you are just a low-level official in the company and therefore not able to make such decisions. They might then back off.

The other message was already mentioned, which is that the sooner companies refuse to make facilitation payments the better, because if they start making them, there is no end to it. If they can resist doing so right from the start, that sends a very clear message to the market and the people who want the bribe will back off.

Dominic Le Moignan: I am sure that Phil has a position to share, so I will jump in very quickly.

On the second element of the question, whether it is enough to explain that you must adhere to the Bribery Act, as Brooke has said that can be helpful. There is an interesting initiative from the Maritime Anti-Corruption Network being trialled in Nigeria that is enjoying quite a high degree of success. I want to share the three things that the network has added to the Bribery Act. It says that charges should be computerised. If you are then asked to pay more, you know what is wrong. There are escalation methods and whistleblowing channels when things go wrong.

What is most important is that it is possible to resolve issues in a quick turnaround through a dispute mechanism that is handled in a timely fashion. I understand that these trial methods have been quite successful in Nigeria as measures beyond the Act.

Phil Mason: It might be appropriate to answer the question by giving you some elements of our integrity initiative. You will see in those methods some of the remedies that we are trying to address. The Business Integrity Initiative has three principal aims. One in a sense is to get away from the narrative that stringent bribery legislation is somehow a compliance burden and a hoop that we have to get companies to jump through. Actually, all the evidence shows that it is the pathway to sustainable commercial success.

Secondly, as others have mentioned, there is the need to address what is often called the prisoner’s dilemma problem. Companies in markets do not really know where to turn if they encounter a problem such as a facilitation payment. Thirdly, with an eye on SMEs, we are trying to understand what really shapes their behaviour and are considering how to change it. What we are picking up from our consultations is that it is not necessarily about better guidance from central government, it is about what happens if a peer SME encounters a problem or a success. Companies are actually learning far more from what happens to their associates than they do from elaborate evidence and pieces of information that are presented by central government.

The initiative is trying to address these three issues which companies have told us about. We have a number of elements in place that are just about

to start. This has been going for around a year and a half. It came together when we were putting the anti-corruption strategy together within the government. No doubt you are familiar with the UK Anti-Corruption Strategy. It commits us to having a set of responses for businesses to be able to export overseas successfully. We feel that the initiative is bringing some coherence to that. We have created a hub that is currently within DfID because it is being spearheaded by us, but it is an all-government exercise. We have three folk who started just a couple of weeks ago and they are now able to roll out the ideas that Brook and Dominic have helped to put together.

I should briefly like to mention six things, and I can supplement them later in writing. The first is improving the online guidance set out on the great.gov.uk website. In the past we have heard it characterised as basically, “Be aware of the Bribery Act. This is what you have to comply with. Good luck”. That was how it described to us. We wanted to change that, and there is already much more nuanced guidance on the website about how to resist some of the situations that companies may come across. For example, we have a set of red flags to show when an agent might be behaving in a corrupt way. They show what to watch out for. Other departments have aligned their own guidance alongside this work. The Foreign Office, the Serious Fraud Office and UK Export Finance have updated their guidance in similar ways and we are trying to put out a more consistent and coherent message.

Secondly, there is something that I think will be of interest to the Committee. We are contracting for three types of guidance services in order to allow businesses to seek out bespoke face-to-face guidance on a particular issue that they might be encountering. These services will operate in the areas of prevention work, compliance work—how to deal with the rules that you may face overseas—and collective action guidance. Each of these is being provided because we have heard that companies really welcome a face-to-face type of interaction with expertise. We are experimenting with this and we are still in contract negotiations with the preferred supplier, but we hope that it will enable companies that are interested in this area to turn to specialist guidance.

The third area has already been mentioned: in-country support. We think that the support that missions and embassies can provide is not as good as it could be. That is what companies are telling us. This goes to the heart of trying to sort out the problems faced by a company when it realises that it is being solicited for a bribe. At the moment, companies do not know where to turn. We and taxpayers would expect our missions to be capable of helping companies to sort out that kind of problem. Much as Cecilia said on the MACN side, we need to complete the feedback loop. If the representations received by an embassy are fed back in dialogue with government, telling them that there is a problem in a contract or a sector, that will enable us to play a role in taking them to a higher level and thus help companies to sort out their prisoner’s dilemma problem.

Fourth is the idea of understanding how SMEs can be influenced and how they learn. We have launched what is being called a “challenge” with an NGO called Business Fights Poverty. It is a collection of 20,000 business

interests. The organisation can fire off questions to its members, giving us a chance to build an understanding of how we can best communicate with SMEs and thus have the greatest impact.

Fifthly, we are conducting a stocktake of successful collective actions and practices around the world to learn about what works in collective action. We are looking at the success factors for why particular engagements between the public and the private sectors and government work. We hope that that will feed into our guidance service on what is a good way of sustaining collective action. I have often said to Cecilia that if MACN could bottle its success in its industry we would use that in other sectors and industries that are under similar constraints.

Finally, to keep ahead of the issue, we are convening under the Joint Anti-Corruption Unit an expert panel to keep the relationship between government and business going. As the integrity initiative unfolds, we will be able to continue having that feedback. When businesses tell us that there is a particular issue that that they want the Government to look at, we will be able to have that high-level dialogue. All this is work in progress at the moment. We are setting them up and we now have some warm bodies to help drive them forward. We will be happy to keep the Committee updated on progress.

The Chairman: I am afraid that we have run out of time to discuss the seventh question, which is as follows. How does the Bribery Act compare with equivalent legislation in other countries? Are there other approaches, either in legislation or in enforcement, which the UK could learn from? If there is anything you wish to provide on that topic, I would ask you to do so in writing.

It simply remains for me to say on behalf of the Committee that we are most grateful to you for giving us what I regard as extremely helpful and valuable evidence. Thank you all very much indeed.

Eoin O'Shea, Louise Hodges and Rodney Warren – Oral evidence (QQ 135-140)

Tuesday 6 November 2018

10.35 am

[Watch the meeting](#)

Members present: Lord Saville of Newdigate (The Chairman); Lord Empey; Baroness Fookes; Lord Haskel; Lord Hodgson of Astley Abbots; Baroness Primarolo; Lord Stunell; Lord Thomas of Gresford.

Evidence Session No. 14

Heard in Public

Questions 135 – 140

Examination of witnesses

Eoin O'Shea, Louise Hodges and Rodney Warren.

Q26 **The Chairman:** On behalf of the Committee, welcome, and thank you for coming to assist us. We have sent you a list of the interests of Members that are relevant to the inquiry. If any further interests arise during the hearing that should be declared to you, that will be done. The hearing is in public. It is being broadcast live. A transcript will appear on the parliamentary website. You will receive a copy of the transcript in a few days' time so that you can look at it from the point of view of corrections. At that stage, if you wish to amplify or clarify any points that you make during your evidence—or, indeed, to make points that have not yet been made—you are welcome to do so. I ask you to provide us with that material as soon as possible after you have received the transcript, because we have a lot of evidence to assess. We know who you are, but for the record will you please introduce yourselves?

Louise Hodges: Thank you for inviting us here today. I am head of the criminal litigation department at Kingsley Napley and I deal with our financial services team. I also have my hat on as the first chair of the Fraud Lawyers Association. I am now the immediate past chair, so I still have committee responsibilities with that organisation.

Eoin O'Shea: I practise law in the City of London at the firm of Reed Smith, where I specialise in bribery and similar matters. My other hat, for what it is worth, is that I serve as the chairman of the City of London Law Society corporate crime and corruption committee. Like Louise, and I think like Rodney, I have also been asked to attend on behalf of the Law Society of England and Wales. It was a joint submission by the Fraud Lawyers Association, the Law Society and the City of London Law Society, to which the three of us contributed. So there are some extra hats to be taken into consideration.

Rodney Warren: I am senior partner at Warren's Law and Advocacy. I am a member of the council of the Law Society and of its criminal law committee. For 10 years, I was director of the Criminal Law Solicitors'

Association. Eoin has already mentioned that we worked closely together—and, indeed, with Louise—on the submissions.

Q27 **The Chairman:** Thank you very much. You will have received a list of questions. We will go through them, but please do not feel in any way confined to them if you think there are other points that could be usefully made in the context of this Committee.

A number of concepts in the Bribery Act, such as adequate procedures and associated persons, have been criticised for lacking clarity. Do you think that understanding of these areas is improving with time? Should we consider abandoning adequate procedures as a concept, replacing it with reasonable procedures, for example?

Eoin O'Shea: I will tackle that first. "Adequate procedures" has been seen by practitioners in this area as problematic, because whether or not a commercial organisation can be said to have adequate procedures in place is a question of fact in each case. It is not something about which companies can be particularly confident in advance of the emergence of some problem or allegation of bribery.

It was thought by some when the Bill was being debated that when the Act came into force there would be precedent and judicial guidance about adequate procedures, but that has not been the case. If one thinks about it, it is unlikely to be the case in the foreseeable future, because even if a case were for example to go to appeal on the issue of whether or not the court had properly defined the nature of adequate procedures, that case would probably be confinable to its own facts. It is a difficult concept for companies to wrestle with.

One occasionally encounters the unfortunate idea that for an anti-bribery procedure to be adequate it has to be perfect or close to perfect and reach a very high standard. The fact that the predicate offence has taken place or been established—an offence under Section 1 or Section 6, which is required before a Section 7 offence can be shown—must mean that the procedures are not adequate because the bribery has taken place. That has to be wrong as a matter of analysis, because if it were right it would deprive the defence of all efficacy.

There must be a margin by which an adequate procedure might still fail in a particular case. It is a matter of human nature that someone who is determined enough to get around any systems and controls and to play the system, as it were, will be able to do so. That should not automatically mean that the system itself has failed or is inadequate. To my mind, if it were better understood that "adequate" does not and cannot mean "perfect"—that was acknowledged during the passage of the Bribery Bill—we would be in a slightly better position for dealing with the concept of adequacy and helping clients to understand it.

I suspect that the others will have more to say about reasonableness. All I will say is that reasonableness was debated and thought about when the Bribery Bill was considered by Parliament and was rejected by the Government at the time. The idea of reasonableness, as I think it was understood then, imported a degree of cost-benefit analysis. The view was that the Government did not want to go there, because they would

be seen as permitting companies to say, "It's too expensive", "We might lose business", or "It's too difficult to put a tough policy in place".

I suspect that, from the point of view of perception, any change to reasonableness at this point would be seen in the same way by quite a few people in what I might call the anti-bribery community. Various international organisations, NGOs and so on would see a move to reasonableness as something of a watering down. Those are some initial thoughts.

Louise Hodges: I endorse what has been said. On the question of whether understanding in this area has improved over time, as Eoin has pointed out there has not been the through-put of cases in order to see the judicial and jury decisions in relation to "adequate procedures". Although the Ministry of Justice guidelines were published when the Act came into force, those have not evolved over time. There is an element of "out of sight, out of mind", particularly when there is a lot of other competing legislation that corporates have to look at. If there is an opportunity to review what the adequate procedures are, it should be taken up.

The issue of reasonable procedures has come to the fore because it has been used in relation to tax avoidance and evasion offences. That is where the difference has created some debate. However, I think we all agree that now is not the time to change what is already in the Bribery Act. A much more radical review of corporate liability might be an opportunity to do it, but making piecemeal changes is probably not productive at this point.

Baroness Fookes: Would a review of the guidelines be helpful at this juncture?

Louise Hodges: I think it would, partly because, again, it would help to raise the profile. One general concern was the big fanfare when the Bribery Act came into force. Certainly, my firm was consulted by a number of companies that were very concerned about it. That has probably diminished over time, particularly for smaller businesses. As I have said, there are lots of competing criminal risks to which companies are now exposed. Some learning must have been done in the various agencies, be it the SFO, the CPA or the NCA, in terms of what they think looks good. If they could give some more clarity on that, it would be helpful.

Eoin O'Shea: But there is an unfortunate reluctance to do that on this side of the Atlantic at least. That perhaps leads into other questions that we may discuss, but I agree that it would be helpful and would not necessarily diminish any of the main priorities of enforcement agencies for them to try to take a view on adequate procedures.

Lord Thomas of Gresford: Are any of you aware of any direction to a jury by a judge in a trial as what adequate procedures mean?

Eoin O'Shea: There was a trial of a small company called Skansen Interiors. I am afraid I cannot call to mind the exact direction of the judge to that jury. The jury found that Skansen Interiors did not have adequate procedures. It was a very odd case from a lawyer's perspective.

One feature of it was that the company had been wound up or was about to be wound up immediately, so the only penalty that could be imposed by the court was an absolute discharge.

Another feature of the case that was surprising to many of us was that a former director or former senior employer of the company had paid bribes. The new chief executive had gone to great lengths to report this and to take remedial measures and so forth. I suspect that people feel that had Skansen Interiors been a larger company it could have benefited from a deferred prosecution agreement, but that did not happen. Although the company received an absolute discharge, there was nevertheless a stigma associated with the conviction. Your question, Lord Thomas, was in relation to the direction of the judge. We can find that and provide it to the Committee if it would be helpful.

Lord Thomas of Gresford: I am interested in how it was put, because I can see how one could put the issue of reasonableness. One could say to the jury, "Well, you consider all the facts and whether its procedures were reasonable". As you remarked, the procedures have not worked if you are in a prosecution; the bribery has taken place. That is a slightly different situation. I am interested in how the direction would be put.

Louise Hodges: One confusing point about that case was that, as is often the case, one senior person was the custodian of how it dealt with its policies. The replacement of the senior person led to previous misconduct being uncovered and being self-reported in the way that all the authorities are trying to encourage. But that did not prevent the company from being subject to criminal proceedings.

That was a mixed message. There may have been very specific reasons related to that case. Eoin has referred to the fact that the company was wound up, which may have been a feature of the decision-making, but it is unfortunate that, when there are so few cases, this stood out as a slightly odd decision.

Lord Thomas of Gresford: So if a chief executive self-reports what has gone wrong previously and has done their best to put it right, it does not stop a prosecution.

Eoin O'Shea: Quite.

Lord Thomas of Gresford: From a policy point of view, it is perhaps not very good.

Eoin O'Shea: It was said, I believe, that the case was pursued to send a message that even small companies needed to have anti-bribery procedures. It is true on the facts of that case as I understand it that there was no piece of paper with "Anti-Bribery Procedure" written across the top. However, I agree that it was a mixed message, because an individual and a company had attempted to do the right thing on discovering past misconduct. Nevertheless, it found itself subject to criminal proceedings, which cannot have been particularly pleasant.

Lord Hodgson of Astley Abbotts: Mr O'Shea, you made the interesting point that if it had been a bigger company it would have benefited from a deferred prosecution agreement. We have been looking at how all the cases are effectively small fry, while the big boys are able to play to a

completely different set of rules. It seems potentially very unsatisfactory that, every now and again, a small person is taken out and hanged in front of everybody, while the big guys carry on, pay their money and off they go.

It would be helpful if you could tell us whether that is a fair representation of what is going on and whether it is satisfactory. We will come to a different matter relating to European arrest warrants later, but, since I am speaking for the first time, I need to declare that I am a trustee of a charity called Fair Trials, which deals with individuals and not corporations.

Rodney Warren: At first blush, I tend to agree that there appears to be a sense of unfairness in respect of smaller organisations, because it is easier to point at the controlling minds of the company and identify the wrongdoing more readily, whereas in a larger company there may be tiers of management and responsibility that have served to protect some parts of the organisation.

The structural differences create the environment; that is a consequence of it. Certainly, in my experience, small and medium-sized enterprises involved in any inquiry or consideration of these matters feel more vulnerable, because when they read about bigger organisations they see different processes that may not be open to them to follow.

Lord Stunell: Is there any way of addressing that imbalance in prosecuting small and large firms, unless we address the wider identification doctrine in English law? The problem is that big is complex and complex is difficult to prosecute.

Eoin O'Shea: The identification principle is a hugely difficult topic that has been the subject of enormous academic and other debate. Views differ as to its utility in—that dreaded phrase—the 21st century and modern commercial conditions. However, there is a narrative out there that is worth resisting, which is that big companies are aware of the nature of the identification principle and so organise their affairs in such a way as to insulate senior management from any identified decision-making and therefore the company from criminal liability.

From my experience representing large companies for many years, that seems wrong. In reality in the commercial world, well-run businesses do not spend much time thinking about interesting but obscure points of law and organising their affairs accordingly. People are understandably worried about personal criminal liability, which may be a driver of some behaviour in large organisations. But it is relatively unlikely that the identification principle is at the root of or a contributor to deliberate misconduct, except in the case of a company that is rotten from top to bottom and is essentially a criminal enterprise ab initio.

Lord Stunell: That is not really the point. The point is that a large company is inherently less likely to be prosecuted and more likely to be let off with a DPA than Skansen or a small company.

Eoin O'Shea: Yes. There are all kinds of reasons for that, one of which may well be the identification principle. But there are other reasons as well, such as the resources that are available to large companies anyway

and the reality that in many cases when one tries to find out who the decision-maker was in a particular course of action there might be 30 people who had some visibility of some part of the transaction. It is more difficult in a large organisation to identify one person and therefore who was ultimately responsible and whether that can be attributed to the company.

Louise Hodges: Eoin mentioned resources. Those are not just the resources of the company. We have to be realistic about the resources it would take for the SFO, for example, to prosecute a corporate for these offences. I am sure that companies that have gone through the DPA process would not necessarily regard it as getting off lightly, whatever others may think. At the end of the day, whether you take a company through the courts or there is a DPA, all you can do is fine it. It is a financial penalty that the company ends up with.

Obviously the DPA has been introduced to try to accelerate that. In a way, that has been successful potentially because the DPAs that we have seen would not necessarily have resulted in companies going to court. So in that sense the DPA has helped and has enabled corporates to be held to account for a lack of anti-bribery policies or for bribery that has happened within them.

There is a constant debate about whether it is better to inject your resources as a prosecutor into prosecuting individuals—as it is the individuals who are the architects and the drivers of bad behaviour—or to go after the companies. But that always has knock-on effects for shareholders, employees and all those areas where a DPA may be a better resolution.

Lord Stunell: So are you saying to this Committee that you cannot see any practical solution to this differentiation of prosecution risk?

Louise Hodges: In relation to the smaller companies, at the moment DPAs are being driven by the Serious Fraud Office, so a lot of those smaller companies would be under the radar or would not fulfil the SFO's criteria for taking on cases. It is about the CPS and training there. It is about the police. It is about looking at how those cases are reported and who they are reported to and then who takes them up. I am sure that whistleblowing is going on in smaller companies as much as in larger companies, but how that filters through to a corporate prosecution is a different issue.

Eoin O'Shea: There is something else that might be worth considering, which is happening in the US: the policy of declinations, which the US Department of Justice is currently piloting. I may have this slightly wrong, but the broad point is that where companies detect bribery by their employees or agents and they self-report that within a reasonable time to the US authorities and co-operate with the investigation, the presumption is that the Department of Justice will not prosecute. The company is generally expected to disgorge any profits that have been made as a result of the bribery.

In a case of full, open and complete co-operation, and in a situation where the only reason the authorities know about the criminal conduct at all is because the company has blown the whistle on itself, the

Department of Justice has the option to decline to prosecute. That may be worth considering in this country as well—in the case of SMEs, for example.

Baroness Primarolo: Louise Hodges, I would like to come back to the question of prosecution risk. I want to be clear what you are saying to the Committee. Are you suggesting that the prosecution risk is higher for a small or medium-sized company than a larger one, or that, because of complexities, it may manifest itself differently in pursuing a bribery allegation? I got the impression that you were saying that SMEs might be more at risk of prosecution. That would be a problem for the legislation. We have not really heard that before. Perhaps I misunderstood.

Louise Hodges: It boils down to the identification principle—the principle means that smaller companies are more likely to be vulnerable to corporate criminal liability, because if somebody can be identified as the controlling mind and will of the company, that brings into play the corporate offences. That is much more likely to happen for a smaller company than for a larger company.

Baroness Primarolo: Is it not true that a smaller company would be able to see through the controlling mind concept but that it should know what is going on and therefore take the procedures that are necessary to make sure that bribery does not go on? It cuts the other way: it is much more difficult in a large, complex area—hence the question of the controlling mind. The legislation is trying to balance that, is it not?

Louise Hodges: It is. I suppose it depends on how you define a small company, because that ranges from a small, family organisation to something where people are not necessarily under your watch the whole time. It is companies whose expenditure on adequate procedures might be much more sensitive because the profit levels are much more sensitive.

When it comes to the demands of those externally in order to win contracts as a corporate entity, the big corporates have a lot more power to have a much more ethical approach, not only their own but their suppliers'. Contractually, they can feed this down, whereas the smaller businesses are much more vulnerable when it comes to winning a contract that can mean the survival—or not—of the company. I am not condoning that, but it creates vulnerabilities for smaller companies in the way that it might not for large companies.

Baroness Primarolo: But they need to know the controlling mind.

Louise Hodges: Of course they do.

Baroness Primarolo: The company is small, so they can be identified, so they must take the necessary steps to protect themselves. I am just a bit concerned that you seem to be saying that there is a higher chance of a small and medium-sized company being prosecuted than a large one. That is not how it is supposed to work.

Rodney Warren: You are absolutely right about it working both ways. We were talking earlier about SMEs perhaps feeling that they were more vulnerable to investigation and prosecution because they are small, but actually, and you make this point eloquently, the small nature of the

company may be precisely the point that makes it vulnerable because of its wrongdoing. It has the responsibility—we might come later to how SMEs cope with, address and think about this—to understand that the immediacy of the corporate structure, where the controlling minds may be the directors who have immediate responsibility for the negotiation and conduct of contracts, is going to put them very much in the firing line, which is not the position in a major global business.

Lord Haskel: Going back to the original point, do you really think that, to a small company, the difference between “adequate” and “reasonable” is merely a lawyer’s point?

Rodney Warren: It is. Experience from speaking to companies and trying to explain to them what might be an adequate procedure suggests that that is not an easy question to answer. Business likes to have certainty—it likes to have questions answered and move on; that is the nature of business—but lawyers cannot always give the direct answer that businesses welcome.

While we can work towards an understanding and development of the idea of what constitutes that definition—Eoin has already talked about that to some extent—there could be a danger in changing that definition now to “reasonable”, because however one tries to explain the difference between the two words, it could be seen as a dumbing down and would certainly lead to a need to explain why there had been a change, so there would be an attendant risk that it could create more damage than any problem it might go towards solving.

Lord Empey: In your experience, what is the level of awareness, particularly in small companies, of the provisions of the legislation?

Rodney Warren: In my experience, I fear that it is low. Perhaps we will come to this later with specific reference to SMEs. I have a view through my own personal experience from speaking with smaller businesses and companies as to why that is.

Q28 **The Chairman:** We have to move on, because we have time constraints. It seems to me that you have already given quite a lot of evidence in relation to our fifth question, “Are deferred prosecution agreements working effectively in relation to the Bribery Act 2010? Is there any way of addressing the imbalances between prosecuting small and large firms in the UK without addressing the wider identification doctrine in English law?” We have probably covered that, but, as I said at the start, if you wish to add anything when you receive the transcript, please feel free to do so. We move to the second question, which Baroness Primarolo is going to put.

Q29 **Baroness Primarolo:** Could we shift the focus to the law enforcement agencies themselves—the SFO, the NCA, the CPS and the police forces? How effective are the UK’s law enforcement organisations when it comes to investigating and prosecuting bribery cases in the UK and involving UK parties abroad? This follows on from our discussion about the different sizes of companies. I would be interested to hear your views on that.

Louise Hodges: On one level, it is quite difficult for us to answer that, because we only have sight of the published data from the various

different agencies or clients who we see coming through the door to seek our advice.

Looking at the external commentators on how we are doing at the moment, the OECD review has given some very positive narrative on the drafting, implementation and use of the Bribery Act. During the discussions when the Act was under consultation, I do not think there was ever the expectation that the floodgates would open and suddenly we would have multiple prosecutions, but it means that the few become representative or have a slightly different status when we are gauging how things are progressing.

Certainly the SFO takes the lead in that, but it always did. In fact, a number of the bribery-related prosecutions that it is dealing with, and which are on its books at the moment, are under the old law. When it comes to the question of a continuum and bribery offences being looked at, that is very good. I think the CPS and the police forces suffer from the number of different types of criminal offending that they are looking at. Whether the Bribery Act and related fraud and other offences get the resources and the training is a different issue, and the numbers of prosecutions there are relatively low.

Eoin O'Shea: I completely agree, particularly with what was said at the beginning. This is a story with which the UK can be reasonably happy. Over the past 10 years, the image of the UK as a country that takes bribery seriously—I suppose I am thinking in particular about international bribery—has improved considerably. That is a result of the Bribery Act itself, which is seen internationally as a gold-standard piece of legislation, and because of the efforts of law enforcement, which have improved considerably during that time.

Not everyone on this table will always agree with the SFO on everything, but it is right and fair to say that the SFO has a difficult job to do. The cases that it has to investigate and prosecute are, almost by definition, more complex and difficult than the vast majority of criminal offending. Again, one should bear in mind that the media in particular tend to seize on any case where there has been an acquittal, or where a trial brought by the SFO has collapsed for one reason or another, as evidence of a narrative that this is a disaster. However, these are very tough cases, and I agree with the former Director of the SFO who has said from time to time, essentially, "Look, our role is to bring appropriate cases before a jury, and it's right that we do so". So two cheers at least for the SFO for its recent track record. As I say, one does not always see things in the same way, but that ought to be recognised.

Rodney Warren: The only thing I would add is that, on the investigation and prosecution of bribery cases, particularly in the UK, it is hard to say how that has progressed from an external perspective. However, there is an opportunity to look at the reporting and how cases come to be known to the investigating authorities in the first place. It is quite hard to see—I get asked about this from time to time—how an individual who is concerned about the conduct of another or concerned in the course of some dealings, can report that believed wrongdoing to the authorities with any confidence that it will be investigated.

That is all about the process by which these things are now managed. I make no criticism of anybody because it is very difficult indeed, particularly at a point where there is so much internet fraud under way, and Action Fraud is clearly very busy receiving reports. It is very hard to see how these things are actively received. The concept is, of course, that if any individual sees any crime and wishes to report it to the police, that should be done through the local police force, but most of them are not well equipped to deal with these things and they will respond by suggesting that the person contacts Action Fraud. At that point, there is silence after that report is made. There is no feedback. I am not sure that the public have a great deal of confidence that any action will be taken.

Baroness Primarolo: Are you suggesting that putting in a report on tax to HMRC does not tend to get a response and that it says that it is because it does not comment on reporting? Are you suggesting that at least an acknowledgement that a complaint has been received is a sensible way to proceed to give people confidence that the whistleblowing process might work?

Rodney Warren: Yes. There are two things there. You highlight a point that when most people are concerned about conduct they will think first about the police and, because they are not experienced in the ways of the system, as it were, they will not think that they should perhaps get in touch with HMRC and make a report direct to it, or whatever they should do. It is where they go first and how they are received that is significant and important to them. I quite agree that it would be immensely helpful, and it must be good practice, that if someone reports something which is to be investigated, it is acknowledged so that they know that and feel comfortable that it is being looked at.

Baroness Primarolo: The idea of a gateway is very interesting. I shall ask about one other quick point. You may not feel that you can answer this, but are you satisfied that the authorities that are investigating allegations of bribery under the Bribery Act are adequately resourced and, most importantly, that they have access to the expertise necessary to pursue the case? You briefly touched on the police forces. Are you confident that the resources and expertise are there?

Lord Thomas of Gresford: May I follow that question? Forensic accountancy is a growing thing. It did not exist 40 years ago, but now it is very much to the fore. Do you feel that the prosecuting authorities have sufficient forensic accountancy resources, and do you, if you are defending, have sufficient access to forensic accountants to meet that?

Rodney Warren: I shall give short answer first to deal with those matters, and I shall take them in reverse order. In my experience, the forensic accounting process is immensely helpful. Where it is needed, it is probably available to both prosecution and defence. My colleagues probably have greater experience than I do.

I am terribly sorry, I have forgotten the other question.

Baroness Primarolo: My question was about resources. You touched on police forces and nothing being heard. Is that a resource issue, a lack of urgency or a lack of understanding of the Act?

Rodney Warren: My honest answer—this is an entirely personal view, of course—is no. However much there may be individuals in high office who may come in here and respond positively and appropriately because they have senior roles, as an outside observer looking at how they have to manage their resources, I would say, frankly, that it is very difficult for them. From an outside perspective, I acknowledge that. Of course, this is a pyramid. The pyramid takes us to the Serious Fraud Office at the top. It may be that because of its capacity to get block-buster funding in the most appropriate cases, it has appropriate resources—others may have other views, I know not—but at the lower level, I am not satisfied at all that there are adequate resources to look into the type of case that might be reported.

Eoin O'Shea: The SFO has been going out of its way for years to say that it has sufficient resources. It does not want it bruited about that it is a soft touch and that it can be pushed around by very big organisations with significant resources that are against it. It is difficult to know the extent to which that is really the case. David Green and others have gone to some lengths to say, "We have enough resources, don't worry about that. We will be able to go after whoever we think it's necessary for us to go after".

It is important that there is specialism. Economic crime generally and financial crime are complex and difficult to investigate and prosecute. With the greatest respect to rural constabularies, this is not run-of-the-mill work for them. It seems to me that there is a lot of sense in having specialist units which can perhaps lend personnel or work co-operatively. The City of London Police has a specialist fraud unit, as you might expect. It has some good and experienced people there, and the same is true of the SFO. There are MoUs and so forth whereby there is co-operation between different agencies, but it seems to me, as an outsider, that there are specialisms, and there is something to be said for centralising resources which can then be doled out as necessary to smaller or less experienced forces.

Louise Hodges: Trying to capture those two points, with the SFO there is the Roskill model which includes investigators, prosecutors, forensic accountants and financial investigators. That model tries to bring all those specialisms together. It has generally worked well, although if you look at the totality of the budget for the SFO, there could be a call for a greater budget for the SFO, although the recent changes mean that it has more control over its budget and is not constantly looking for blockbuster funding or case-by-case funding as financially its resources are its own. There is an issue at times about quality as well as resource as the salaries that can be earned as a CPS lawyer compared to in private practice, and I imagine that in all the other specialisms within the SFO you can earn a lot more money in private practice. We are following the trend in the US where people are coming out of the organisation and into the private sector and the other way. There is an issue about whether you can pay for the quality of people that you may want to investigate and deal with cases of that type.

The SFO is different from when you are looking at police and other agencies. Once you get outside the specialist units in the City of London

Police, it is much more challenging to find that type of specialisation outside a relatively small area. There have been a number of investigations where the SFO has buddied up with police forces. That has been quite successful, but it always boils down to the fact that the police forces are dealing with an extraordinarily broad range of offending and there are lots of competing demands on their resources. Naturally some give way, and I am afraid that bribery is probably in the "difficult to do" box.

Q30 The Chairman: We move on to the third and fourth questions, which were going to be put by Baroness Fookes and Lord Thomas respectively, but we can deal with the two together, because they are related. If they will forgive me, I will read out the third and fourth questions and ask for your evidence on those.

The third question is this. Should the UK consider following the example of the United States, where an opinion procedure allows companies to seek government advice on the permissibility of particular deals in advance, and gain some degree of protection from prosecution as a result? Is there a need for the Government to provide more personalised guidance to businesses in relation to the Bribery Act? The first part of that question relates to what are known as safe harbours.

The fourth question is this. Is the Ministry of Justice guidance on the Bribery Act providing adequate and up-to-date information for businesses, especially SMEs? Are SMEs able to access high-quality, affordable advice on the Act when needed? We have touched upon that to a slight degree, but if you could now address yourselves to those two questions, I would be very grateful.

Eoin O'Shea: As to the first question and the opinion procedure in the US, my answer is a qualified yes. Anything that incentivises good practice should be supported, in my view, and providing a system in a case where the applicant, for example, lacks sufficient resources or expertise to be able to come to a view or there is perhaps something unusual or out of the ordinary that cannot be answered by looking at existing guidance, and the applicant can rely on the response of the relevant authority is a good thing.

It is difficult to think of a reason why that should not be done, subject, I suppose, to a couple of points. The first is resources. The second is who would do it; which organisation would carry out that function on behalf of, let us say, the Government or the state? In the US, the Department of Justice seems to have no difficulty in doing that, and it has—it certainly had until recently; it may still have—a compliance function, a compliance counsel: the person or maybe team of people whose job is to deal with these kinds of inquiries and generally encourage good practice more broadly. Their role is also to look at and evaluate remediation measures and corporate compliance programmes, and so forth, more generally.

There was a view at the SFO that it did not want to be in the business of giving advice or turn itself into a regulator, and that its proper focus ought to be prosecution only. That is understandable to some extent, but it ought not to be impossible to have a separate team or department that

can provide assistance of this nature. As has already been identified, SMEs and economic actors without significant resources might well benefit from that. It ought not be beyond the wit of the Government to come up with a similar system, it seems to me.

Louise Hodges: I have looked at the opinion procedure process in the US. Obviously, I am not a US lawyer. In that system there have been some barriers to it being a success, but certainly if we were to look at introducing something like that, there are ways in which we could overcome those barriers if we looked at the system from the outset.

One of the fundamental problems is the timing between someone making an application for an opinion and how quickly that can be turned around. Quite often, transactions are time critical. The other issue is who it binds, because in the US it just binds the DOJ from not bringing proceedings. Obviously, in the US, a number of different agencies can bring proceedings, and it would be the same in the UK.

With some thought, it would be a positive thing for companies to be able to posit transactions or whatever and say, "Am I completely in a world of risk here or does this look suitable?"

The Chairman: What might be said against that is that you are then excepting the criminal offence of bribery from the way you deal with any other criminal offence of any other nature. I do not think that there is anywhere else where you can say, "If I do this, will I be committing a crime?", except by going to your own lawyers. That is one problem.

The other problem is one that you have already touched on. If one was to introduce a scheme of that kind, it would have to be pretty well financed and run by pretty high-powered people, who would be required to turn around and answer very quickly indeed. The problem that I see as a lawyer is that it produces rather an odd circumstance: if you are going to be let off because the Government have said that what you are doing is not a criminal offence, in effect you are taking away from the courts their primary function to declare what the law is.

Rodney Warren: Yes. Those are very important points. I make a distinction between companies that are trying to make decisions about their conduct for contracts being entered into within the United Kingdom, and those where they may be abroad in other jurisdictions where they have less experience of local custom and local methods of tendering and procurement.

To that extent, it seems a good opportunity to assist companies that might not have the breadth of experience in their international trade to be able to get some guidance. However, there is a perversity about that, which I suppose is readily recognised, which is that those most likely to seek that guidance are probably those least likely to transgress.

Eoin O'Shea: On the Lord Chairman's point, it depends on what one sees as the primary objective of the legislation. Rodney's idea that it could be limited to foreign cases is right. But at least part of the objective of the Bribery Act was to encourage good practice and to actively encourage companies to put adequate procedures in place and to be proactive in

preventing bribery. In circumstances like that, one is closer to a regulatory regime than a purely criminal justice regime.

If one wishes to encourage good practice, the Section 9 guidance is another way in which that is being done; various examples are given of cases that would fall inside or outside the lines. That seems to be another instantiation of the same principle, of seeking the same objective. I would not necessarily agree that it takes away from the courts the duty to make rulings on the law.

One could make the same criticism of the DPA regime. Although there is judicial oversight of DPAs, in reality agreements are come to and brought before the court, and no one before the judge argues the contrary, saying, "This DPA is not in the interests of justice", or, "This DPA is not fair". The judicial development of the law is a slightly different topic.

My point is that this is a question of priorities. If one wishes to prioritise the encouragement of good practice, there is something to be said for the opinion procedure.

Baroness Fookes: Could I follow this up a little? Are you prepared to recommend to us that we should seriously consider going down that US route of companies seeking government advice?

Eoin O'Shea: For my part, yes.

Louise Hodges: I am more agnostic.

Baroness Fookes: It seems to be "on the one hand" and "on the other hand". You are agnostic. Eoin is in favour. Mr Warren?

Rodney Warren: I cast the balance in favour.

Lord Empey: I return to the question of awareness on the part of companies. This is 2010 legislation, and in the natural progression of any business the various cohorts of people in companies who deal with this type of activity abroad will move on. The people who were there when the Act was brought in and there was a bit of publicity and activity about it may have an awareness of it, but their successors are more likely to be in place now.

You seem to be sceptical, Mr Warren, about the level of awareness of the Act, particularly in small businesses. What could we recommend that would improve that level of awareness so that people understand the legislative environment in which they operate?

Rodney Warren: I have been giving some thought to this, and I am pleased that I have at least a suggestion. Whether it will be thought to be a good one is another matter.

The difficulty, as you have said, is that when the Act first received a great deal of publicity a lot of attention was paid to it, and that the guidance has been there but it is not been readily updated. It does not change the quality of the guidance, of course, but it is not within the focus of those who should be looking. As you say—this is a very important point—people who may have been mindful of it some years ago may have moved on to entirely different jobs.

Two lessons have been learned, in a way. One, most recently, was with GDPR, which had a focus in corporate bodies that seemed to draw in the need to pay attention to regulatory requirement, almost to the exclusion of other obligations. That might sound slightly surprising, but in small businesses there is the sense that people have enough to think about in running their businesses and cannot cope with yesterday's obligation. Perhaps I am being a little cynical about that, but it just seems to me that that may be the case, and it serves to make the point.

My example is the Police and Criminal Evidence Act. That is a very live piece of legislation. It is in operation all the time by very many people. It is at the cornerstone of our criminal justice system. It came up for review, and the Home Office, looking at the review after approaching 20 years, I think—I do not recall exactly; it must have been about that—felt that it was helpful to see how the codes of practice were being operated; whether they were appropriate, whether they could be changed or improved.

The then Home Secretary then set up the PACE review board, which has continued to exist. As life has changed, with electronic working and so forth, there has been a ready opportunity to develop the codes of practice, to seek approval, and to seek input from specialists across the broad spectrum; the board is not just made up of individuals in the Home Office—invited to participate are academics, practitioners, police officers of course, and those directly concerned with its operation.

It has served to generate a constantly renewing focus on how the Act is operating, and it seemed to me that there is an opportunity here for the Ministry of Justice to consider doing something like that with the guidance so that it is frequently refreshed, maybe annotated at the point at which it is refreshed periodically—perhaps annually—and people will be able to look at it. It is a document that they will see and they will not think that it is stale or out of date.

Q31 The Chairman: Unfortunately we have run out of time, which means that we cannot address the sixth question. I knew it was going to creep into this Committee at some stage. It partly concerns Brexit. May I ask you to address yourselves, when you receive the transcript, to anything you wish to say in relation to the sixth question, which concerns the European arrest warrant, the investigation order and so on?

It remains to say thank you very much indeed for providing us with some very valuable evidence. I repeat that if there is anything that you wish to expand upon, clarify or correct, you have an opportunity to do so when you receive the transcript. Once again, on behalf of the Committee, thank you for your attendance.

James Wolffe QC, Andrew Laing and Denise McKay.- Oral evidence (QQ 141-148)

Tuesday 6 November 2018

11.40 am

[Watch the meeting](#)

Members present: Lord Saville of Newdigate (The Chairman); Lord Empey; Baroness Fookes; Lord Haskel; Lord Hodgson of Astley Abbots; Baroness Primarolo; Lord Stunell; Lord Thomas of Gresford.

Evidence Session No. 15

Heard in Public

Questions 141 – 148

Examination of witnesses

James Wolffe QC, Andrew Laing and Denise McKay.

Q32 **The Chairman:** On behalf of the Committee, good morning to the three of you. I should mention one or two matters of administration. The interests of Members relevant to this inquiry has been sent to you. The session is in public and will be accessible on the parliamentary website. There will be a verbatim transcript of the evidence, which will be sent to you a few days after this session. That is your opportunity to make any corrections, additions or amplifications to the evidence that you feel fit to make. All I would say is: could you please do that as soon as possible after receiving the transcript, because we have quite a lot of evidence to assess? I will ask you in turn, although of course we know who you are, to introduce yourselves so that that will appear in the transcript. Lord Advocate, may I start with you?

James Wolffe: Thank you. As Lord Advocate, I am head of the system of prosecution in Scotland.

Denise McKay: I am head of the civil recovery unit for Scotland. I am a solicitor acting for the Scottish Government currently fulfilling this role.

Andrew Laing: I am Deputy Procurator Fiscal for a division that we call "specialist casework" in the Crown Office and Procurator Fiscal Service. Ordinarily I am based at the Scottish Crime Campus in Gartcosh in Scotland.

Q33 **The Chairman:** Thank you. You have been sent a list of questions, which we will go through in the course of this hearing, but do not feel in any way confined to them if there are other points of importance that you wish to make to us.

I shall start by asking the first question. The Ministry of Justice guidance makes only passing reference to the fact that Scotland is a separate jurisdiction. Should it be amended? Is there sufficient co-operation between the Ministry of Justice and the Crown Office?

James Wolffe: Perhaps I should answer that. The first thing to appreciate about the Ministry of Justice guidance is that it is statutory guidance made under Section 9 of the Act. It fulfils a particular function in the operation of the Act, mainly to provide guidance to commercial organisations on fulfilling their responsibilities under Section 7. As such, it applies throughout the UK, as it makes clear, and the devolved interest is respected by the requirement on the Secretary of State to consult Scottish Ministers before publishing the guidance.

So on the question of what the Ministry of Justice guidance is intended to do, it fulfils the function by setting out guidance applicable to commercial organisations across the UK to assist them in fulfilling their responsibilities under Section 7. I saw in one of your earlier sessions some comment about the interaction with the self-reporting scheme that I approve for use in Scotland. That, of course, has a quite different function, separate from the function that the Ministry of Justice guidance fulfils. It certainly would not be for me to replicate the statutory functions of the Secretary of State under Section 9.

Having looked at the guidance in light of the question, I can see that there could be clearer flagging of the fact of a separate jurisdiction and the particular responsibilities of the prosecution authorities in Scotland. I have absolutely no reason to think that there would be any difficulty in what I suspect would be relatively minor adjustments to the guidance to reflect that and to make it clearer for the reader.

There is perhaps a constitutional point that I should make, just so the Committee has the structures clearly in its mind. We are dealing here with matters that in Scotland are within the competence of the Scottish Parliament. Questions of policy in relation to this area would be matters for the Scottish Government collectively. Although I am a member of the Scottish Government, I fulfil my prosecutorial functions entirely independently. Liaison with the Ministry of Justice and consideration of any issues of policy regarding Scotland would be matters for officials within the Justice Directorate of the Scottish Government. As I said, I have no reason to think that there would be any particular difficulty in what I suspect would be relatively minor signposts relating to the separate jurisdiction, should that be thought to be helpful.⁷

Q34 **Baroness Fookes:** In the other UK jurisdictions, prosecutions require the authority of the Director of Public Prosecutions or the director of the Serious Fraud Office. Do you think that decisions on prosecutions in Scotland are taken at a sufficiently high level? Before you answer, I recall that we have had previous evidence from those who think that that level of authority is too high in the other jurisdictions and did not need to be so.

James Wolffe: I suspect that I may answer most of the questions, although Denise or Andrew should feel free to add anything should they wish. I suppose the first thing to observe is that it is not the practice to provide expressly for consent of that sort in Scotland. The context is that in Scotland we have a single unified system of public prosecution, for which I am constitutionally responsible and in which all prosecutors are

⁷ Note by witness: I have now asked officials in COPFS and Scottish Government to liaise with the Ministry of Justice, with a view to proposing these minor additions to the guidance.

obliged to apply any policies that are laid down or approved by the Lord Advocate. So we are not operating as in England and Wales with a system where there may be a number of possible prosecuting authorities—and, indeed, the possibility of private prosecutions.

In Scotland, a private prosecution may be brought either with my concurrence as Lord Advocate or, if I decline to grant concurrence, if the court approves the prosecution. It is clear from the recent case of Stewart and Payne that, in effect, the court will grant its approval for private prosecution only if there has been a clear failure by the Lord Advocate to fulfil his responsibilities. I am glad to say that private prosecutions are exceptionally rare in Scotland. The constitutional structure is different.

As it happens, the internal instructions for Bribery Act offences are that all such offences, at whatever level of seriousness, will be reported to the Serious and Organised Crime unit of the Crown Office, which Andrew heads. There, we have a specialist team of investigators, prosecutors and forensic accountancy experts who deal with this, along with other complex and serious cases. Once any such case has been considered and investigated under the aegis of the specialist casework prosecutors, it is reported for instruction by Crown Counsel. In our system, Crown Counsel are senior prosecutors drawn from the private Bar and from within the service who hold a commission to exercise my functions in the context of the prosecution of a crime.

Andrew will correct me if I am wrong here, but our internal arrangements have the practical effect that all offences under the Bribery Act will be considered by the specialist prosecutors under Andrew's aegis and, ultimately, instructed by Crown Counsel. That is true at whatever level they may ultimately be prosecuted.

Baroness Fookes: Thank you.

Q35 **Lord Thomas of Gresford:** Unlike civil settlements, deferred prosecution agreements have a detailed statutory basis and require judicial scrutiny and approval. Do you agree with the OECD that Scotland should consider adopting a similar scheme?

James Wolffe: The first thing that I should say about deferred prosecution agreements is that they were introduced not in the Bribery Act but in the Crime and Courts Act 2013. They are not specific to Bribery Act offences, but they are a mechanism available for a range of corporate offending.

The Committee will appreciate that deferred prosecution agreements raise a number of potentially competing policy considerations. As a prosecutor, I recognise that the model provides a range of disposals that are not available under our self-reporting scheme. At the same time, they involve, certainly for Scotland, a novel judicial role played in deferred prosecution agreements.

The provisions in the Crime and Courts Act followed an extensive consultation process for England and Wales. Because of the policy issues that arise, it would be necessary to have a similar consultation exercise were they to be introduced for Scotland. Of course, those are matters for

the Scottish Parliament, and it would be for the Scottish Government to take that forward. The Scottish Government are well aware of the OECD recommendation that consideration be given to the introduction of deferred prosecution agreements in Scotland. They intend to give consideration to that recommendation.

Lord Thomas of Gresford: I strongly suspect that the Scottish Government will do nothing unless you, as Lord Advocate, suggest that this would be desirable.

James Wolffe: As I said earlier, as Lord Advocate I am a member of the Scottish Government, albeit I exercise my prosecutorial functions entirely independently. The questions of policy that arise are matters for the Scottish Government collectively.

Lord Thomas of Gresford: So you cannot tell us—

James Wolffe: I can say that the Scottish Government are well aware of the recommendation of the OECD.

Lord Thomas of Gresford: From your answer, I gather that you are not pushing it with the Scottish Government. Is that right?

James Wolffe: I do not think it would be right in a public forum for me to discuss matters from within government.

Lord Thomas of Gresford: I am sure it would not.

The Chairman: Do I gather from that that the other two people giving evidence are not particularly enamoured of the idea of introducing deferred prosecution agreements into Scottish law?

Andrew Laing: It is not yet available in Scotland. We have considered the model and have a different model in place for bribery cases. From our experience in Scotland, we believe that that has largely been a successful exercise. Were a deferred prosecution model to be introduced in Scotland, clearly that is a matter that we would take forward and engage with. However, I suppose it would require consultation with the Scottish judiciary, among other things, prior to us getting to that point.

The Chairman: There has been criticism on the ground that it looks, whether rightly or wrongly—it is possibly irrelevant—as though if you are a big, rich company, you can avoid being prosecuted by entering into a DPA. That seems to be less available to smaller companies, so it looks a bit unfair. Do you have any views as to that way of looking at DPAs?

James Wolffe: I do not think it would be right for me, or for any of us, to comment on the way DPAs operate in another jurisdiction. The point you make illustrates that there are a range of policy considerations. It would therefore be right that such a proposal should be consulted on if it was to be taken forward. If it is to be taken forward, it would be right for it to be recognised within the devolution settlement that it is a matter for the Scottish Parliament to consider, and right for the Scottish Government to consider the policy questions.

Lord Thomas of Gresford: But the problem with the civil settlement, as we have been told, is a lack of transparency. You do not have the same publicity as happens with the deferred prosecution agreement, where the

matter has to go before a judge in open court for discussion. That is one problem.

Another is that, under a civil settlement, a company is obliged to disgorge any profit it may have made from bribery cases, but there is no penalty element in it. Would you regard those as weaknesses?

James Wolffe: On the first point, I do not accept the criticism of a want of transparency. As a general rule, in civil settlement cases, proactive publicity is given to the settlement by way of press releases and publications by the Crown Office, and that will certainly be the case in any future civil settlement case. It was my impression when I saw the question that those were picked up by the general media.

Indeed, Andrew has been able to confirm that to me this morning. They are picked up by the media, including by the BBC. I do not think that the criticism of a want of transparency in terms of publication being given to the civil settlement is accurate. I have read what the OECD had to say, and certainly its comments will be taken into account in any future case.

Lord Thomas of Gresford: May I press you on that before you go to the second point? The concept of the settlement can include the degree of publicity given to the offending behaviour of the person. The company that is under pressure may settle simply on the basis that that would avoid publicity. You will put out a press release, but is there any input into that press release from the company that is offending?

James Wolffe: No, is the short answer. I saw that that suggestion was made in previous evidence, but it is simply not correct to suggest that press releases are adjusted with the company concerned. It is a matter for the Crown Office to decide what publicity to give. The Committee will appreciate that in the context of self-reporting by a company, where the Crown Office may well be considering investigation and bringing forward criminal proceedings against individuals, there may be limits to what can put into the public domain from the point of view of protecting any ongoing possible criminal investigation. That is a factor which the Crown has to take into account when it decides what to put into the public domain.

What I can say is that there is proactive publicity of the civil settlements, and they are picked up by the general media. The companies involved therefore have the sanction, if one can call it that, of adverse publicity.

Lord Thomas of Gresford: I stopped you on my second point, which was the disgorging of profits as opposed to penalties.

James Wolffe: That is absolutely right. The deferred prosecution agreement model provides a range of additional options for disposal. That would no doubt be a consideration, among others, when considering the policy question. It would be for the Scottish Government to consider pursuing the deferred prosecution agreement option in Scotland.

I do not think there is evidence, and I certainly would not accept any suggestion, that the civil settlement option is any sort of soft option for the companies that engage in self-reporting. The Committee will have seen the self-reporting scheme. It requires a rigorous approach to the investigation and disclosure of the conduct involved. For its own part, the

Crown takes a rigorous approach to interrogating that material. If the Crown is prepared to enter into a settlement rather than to prosecute, that decision itself is made following a rigorous consideration of where the public interest factors lie.

The outcome of course for the company is the sanction of the publicity and the requirement in effect to make a full and candid disclosure, to put in place measures to prevent repetition and to make whatever payment is identified through the civil recovery process.

Lord Empey: Would it be fair to say, when looking at the OECD report, that in both jurisdictions perhaps there has not been a sufficient volume of cases to assess accurately whether your particular model or the other models that we are looking at are effective in achieving their objectives? Is it just that there have not been enough cases over the period?

I also wanted to ask you about the level of knowledge, particularly among small businesses, about their obligations and how they are transmitted to them.

James Wolffe: On the volume of cases, we will deal with all those that are drawn to our attention. We have had five cases that have been dealt with through the self-reporting scheme. We have prosecuted cases under the Bribery Act. It is true to say that we have had no foreign bribery cases since the Act came into force. We have had domestic cases across a range of different areas.

Lord Empey: Were they brought through existing legislation prior to the Act coming into force?

James Wolffe: We have prosecuted domestic bribery cases under the Act, including quite recently a juror who was convicted of taking a bribe. Before the Act came into force in 2010, we prosecuted Weir Group plc, which I think was a FTSE 100 company at the time, for a breach of sanctions legislation involving kickbacks in the context of Iraq. The company was fined £3 million, and a criminal confiscation order was made of £13.9 million.

It just so happens that that predated this legislation. Since it has come into force we have dealt with the cases that have come to us. I accept entirely your point that it is a relatively small sample. We will continue to deal with each case that comes to us and we will apply the same robust, effective and fair approach that we have taken so far.

Lord Empey: I am just trying to get to the point you made earlier that you and the Scottish Government are aware of the OECD report and were continuously keeping these matters under review. I wonder if it was the lack of volume of cases that did not lead you in a particular direction. You did not have enough evidence to judge whether what you were doing or what was being done in other jurisdictions was appropriate.

James Wolffe: I think it is a fair comment that the sample has been relatively small. No doubt one can make certain assessments of the different models on the face of it, but so far as we can see, the model that we adopt is effective in securing its particular aim, which is to encourage good corporate behaviour in the sense of the self-reporting of

wrongdoing, of full and frank disclosure and of putting in place measures to prevent repetition, and of disgorging the benefit.

Q36 Baroness Primarolo: I would like to come back to the question of the DPAs, but not the policy because I appreciate the point that has been made with regard to decisions by the Scottish Government. The DPA is signed off by a judge and then the judgment is reported and is accessible within constraints that are decided. How are the civil recovery arrangements communicated publicly? Are they added on a case-by-case basis to the Crown Office website? You mentioned a press release, but that is not quite the same thing. Saying that a conclusion has been reached in a case is not the same as saying when the case has concluded, "This is what happened and why, and these are the consequences". Can you take us through how those civil recovery arrangements are notified as a decision?

James Wolffe: I will do that and then, because it follows on, I will pick up Lord Empey's question about the steps taken to ensure awareness. I apologise that I did not pick that up at the end of my previous answer.

As I said in reply to an earlier question, there is proactive publicity in the form of press releases. In my papers I have a number of examples of press releases and some of the reporting that has followed them. I am sure that I could make them available to the Committee if that would be helpful in showing the sort of thing that is done in relation to these cases. I have one in front of me relating to a self-reporting case that identifies the sum to be paid—£5.6 million. It makes it clear that the company accepted that it had benefited from unlawful conduct. It records that the company admitted that it had benefited from corrupt payments made in connection with a contract entered into by one of its overseas subsidiaries. Therefore, the central information is there, at least in the example in front of me.

Baroness Primarolo: That would be very helpful. I know that we are pressed for time and there are other questions but, in terms of transparency and awareness, we are trying to find out whether companies being able to see the decision publicly, on a website, as well as in a press release, adds to the total sum of knowledge. I am sure that, rather than going through it now, you could let us know.

James Wolffe: I can certainly pass on examples of the press releases.

Baroness Primarolo: And where the information has been publicised.

James Wolffe: And the way the media pick it up. On the more general point, which Andrew can probably speak about more directly, when opportunities present themselves, members of staff involved in this work speak to bodies in appropriate fora to promote awareness.

Andrew Laing: A recent example is senior colleagues from one of my units—the serious and organised crime unit—attending a training event called the Fraud Academy in Scotland, where 50 to 100 professionals and people from industry come together to learn about fraud -related matters from professionals such as us. Within those sorts of opportunities, we have advised about the self-reporting scheme, going through cases and providing advice to solicitors and industry about how the Scottish scheme works, what the outcomes have been and the corporate governance that

we expect within Scotland. We have gone through a number of those engagement processes, and we are frequently contacted by solicitors' firms, often representing companies, to find out about this initiative and to ensure that it is being continued.

Certainly, from checking what is available in the public forum, it seems that the outcomes of the cases we have dealt with, whether prosecutions or civil settlements, are reported. Indeed, by simply checking, via a Google search, the companies that have been proceeded against, one can see that the outcomes that we have achieved are listed within the first 10 or 20 searches under the companies named. It seems that the results are closely linked to the companies that we have taken action against. On that basis, it seems that there is a high degree of transparency in Scotland.

Lord Thomas of Gresford: Are you aware of any civil recovery settlement where a term or terms have been redacted in publication: that is, they have been not published but suppressed?

Andrew Laing: No. There was a suggestion earlier about that, but we would never enter into any discussions with those representing a company about certain facts being suppressed. The only such occasion might be if there was to be a prosecution and a prosecution service unilaterally decided that certain facts should not go into the public forum if it was thought that that might be prejudicial pre-trial publicity. Other than that, there would certainly be no suggestion of any pressure being placed on the Crown to suppress information or to come to an agreement on what the narrative should be.

Baroness Primarolo: So within the limits that you have described, there is a place where members of the public can go to see what judgments have been recorded in civil recovery proceedings, obviously within the constraints that you have just mentioned.

Andrew Laing: The COPFS has a public website on which we have news releases, with a number of related press releases and stories. These cases are all included within that.

Baroness Primarolo: That is not quite the same thing. I am asking whether the decisions on the civil recovery settlements are listed as such, whether or not there has been a press release. Is it a case of "These are the cases and the facts within the constraints of what might be redacted", so that Mrs Smith in Musselburgh can click on to the website and see those cases?

Andrew Laing: No, I do not think we have that, but I would have thought that it was something that we could do without too much difficulty.

Baroness Primarolo: Do you think that that would help to achieve transparency and greater understanding of the obligations relating to bribery under the statutes as covered in Scotland and the rest of the jurisdictions in the United Kingdom? You have some very big companies—oil companies being one example—that would need to know these sorts of things.

James Wolffe: I entirely take the point about having to make only a single click on a website rather than undertaking a search. I imagine, without taking technical advice, that the creation of a single point on the website would be perfectly possible, as Andrew says.⁸ However, if one steps back and asks whether significant companies operating in Scotland are aware of their obligations, I anticipate that they will be aware of their obligations under Section 7 of the Bribery Act. Significant companies will be legally advised, and I am pretty confident that the relevant legal sector in Scotland is well aware of the approach that the Crown takes to the sort of work that Andrew has described. Even if the legal advisers involved did not have to hand information about particular cases, they could get it pretty readily in the way that Andrew has described.

I do not for a moment doubt the possibility of doing more. As I said earlier, I have noted the recommendations in the OECD report and they will be reflected and taken into account in future cases in seeking to maximise publicity around them. But if one stands back and asks whether the relevant public are unaware of this, I would be very surprised if they were not.

Baroness Primarolo: Are the Government considering this alongside the question of whether or not to use DPAs and the question of how to make sure, more widely, that civil recovery settlements are all in one place so that people do not have to search? We have had evidence that even small and medium-sized companies do not know what they need to know, and having one-click places where you can see whether something is in breach of the Act is helpful to them.

James Wolffe: The question of what is and is not publicised by the Crown Office and Procurator Fiscal Service will ultimately be a matter for me and not the Scottish Government. However, for accuracy's sake, as I said a moment ago, no doubt one can always look at additional ways of making more information available. We have described the efforts that are made, and I have also said that I have seen the recommendation in the OECD report, and it will be taken into account in future cases.

Baroness Primarolo: Forgive me, I was not thinking so much of the OECD report; I was thinking of publicising your fantastic results and efforts in progressing this work, which seems a good thing to make public. Perhaps you might want to take it away and consider it, because if the good work is being done, it should be known.

James Wolffe: Absolutely. So far as we can tell, it is known among the relevant public, but we will always think about how we can do better.

Baroness Primarolo: You never know what is relevant until it is relevant.

Lord Thomas of Gresford: You and the Scottish Government would probably think it highly undesirable that a company should feel, "If I self-report in Scotland, I won't pay a penalty and I won't get as much

⁸ Note by witness: I have now asked COPFS officials to progress this and to produce a single page on the COPFS website which contains links to relevant information about bribery cases, for the benefit of businesses and the general public.

publicity, so that's the place to go".

James Wolffe: If any company thought that anything other than a robust approach would be taken to a self-report, it would need to be advised otherwise. We approach this exercise as prosecutors robustly and effectively.

I saw some consideration in the early evidence of the possibility of forum-shopping. Questions of forum, or primacy in terms of investigation or prosecution, are for the relevant prosecuting authorities—we and our counterparts in the other UK jurisdictions. In taking decisions on which agencies should take primacy, we apply the principled approach set out in the memorandum of understanding with the Serious Fraud Office. These matters are discussed through the multilateral groups that deal with them and in which Andrew and other senior colleagues take part. If there was any thought on the part of a corporate entity that it could choose where to go to self-report, again it would need be advised otherwise, because we are clear in our self-reporting scheme that there would be liaison with our counterparts in other jurisdictions. The decision about which agency took it forward would be taken applying the principled approach set out in the memorandum of understanding and would broadly reflect the approach that we would take in any transnational cases.

Lord Thomas of Gresford: To follow that through, it would be no good reporting in Scotland because the decision as to which forum, which jurisdiction, would deal with it is a matter for discussion with your counterparts in England and Wales.

James Wolffe: Indeed. So a company might come to us with an indication that it was interested in self-reporting. Whether we were the right agency or whether it would be one of our counterparts would be decided by us in conjunction with our colleagues in England and Wales.

Andrew Laing: And vice versa; that is correct. If there was jurisdiction for prosecution of the crime in both jurisdictions, conversations would be required between the COPFS and the SFO or the Crown Prosecution Service. As the Lord Advocate said, it would be those discussions, based on the principles in the memorandum of understanding, that determined that. It would certainly not be from any indication from the company involved.

Lord Thomas of Gresford: Is that a fairly routine thing?

Andrew Laing: Indeed.

Q37 **Lord Haskel:** Chairman, we have already touched on this, but the OECD working group suggests that there is scope for improving communication between the law enforcement authorities of England and Wales and those of Scotland. What improvements could be made?

James Wolffe: Again, I read that with interest. There are well-established channels of communication between senior prosecutors in the Crown Office and Procurator Fiscal Service and counterparts in England and Wales. That is part of normal, routine working in any case where there is potential cross-border interest.

One thing picked up by the OECD was non-attendance by prosecutors from Scotland at the UK Bribery, Corruption and Sanctions Evasion Threat Group and the Foreign Bribery Intelligence Clearing House. I am not sure that I can comment on the accuracy or otherwise of that observation, but I can certainly say that, since then, senior prosecutors from Scotland—Andrew or his colleagues—regularly attend those meetings.

I am as confident as I can be that we have good channels of communication with our colleagues and counterparts in other parts of the UK. Of course, we also deal with cases that extend beyond the UK. The Crown Office and Procurator Fiscal Service international co-operation unit has good links with counterparts in other jurisdictions as well.

Andrew Laing: I cannot comment on the previous attendance at those meetings because I took up my post only in April of last year, but I can say that, on commencement in my post, either I as a senior manager or my colleague have attended each of the meetings either in person in London or by teleconference from the Scottish Crime Campus in Scotland, sometimes with our counterparts from the Police Service of Scotland.⁹ As you would imagine, there are a number of other opportunities for liaison with our colleagues in the SFO and the CPS. We have a very close working relationship with other agencies such as the National Crime Agency within the Scottish Crime Campus, which is a great opportunity to collaborate with partners.

James Wolffe: Perhaps it is worth making a point about the Scottish Crime Campus. It is a state-of-art facility that was opened in 2014. It collocates the relevant parts of the Crown Office and Procurator Fiscal Service in Scotland—the prosecution authority—and Police Scotland as well as other law enforcement agencies. In this context, we have the benefit of a single national police force—the second-largest force in the UK—and its economic crime unit being based in the crime campus along with Andrew’s team. We have officers from the NCA, HMRC and other agencies. They are collocated in the crime campus.

The general report is that that provides enormous benefits in the form of multi-agency working within Scotland. In the Scottish system, the police investigate subject to the direction of prosecutors, so there is an institutionally close relationship in these cases, as in other significant economic cases, between Andrew and his experienced prosecutors and the police investigators.

Lord Haskel: As far as the Bribery Act is concerned, do you think that the communication is adequate?

James Wolffe: On the information that I have, I do.

Q38 **Lord Stunell:** In England, Skansen Interiors Ltd self-reported but was still prosecuted under Section 7. Are you aware of any cases where a Scottish company has self-reported but has still been prosecuted rather than referred to the Civil Recovery Unit?

⁹ Note by witness: by way of example, I attended the meeting of the Foreign Bribery Clearing House on 14 November 2018, and will attend the next meeting of the Bribery, Corruption and Sanctions Evasion Threat Group on 18 December 2018.

James Wolffe: We have not had any such cases; I should of course add “yet”. We have had five cases that have been self-reported. In none of them was the corporate entity prosecuted. In one of them, the former managing director of the company was prosecuted as an individual, in addition to the civil recovery exercise through the settlement with the company. We do not have a case analogous to the Skansen case, but it is not precluded under the scheme.

Lord Stunell: That was my supplementary, really: is it a prosecutorial principle not to prosecute if there is self-reporting, or do you reserve the right to continue with a prosecution despite self-reporting?

James Wolffe: The ultimate decision on whether or not to prosecute is always one for the independent prosecutor acting in the public interest. The question of whether the self-report and the information provided by the company are such that the prosecutor can conclude that it is acceptable in the public interest to go down the civil settlement route and not prosecute is always one for the prosecutor.

If the case goes down the civil recovery route, the Civil Recovery Unit interrogates the information that is provided, and if that process were to disclose additional information and it became evident that there had been a failure to fully report, it would come back to prosecutors to reconsider. Andrew might be able to give some insight into the practical way this happens. It would be wrong to get the impression that an envelope simply arrives on Andrew’s desk as a self-report with no context as to whether or not it meets what would be required by prosecutors and would justify a prosecutor taking the view on a principle basis that it would be acceptable not to prosecute in those particular circumstances.

Andrew Laing: A number of principles are set out in the protocol that we have in relation to the expectations on the company self-reporting as to whether or not we would recommend a civil settlement. So there would need to be that very thorough disclosure. If in the independent investigation that is undertaken more evidence comes to light of criminality, that may well indicate that the company has not honoured its obligations and that might point towards a prosecution.

The degree to which those high up in the company have known or connived in the criminality would be another of the principles that would be taken into account. If a new company had taken over and discovered activity that had taken place historically, and had brought that to light and put in better corporate governance, that would be a principle on which we would be more likely to accept civil settlement.

The Lord Advocate gave a good example of that. A civil settlement of £138,000 was reached in 2013 for a company called Thomas Gunn Navigation Services Ltd, but subsequently there was a prosecution of Thomas Gunn, the managing director, so that was a prosecution in court in which the court decided the outcome and what should happen to him.

There is no expectation that we will not enter into a prosecution, but it is more likely that it will be a civil settlement if all the general principles are taken into account. The procurator fiscal will consider matters, but ultimately a report will be given to Crown Counsel—senior advocates acting under the Lord Advocate’s direction—and a further layer of

independence will consider whether or not civil settlement is the appropriate outcome. A number of safeguards are built into the system.

- Q39 **The Chairman:** Thank you very much. That leaves us with one unanswered question—what does England and Wales have to learn from Scotland in deterring bribery and dealing with offences of bribery?—but we have run out of time. I do not think we can deal with that today, but I would be very grateful, if there is anything you wish to say on that question, if you provided us with that information when you have had a look at the transcript.¹⁰ I repeat that, at that stage, apart from telling us about any corrections, please amplify or add anything that you think would be useful to us, and please do that as soon as possible because we have a lot of evidence to assess. The Committee is extremely grateful to you for coming and for giving us such valuable evidence. Thank you very much indeed.

¹⁰ Answer to Question 7 provided by way of Supplementary Memorandum

Sir Brian Leveson - Oral evidence (QQ 149-154)

Tuesday 13 November 2018

10.35 am

[Watch the meeting](#)

Members present: Lord Saville of Newdigate (The Chairman); Lord Empey; Baroness Fookes; Lord Grabiner; Lord Haskel; Lord Hodgson of Astley Abbots; Lord Hutton of Furness; Baroness Primarolo; Lord Stunell; Lord Thomas of Gresford.

Evidence Session No. 16

Heard in Public

Questions 149 – 154

Examination of witness

Sir Brian Leveson.

Q40 **The Chairman:** Sir Brian, good morning to you on behalf of the Committee. You will have been sent a list of interests of members of the Committee relevant to the inquiry. The session is public. It is being broadcast live and will be available subsequently on the parliamentary website. A verbatim transcript of the evidence will be taken, which will be sent to you in a few days' time. When you receive it, feel free to add amplify, correct or otherwise deal with it as you see fit. I know how busy you are, but I ask you to respond to that transcript as soon as possible after you have received it, because we have a lot of evidence to assess and a time limit on when we can produce our report. Of course, everybody in this room knows you well, but please introduce yourself for the purposes of the transcript.

Sir Brian Leveson: Certainly, Lord Chairman. I am President of the Queen's Bench Division and Head of Criminal Justice in England and Wales. My particular involvement with the Bribery Act, save for sitting in the Court of Appeal Criminal Division in relation to appeals that have been conducted, has been to be responsible for the operation of the scheme devised by the Crime and Courts Act 2013: deferred prosecution agreements.

Q41 **The Chairman:** Thank you. You have received a list of questions, but neither you nor the members of the Committee are confined to them, so feel free to add anything you think we ought to hear. I will ask the first question.

Three of the four deferred prosecution agreements to date have involved some of the UK's largest companies, which are deemed "too big to fail". Is there a concern that such companies may be offered DPAs, however bad their conduct, and even if they have not self-reported or been exceptionally co-operative?

Sir Brian Leveson: First, I think it was only two of the four companies, but that is a detail. Would you mind if I started at the beginning with my experience of deferred prosecution agreements? That might be of interest to the Committee.

The Chairman: That would be very valuable. Thank you.

Sir Brian Leveson: When I originally looked at the draft legislation, I was very concerned that we were creating a system whereby corporations were dealt with differently from individuals. It struck me, reading the Bill, that if a company committed a crime there was no reason why that company should not be prosecuted in the same way as individuals would be.

The legislation passed and I was given the responsibility of policing the scheme. I quickly became convinced that far from being inappropriate it was entirely appropriate for this reason: a company is no more than a structure or set of scaffolding around which people operate. The company itself does nothing. It is the directors, managers and everyone else who run the business. That business has many facets. It employs perhaps thousands of people, perhaps only a few people. It has a contracting arm. It has many different forms and guises.

In the main, what the company does may be entirely laudable. That does not prevent some people, and sometimes controlling minds, taking advantage of opportunities by making corrupt payments etc. That does not affect the company itself, although the company makes money out of it. Therefore, given that a company could only ever be fined—you cannot lock up a company—it struck me that it was a mechanism whereby one could try to improve the corporate culture in connection with bribery and corruption in a way that was very much in the public interest.

So it is not that a company is too big to fail; it is whether the company in its constituent forms needs to fail. Sometimes that is the case, because the company is set up as a dishonest venture from first to last and it needs to be closed down. The largest DPA, which everybody knows about—Rolls-Royce—was a massive operation undeniably involving managers; how high the managerial involvement went was discussed in the judgment that I provided.

However, as a society, we have to decide not whether it is too big to fail but whether it is in the public interest that it should be prosecuted and thereby deprived of the opportunity of entering into public contracts, or whether there is a different way. The different way, which the Crime and Courts Act prescribes, is to permit the company to come clean, not only to give up the money it has made but to pay a financial penalty, which we will come to discuss, and undertake monitoring and compliance mechanisms to demonstrate that it has changed.

So rather than saying “too big to fail”, I would ask whether it is in the public interest that you need to go further than a DPA. I made it clear in the Rolls-Royce judgment that that question troubled me enormously at the time. You will see how I solved it in the judgment.

The question goes on: “even if they have not self-reported or been exceptionally co-operative”. If they have not been exceptionally co-

operative, they cannot be too big to fail. This works only if there is maximum co-operation from the company. Self-reporting is a rather interesting question. You may remember that in relation to Rolls-Royce there was material in *Private Eye* or another publication, but the company investigated and revealed far more than had ever been disclosed. It is a balance, and each case has to be considered on its own merits. I hope that is a sufficient start.

The Chairman: There is an impression, which some of our witnesses have talked about, that if you are a big and rich enough company, you can buy off being prosecuted, whereas if you are a small concern, you are very much more likely to be prosecuted rather than offered this way out.

Sir Brian Leveson: XYZ was a small company. It is still not named in the public domain because the prosecution is still ongoing; I checked that before coming here today. I suppose in one sense it helped that XYZ had a larger parent behind it that was prepared to support it.

The real question comes down to the balance between the public good and permitting behaviour that falls within the Bribery Act to go unpunished. I do not think that any of the companies that have been the subject of DPAs would argue that they had not paid a very substantial financial penalty. Indeed, one of the terms of the legislation is that the financial penalty has to be the equivalent of the financial penalty that the company would have paid had it been prosecuted and pleaded guilty.

To that extent, it is not the penal consequences—indeed, in one sense, because of the disgorgement of profit a DPA takes more, although of course those who have suffered a loss can always sue the company—it is whether the company should be forbidden from entering into public contracts and the like. I would be surprised if a company could legitimately complain, “We were too small, so we were prosecuted”. I would be very concerned if a company said, “We are too big and therefore we do not care, because we will always be able to buy off the claim”. The balance is what I discussed in the judgment.

Lord Thomas of Gresford: But the public good could be defined as the amount of jobs at stake, which obviously means that a smaller enterprise without so many jobs at stake is in a worse position than the large enterprise where many jobs are at stake.

Sir Brian Leveson: I understand the point, but I do not think that is how DPAs are being approached. There were 25 jobs at stake in XYZ. It self-reported and was offered a DPA, which was approved. For each of those 25 people, they had a job in a manufacturing industry that was significant to them. I take the point that it is all a question of balance and where you strike the balance in relation to criminality, as well as the extent of the co-operation and the damage caused. It is a complex issue but, as I say, having started from the position when I read the Bill that I was dead against them, I am now in quite the other camp.

Lord Grabiner: We have had evidence to the effect that the burden of the legal cost to small and medium-sized business is very significant. For that reason, there might be some justification for introducing what was suggested to us as a streamlined process for smaller companies. Unfortunately, we were not told what the streamlined process would

consist of. I do not know whether you have a reaction to that.

Sir Brian Leveson: As the system has become more known and bedded down with the SFO, which has been responsible for the four DPAs to date, it should be possible to take steps to streamline how the system works. But the company has to be prepared to come clean. It comes clean by doing its own investigation and then revealing that investigation to the authorities. That is in the public interest, because it allows the authorities to focus on other cases. It can cost money—I cannot pretend that it does not—but if the company is small it should not cost too much because there is not as much to look at.

There are ways of speeding up what happens. You will see that my thinking on this has developed, if you have had a chance to read the judgments that I have given in the four cases. The Act requires, first, that the judge responsible for looking after the DPA has to approve in principle. That is done in private under Section 7. Obviously, if the court does not approve, there has to be a prosecution and everything has to have been kept quiet to avoid prejudice in relation to the prosecution.

If the judge approves in principle, there has to be an agreement and then a public hearing, where it is critical that you go over the same material; otherwise, the public do not have the chance to scrutinise what is being done in their name. I found that rather difficult, because once I said that it was likely to be appropriate to impose a deferred prosecution agreement, which is in the public interest and is fair, just and proportionate—I cannot remember the precise terms of the statute—it is very difficult for me then, two weeks later, when they sign the very agreement that I have just said is likely to be fair, just and appropriate to say, “Actually, I’ve changed my mind and it isn’t”, unless there has been a change of circumstances.

It so happened that in the Rolls-Royce case, because of the combination of the DPA here, with one in America, and the change of Administration, that had to be done almost at the same time. Days followed and therefore I produced only one judgment. It was allowed to be conducted much more speedily. I have now come to the view that there is no reason why one judgment is not sufficient. I have not saved a great deal of legal costs, and far be it for me to deprive lawyers—

Lord Thomas of Gresford: Have any applications under the Section 7 procedure for approval of an agreement been refused?

Sir Brian Leveson: No, but in one of the cases I did not approve it the first time round. I examined it and I made a number of points to the SFO and to the company concerned. In effect, I told them to go away and think again.

Lord Thomas of Gresford: You sent them home to think again.

Sir Brian Leveson: That is exactly what I did. They did think again. Then the parties came back and I was prepared to be satisfied. I am not sure whether I could tell you if I had said no, because by definition that company would now be being prosecuted. But I have not.

Lord Hodgson of Astley Abbotts: Will there be a record of companies that have been refused a DPA and are then prosecuted? Does it become a

matter of public record that they applied for a DPA?

Sir Brian Leveson: It would not become a matter of public record if there was a prosecution, because by definition the company would have to come clean and say, "We're prepared to enter into an agreement on the basis that we've committed this crime". If the DPA is not approved, that could not be used in evidence against the company in a criminal case. If a company was prosecuted and convicted, it could perhaps be said that an offer was made or a discussion was had that failed for this or that reason. I do not know. I would have to think about that. It would be a matter for the SFO or the prosecuting authority and the company.

The Committee ought to understand that, with a DPA, the judge is in a very unusual position, which is why I have taken the responsibility for doing them all to date. If I say yes, it all goes ahead and there is an agreement between the SFO and the company that nobody can ever challenge. If I say no, there is a prosecution and nobody can ever challenge my saying no. This is a very unusual jurisprudential problem, because it is outwith the general way in which we conduct proceedings. That is why I have dealt with each one to date. You will reach your own conclusion as to the merits of that view if you read the judgments.

Q42 **Lord Thomas of Gresford:** I want to focus a little more on self-reporting. You said, Sir Brian, that the XYZ case "provides an example of the value of self-report and co-operation". If the presumption is that a company that self-reports is offered a DPA and a company that does not self-report is not offered one, what should be the criteria for any exceptions?

Sir Brian Leveson: Unless the company is prepared to co-operate fully, there could be no question of going down this route. The whole point of a deferred prosecution agreement is that the company recognises what has gone wrong, is prepared to accept the financial penalty, which is what is imposed, for having done wrong and takes steps to ensure that it does not happen again.

The last part of that sentence, to my mind, is one of the most important. If the company is not prepared to co-operate, I do not think that it starts. Self-reporting is a mechanism whereby you demonstrate a willingness to co-operate. It is one of the features of Rolls-Royce that I discussed, because it was not strictly from first to last a self-report. Standard Bank was a complete self-report, as was XYZ.

I do think it is worth encouraging companies that uncover criminal behaviour to say, "We are not going to keep this to ourselves. We will come clean, take the consequences and build from there". It is one of the reasons why I have emphasised in each case that actually this is good for the company and its employees, and it is good for the customers of the company to realise that the company has moved forward.

It is also good for the company in this way: if there is to be a prosecution, the management time taken up dealing with the criminal process is enormous. Even before there is a criminal process, a great deal of management time, money and effort is taken up dealing with wrongdoing in the company.

So I cannot say “automatically”, because I would not want anything to be automatic, but early self-reporting, even if something has entered the public domain, demonstrates a willingness to co-operate, and co-operation is absolutely essential.

Lord Thomas of Gresford: Self-reporting opens the door, but it does not create the presumption that a company will get a DPA, as I understand it.

Sir Brian Leveson: There cannot be presumption at any level of this. A company may say, “We think we have done wrong” and then start to create difficulties. This is available for those who are providing not just a token admission but a full-throated willingness to demonstrate that this sort of behaviour has no place in their company.

Lord Thomas of Gresford: Does it follow that there have been prosecutions of companies that have self-reported?

Sir Brian Leveson: I cannot answer the question, because I simply do not know. I am very sorry.

Lord Empey: How do you determine whether or not a company is co-operating fully? What would be your checklist?

Sir Brian Leveson: To some extent, I rely on the prosecutor to acknowledge that and to say so. I have thought about what I would do if I was unhappy about some arrangement that the company and the prosecutor had made, because I have no investigative arm myself; I merely have the parties in front of me. Although I have never had to do it, I have contemplated what I might do. One possibility would be to say to the Attorney-General, “I would like somebody to look at factor X in this. I cannot do it myself, but I am not satisfied”.

In the main, what happens, and has happened in each of the cases, is that the prosecutor takes the report—the self-reports are not just a letter; they are followed up by detailed professional input from solicitors and accountants as to what has gone wrong—and the SFO will then analyse in detail not merely the report but the underlying material, in exactly the same way, I think, from different experience, as the Revenue in relation to those who respond to Hansard warnings to come clean about their tax affairs.

One of the questions the Revenue asks is, “Will you instruct your advisers to provide a report on your tax affairs, and then will you give us the authority to look at all the underlying material to check the accuracy of the report?” I think that is what happens, and has happened, with the SFO. I have detected no problem with the prosecutor being able to check up on the willingness of the company to come clean fully. I would expect that, if the company was dragging its feet, a DPA would cease to be contemplated.

Q43 **Baroness Fookes:** Sir Brian, you have already quoted from the Crime and Courts Act 2013 about the financial penalty for a DPA being broadly comparable to the fine that a court would have imposed following a guilty plea. The sentencing guidelines suggest a maximum reduction of one-third. Do you not think that companies should co-operate with the authorities without the incentive of a further reduction?

Sir Brian Leveson: A further reduction beyond the one-third or the one-third?

Baroness Fookes: Both.

Sir Brian Leveson: We give a reduction of one-third to those who plead guilty at the first available opportunity. That is within a guideline issued by the Sentencing Council and crosses all crime, with the exception of murder, for reasons that are unnecessary to go into. If the penalty is to be comparable, it is appropriate to give exactly the same allowance.

Actually, we give a further allowance and I do not apologise for this. I will give an example from my professional experience. Three years after having committed a robbery, entirely successfully and without being caught, the defendant went to the police and said, "I can contain myself no longer. I committed this robbery". He was then prosecuted and he pleaded guilty. The argument was, "Of course you get a third off for the guilty plea, but you are entitled to more than a third because you have demonstrated particular remorse by being prepared to volunteer that you committed this crime when there was no other way of bringing it home to you". That argument prevailed, at least to some extent. Again, that is contained within the guidelines issued by the Sentencing Council for the punishment of crime: namely, that a demonstration of remorse, over and above pleading guilty, has value.

The value of pleading guilty is threefold, as I used to advise clients. First, your explanation of the facts may contain some mitigation which otherwise the judge may not hear about. Secondly, it is a way of reducing the impact on the victims and everybody else—you have not forced them to come to court. The third reason is pragmatic: if every defendant pleaded not guilty in every case, our criminal justice system would collapse. So there is the pragmatic reason that it is in the interests of justice to dispose of the work for people to plead guilty—when they are guilty. I make that very clear: I do not want anyone to plead guilty when they have not done it simply to get it over with.

There is no reason why exactly the same should not happen here. A company that has self-reported and co-operated is entitled to the reflection of remorse—a difficult word in the context of companies—shown. All we are doing is making the system comparable. There is no advantage below the financial penalty or a disadvantage above it. It is comparable with the sentence that would have been imposed after a guilty plea. That is what Parliament decided, and I believe it is the correct approach.

It is actually more expensive for companies because of the disgorgement of profit, which is part of the deal, which in a criminal context would have to follow separate civil proceedings or separate negotiations. It could not be part of an order unless you could make an order of confiscation or compensation. That you could do.

Baroness Fookes: What about having more than a third?

Sir Brian Leveson: They get slightly more than a third because they have shown co-operation, in the same way as the defendant, my robber, got more than a third: because he had volunteered something that

otherwise the police would not have brought home. I believe that is a consistent application of the way in which we approach the imposition penalties for crime.

Where they benefit enormously if they go down this route is in the non-penal consequences of a conviction, which I mentioned in connection with the public procurement contracts. A number of countries will not allow companies convicted of corruption to compete in public procurement exercises. So there is a non-penal consequence of conviction that does not apply if you have gone down the route of a deferred prosecution agreement, but it is right that they should be broadly comparable; we want to encourage people to self-report, because we want to encourage better behaviour.

Lord Hutton of Furness: As I understand it, if a company enters a guilty plea at the first available opportunity, such as on day one of a criminal trial, it could get a one-third discount.

Sir Brian Leveson: That is not quite right, because the first day of a trial does not get you a third. You get a third only if you plead guilty at the first available opportunity, which is at the PTPH hearing; in other words, very early on. Why do we do that? It is because we want the police to be able to concentrate their resources on cases that are going to trial. At the very earliest stages, it will not be a trial-ready file.

The pragmatic reason is that if you plead guilty at the first available opportunity you can show remorse. You also stop the trial preparation. If you plead guilty on the first day of the trial, your reduction is down to 10% because all the work has been done.

Lord Hutton of Furness: If we want to encourage self-reporting as perhaps the best tool for fighting bribery and corruption—with the best will in the world, the SFO and the other prosecuting authorities will probably never unearth all the criminality or the potential corruption on their own—is there not a case for making sure that companies that do self-report attract even more generous a discount than a company that might get something very similar to the one-third discount on sentence in a DPA even though they have not self-reported?

Sir Brian Leveson: They do. I will have to check, but I think it went up to 50%. In other words, I increased the discount. This was what the parties negotiated, which I approved. The discount as a consequence of coming clean before the knock on the door, as it were, has gone up in each of these cases to 50%, I think.

Lord Hutton of Furness: Should we not test that? If that releases a lot more self-reporting, or whatever, we could probably conclude that your additional 16.7% discount has had an effect. If it is not having an effect, perhaps we ought to look at it again.

Sir Brian Leveson: Interesting. I think that will be a matter for you, because of the equivalence that the Act provides to a broadly comparable fine that a court would impose following a guilty plea. I have rather taken that as encompassing the court's approach to criminal conduct. There could be an argument for saying that. I think that a company's decision whether to go down the self-reporting route is probably governed more

by different calculations than the difference between 50% and 60%. Actually, many more considerations play into the decision, so I am not sure how much difference it would make. But it is, as I say in different contexts, a matter for you.

Q44 **Lord Hodgson of Astley Abbotts:** Transparency International is concerned that DPAs will become an automatic way of getting cases resolved, leading to a fine for the company but not resulting in individual prosecutions. It believes that punishing senior individuals is the best deterrent. Could you give the Committee your views on that?

Sir Brian Leveson: I certainly shall, but I will challenge the premise because I do not agree with it. Critical to my approach to DPAs over the four that I have done has been that those who are responsible for the criminality face prosecution. First, they are no longer in the company. What is not permissible for me is that the company self-reports but does not root out the cause of the problem, because, as I said at the very beginning, a company is just a structure, just the scaffolding. It is the people who are operating it. So I am afraid that I cannot contemplate agreeing a DPA if the people who were responsible for the corrupt payments or other criminality remained in the company. It would just demonstrate the fear that Transparency International identifies.

Do I agree that punishing senior individuals is the best deterrence? Yes, I do. It is absolutely critical that the individuals in these circumstances are prosecuted, however senior or junior in the company they are. Rooting them out is a critical part of the exercise of self-reporting and demonstrating compliance.

So I agree, but I do not accept the premise.

Lord Hodgson of Astley Abbotts: Do DPA inquiries lead up the chain of authority? If you are in a subsidiary company, which is therefore owned by another company, and you self-report, does the DPA inquiry trace the line through to the parent, or is it always just held within the corporate entity?

Sir Brian Leveson: I would expect it to be traced to the parent. If the parent has received substantial dividends as a consequence of the corruption, I would want those to be reflected in the overall financial payment.

In that regard, as you are looking at the Bribery Act, I commend Section 7, which is the power whereby a company is guilty of an offence if it has failed to take reasonable steps to prevent an act of bribery, because the difference between this country and the United States, I believe, is that attribution here requires controlling mind, whereas in America it is—

Lord Thomas of Gresford: Vicarious.

Sir Brian Leveson: Correct. In other words, if an employee in the States commits the offence of bribery, the company is automatically liable. That is not the position as a matter of English law, and I am not advocating or saying anything at all about whether that should change. That is not my brief, and it would be inappropriate for me as a judge to comment on it.

The ability to say, "You've not taken steps to prevent", is, to my mind, absolutely critical. If the Committee were to look at the wider position, extending it to other offences of fraud, I personally think that that would be in the public interest. Again, as a serving judge, I say that the policy is for you, not for me.

Baroness Fookes: Sir Brian, you used the term "reasonable" in connection with this. I believe that the law says "adequate". Do you see any distinction between those two words?

Sir Brian Leveson: There is a question.

Baroness Fookes: It has come up in evidence to us, which is why I picked on it.

The Chairman: The point has been made—not everyone agrees with it—that "adequate" is not a good word to use because, *ex hypothesi*, the steps that were taken were inadequate; otherwise, there would be no question of prosecution. One can see that from a highly technical legal point of view, but I would have thought that "adequate" would be construed by a judge as meaning, in effect, reasonable in all the circumstances.

Sir Brian Leveson: That was exactly the thought that was going through my mind and I was just testing myself on whether I would be creating a hostage to fortune by saying so. Chairman, I am very happy to adopt your articulation.

Lord Thomas of Gresford: It was the subject of debate at the time of the passing of the Bribery Act. There was an amendment to change "adequate" to "reasonable", which the Government resisted. So the matter was discussed at the time and "adequate" was chosen, although that does not bind us.

Sir Brian Leveson: No, but I spend a considerable amount of time focusing on the words chosen in an Act of Parliament and trying to make it work. Lord Saville has identified how that would work if it came to be argued in court. It has never been argued in front of me.

Q45 **Lord Empey:** Sir Brian, what importance do you attach to the fact that DPAs cannot be agreed without judicial approval?

Sir Brian Leveson: I think it is absolutely critical, because we do not do plea bargains in this country, as others do. This has to be conducted in public, so that, in other words, everybody can see what is being done in their name. Therefore, there is no private deal between a prosecutor and a company that nobody ever hears anything about.

On the contrary, this can be challenged independently. As I explained, I have thought long and hard about what I would do if I was unhappy that the company had pulled the wool over the eyes of the prosecutor—it is unlikely to be the other way round—and about how I could cope with it, because I have no investigative arm. Of course, the Attorney could say, "No thank you", and I would have to do the best I could.

I make it clear to the Committee that the preliminary hearings, where approval is sought in principle, are not rubber stamps. I take each step of what has gone on very carefully and at great—some people might say

tedious—length. I want to be satisfied that the terms of the Act are satisfied, given that there is no way of challenging my decision. That is why I have reserved to myself all the DPAs, at least to date, to establish a jurisprudence so that companies and prosecutors can understand what the court will say. If there was no court process, nobody would ever know and each company would have to make up its own mind about how the relevant prosecutor would think about its position.

Now, you can look at XYZ, Standard Bank, Rolls-Royce or the fourth DPA and see how it works. You are in a position to read the judgments, which will solve any sleeplessness that you have, and decide whether this is the right way to go. If it is not, you can review the legislation. The disinfectant of transparency in this area is absolutely critical.

Lord Empey: You have repeated the word “critical”. Of course, there is a difference in the approach taken by our Scottish colleagues. That was highlighted by the OECD. Do you have any views on whether perhaps they need to have another look at their system?

Sir Brian Leveson: It would be impertinent of me to comment on the Scottish system.

Lord Thomas of Gresford: Have a go at the Northern Ireland system—see what he says then.

Sir Brian Leveson: I believe that it is very important. Let us assume that there had been no judicial involvement. How would you as a Committee be able to unpick how this scheme worked? You could ask the prosecutor, because they will doubtless publish something. You could then say, “We would like to get into the detail”, and suddenly you would have to review everything yourselves.

Here you can see in one place, or several places, how I have gone about the job, and you are entitled to say, “Actually, we don’t think you’ve done this very well and therefore we will consider the legislation or provide a report that says this ought to be thought about differently”, because this is the only way anybody is checking up on the way in which judicial approval operates. I do not resile from the word, with great respect to my Scottish colleagues.

Lord Haskell: Do you think that judicial approval acts as a deterrent to firms saying, “This is such a good deal that we’re going to do it, and if we get found out we’ll go for a DPA”? Do you think it discourages firms from taking that attitude?

Sir Brian Leveson: I would be disturbed if a firm took the calculated gamble: “This is such a good deal that we’ll risk it”. One of the things about self-report is how it happened, who is responsible and who is going to be prosecuted. The probability is that it is more likely to say, “This is such a good deal and we’ll not be found out”. I cannot touch that. That is a judgment that I think criminals are making all the time: “I’ll do this, and I’ll not be detected”. The question is not, “How many years will I get?”, but, “Am I going to be caught?”.

Lord Grabiner: Sir Brian, the legislation has been in place for some years now. Would you have expected there to be more DPAs than there have in fact been?

Sir Brian Leveson: I cannot really say, because I do not know how much work is going through the SFO—or, indeed, the other prosecutors, because of course it is not just the SFO, although the SFO is always likely to be the most involved prosecutor. I have no doubt at all that the then director of the SFO took this step cautiously to begin with, and rightly so. I am very conscious that the Solicitor-General who piloted the legislation through the House of Commons was actually instructed as counsel on two of these cases.

I cannot say that there would have been more. I have no doubt at all that anxious thought was given to whether or not Rolls-Royce should be offered a DPA, because it is so big. Certainly, as I say in the judgment, very anxious thought was given to whether the extent of the corruption involved did not require more, but I came to the conclusion that I came to. It is really a question for the Director of Public Prosecutions or the director of the SFO, because I just do not know the size of the casework they are carrying.

The Chairman: That has brought us to the end of our questions, Sir Brian. To try to summarise your evidence, first, it is vital in your view that each possible DPA is looked at in the greatest possible detail of the individual circumstances that arise. That applies also to the form of any penalty that may eventually be agreed with the company concerned.

Secondly, you make the point that it is absolutely essential that individuals who are guilty of criminal offences should be prosecuted. Thirdly, you regard it as vital that there should be judicial approval of any DPA.

Sir Brian Leveson: I could not improve on that.

The Chairman: That is very kind of you to say so. On behalf of the Committee, I thank you for your most valuable evidence on DPAs.

Sir Brian Leveson: I hope it is helpful.

The Chairman: Thank you very much indeed.

Lisa Osofsky, Max Hill QC, Hannah von Dadelszen and Kristin Jones – Oral evidence (QQ 155-161)

Tuesday 13 November 2018

11.30 am

[Watch the meeting](#)

Members present: Lord Saville of Newdigate (The Chairman); Lord Empey; Baroness Fookes; Lord Grabiner; Lord Haskel; Lord Hodgson of Astley Abbotts; Lord Hutton of Furness; Baroness Primarolo; Lord Stunell; Lord Thomas of Gresford.

Evidence Session No. 17

Heard in Public

Questions 155 – 161

Examination of witnesses

Lisa Osofsky, Max Hill QC, Hannah von Dadelszen and Kristin Jones.

Q46 **The Chairman:** On behalf of the Committee, I welcome Lisa Osofsky, Max Hill, Hannah von Dadelszen and Kristin Jones to give evidence to us this morning. The session is open to the public. It is broadcast live and will appear on the parliamentary website. There will be a verbatim transcript of the evidence. A few days after this session, you will be sent a copy of it. At that stage, we would be very grateful if you could check it for accuracy, make any corrections that you feel are required, and amplify any of your evidence if you so wish. Indeed, if you wish to give any further evidence that you think would be useful to the Committee, please do so.

Although we know who you are, I will ask you in turn to introduce yourselves so that that introduction can appear in the transcript.

Lisa Osofsky: I am from the Serious Fraud Office.

Hannah von Dadelszen: I am also from the Serious Fraud Office.

Max Hill QC: This is my thirteenth day as Director of Public Prosecutions.

Kristin Jones: I am the head of the Specialist Fraud Division in the Crown Prosecution Service.

Q47 **The Chairman:** You will have received a list of questions. Neither you nor the Committee are confined to them, but we will go through them, and if you wish to add anything that is not encompassed in the questions, please do so.

I will ask the first question. Prosecutions for offences under the Bribery Act require the personal consent of the DPP or the director of the Serious Fraud Office. Scotland has no analogous provisions. Are our provisions overkill?

Lisa Osofsky: In our office, it is a different model. We both investigate and prosecute. Therefore, I am not in the same situation as someone

who inherits a case that has already been investigated by another body. I apply the same standard to Bribery Act cases as I do to all the cases in my docket. Mind you, it is a much smaller docket than Max's. We have an intelligence function that looks at the initial, sort of pre-investigation, phase. I approve investigations themselves, so I go right back to the beginning, regardless of the topic, whether it is complex fraud or bribery, and I will decide whether we have a charging decision.

So the way we deal with cases at the Serious Fraud Office is slightly different, and I am involved in every decision. I am the accounting officer. The buck stops here. I want to be able to make that decision from start to finish.

Max Hill QC: As the Director says, there is a difference from where I sit, not being an investigator and not even having the power to order the commencement of an investigation. We respect entirely the fact that the requirement for personal consent was a parliamentary decision, no doubt because Parliament and the Government of the day were rightly cautious, I suggest, about what could have been an early rush of Bribery Act offences immediately on the granting of Royal Assent in July 2010.

There has been no rush, but not because of any blockage at the consent stage, so far as we are concerned. So I suggest that it works, but whether this Committee and the House will want to consider an amendment to it in the longer term is, in the first place today, a matter for the Committee.

By that I mean two things. First, having had the benefit of hearing Sir Brian Leveson's evidence—we may come on later to the question of extending the reach of some of the offences under the Act; Section 7, the "failure to prevent" offence, has been touched on already this morning—in the event of an extension, say, to other areas of fraud or economic crime, that might be an opportunity to reconsider whether personal consent in my position is required.

I would add that, as a matter of experience, the head of our Specialist Fraud Division, who is very much our subject specialist, sits right alongside me, but within the organisation that I represent we have, in each of the regions, a Chief Crown Prosecutor. If I were pressed, however gently, to say whether in my view, looking at it within the organisations, these are decisions that could be devolved down to Chief Crown Prosecutor level, I would not demur.

There is flexibility if, in the fullness of time, this Committee and indeed Parliament says that the initial caution can now be replaced with a more flexible view.

Lord Grabiner: We have had evidence from the City of London Police to the effect that the mechanism for securing consent has been long-winded, for want of a better expression, and that that might have led to defendants being charged with different offences apart from bribery. Is there any substance to that?

Max Hill QC: I am bound to say, with absolute deference to the evidence that has been given, that I do not recognise a bottleneck here. Of course, submissions will have to be prepared in order that a case be put, at the

moment, up to me, but I am not aware of any worked example of where there has been lengthy delay or where the outcome has been different from what may have been intended or expected by the investigator. So I treat that with caution.

However, this area of legislation, albeit that we may go on to discuss it, has not perhaps generated as many cases as some might have expected—and here we are, seven and a half years after Royal Assent. In the Crown Prosecution Service, it resonates at all levels of the organisation, by which I mean that our CPS regional areas deal with cases that tend to be of the lowest complexity—down to bribery with a view to obtaining a driving licence, to give an example. Alongside that are our casework divisions, which are not all based in London but have regional working as well, which will look at many of the more complex cases. Alongside that is the Specialist Fraud Division, which will look at the largest cases that our organisation considers. So we have an organisational structure, and it is all in place at the moment to assist me if I need to make that personal decision.

Yes, there will be times when there is delay. Just as in Sir Brian's worked example where he in effect sent back to the parties what was proposed for a DPA, we reserve to ourselves the right, in general crime and in specialised areas such as this, to say to the investigator, whoever that might be, that a little more work needs to be done before we reach the charging point. That is not delay. It is certainly not a bottleneck. It is the prosecuting authority taking care to ensure that in each case where personal consent is granted, as here, the case is really ready to run.

That is the way I would encourage people to look at that issue.

Baroness Fookes: Do you mean that your personal consent was required in the case that you cited of the person trying to bribe the driving examiner?

Max Hill QC: Yes, that is technically correct. In the first slew of cases, personal consent is required every time. I do not shirk away from saying that that could be made to look like quite an onerous responsibility. In fact—you may have some statistics from the Attorney-General's office—so far as the CPS is concerned, we made 13 charging decisions last year and 13 this year, so 26 over two years. I am by no means seeking to add to my personal workload, but actually the number is proportionate. It is manageable.

Going back to my first answer, however, if—this might require at least secondary legislation—Parliament thought that now that the legislation has bedded in we can have a more flexible regime and not require personal consent, I would agree with that. To take your example, if I may, that might mean that where an individual CPS area is looking at low-level criminality, the Chief Crown Prosecutor in that area could take the decision rather than it having to come all the way to me.

Lord Thomas of Gresford: Presumably you would have to lay down guidelines to the area prosecutor, who decides whether to take the decision himself or to refer it up. Do you see any difficulty with that?

Max Hill QC: I do not within the organisation. Where we have a specialist division within our organisation, which is the field leader, that is immediately where I would look for the laying down of terms. But let me be clear: I place absolute faith and trust in the very senior and experienced prosecutors who occupy Chief Crown Prosecutor levels within the organisation. I place my confidence there.

Kristin Jones: We have plenty of guidance in relation to decision-making and I think the Chief Crown Prosecutors would rely on that.

Lord Grabiner: The consent point may just be a historical hangover. I know it has been legislated, but that was the position under the old law. It may have been adopted for perfectly good reasons, but are you saying now that it is unnecessary? Would you go as far as to say that?

Max Hill QC: I am not trying to avoid it; that is the point I am making. If we maintain the status quo, that does not present a difficulty within the organisation. But I recognise, as many commentators do, that we are still in the early years of the implementation of this statute.

To take one transatlantic example, the Foreign Corrupt Practices Act 1977—the US equivalent—found that for as long as perhaps the first 20 years after implementation, the number of prosecutions brought was low, and then there was a rising curve. We are going through that same process in terms of the number of years. We may therefore see an increase in the number of prosecutions. That would consolidate the point that further flexibility over time might be a good thing.

Lord Thomas of Gresford: Presumably there must have been some feeling at the time the director's office was formed that there is something special about bribery that takes it outside ordinary fraud and corruption. Do you think there is anything special about bribery?

Max Hill QC: I would suggest that there are a number of special features. If I dare say so, as one lawyer to another, we can recognise that the Section 7 offence in particular is an interesting "failure to prevent" offence. Looking across criminal law in general, there are very few offences of omission—almost all are offences of commission—but this is an offence of omission. That does set it apart. It means that it has a hybrid function within commercial organisations. There is a preventive function. You need to look within your own structure to ensure that you do not breach the law that has now been passed.

There is then a reactive function on the part of the Crown Prosecution Service and other prosecuting authorities to step in and to prosecute where the line has been crossed. In that sense, through this Act we are taking acts of omission into the criminal courtroom, which does not happen in very many other places. To that extent, it is special, but I emphasise that it is crime and, like so many other species of crime, it is quite right that when it passes the Code for Crown Prosecutors test as to evidential sufficiency and public interest, it belongs in court and that is where we take it.

Lord Grabiner: Another thing that is peculiar to the bribery issue is that it might involve a foreign Government or foreign government officials. One can see that that might provide a justification for more senior

scrutiny and prosecutorial discretion because of the impact on international relations.

Max Hill QC: Yes. I would tend to agree. As you know, the Section 6 offence has not been used with great frequency, but that is perhaps for other reasons: the complexity and level of investigations, as well as the time that they take. Perhaps we will come back to that later.

Q48 **Baroness Primarolo:** Lisa, picking up the last point about highly complex cases and the level of investigation that is necessary, do you believe the organisation has adequate financial and human resources for the lengthy investigations that are often involved in relation to offences under the Bribery Act? In particular, do you find it difficult to compete with the private sector on the skills that you are looking for in attracting and retaining staff?

Lisa Osofsky: I was very lucky to come to the helm when we had a nice uptick in our core funding. What used to be £34.3 million is now £52.7 million—great, a nice big extra chunk of change.

In terms of our ability to go back for additional funding, there is a new mechanism. It is a slightly different version of what was called blockbuster, but it allows us to ask for additional funding if in a financial year we have a case that goes over £2.5 million; we are allowed to go back to ask for more.

I am not quite as green as Max, but I just got here so I am pretty green. I would like to give it a go and see if I can make it work with the extra I have been given. If I cannot, I would certainly consider all measures. But at this point my feeling is, “I have a nice extra amount of money and the ability to go back when I need more”. We have not had any cases that have not been brought. We have not faced the sad day when we cannot bring a case because we do not have the money. I would not want that to happen in my lifetime. Given the funding structure, I am confident that I will not face that. At this point, my sense is that we have the finance that we need—for now, provisionally.

Also, if you look at the trajectory of our past years in existence and what we typically spend, we are in the right ballpark. We are just about there. I will not bore you with the pence here and there, but I am the accounting officer. I am quite conscious of what our cases are going to cost. I am from the Midwest of the United States, so I am going to approach this with a Midwestern optimism. We appear to have the structure that will work for us.

The human side is another great twist, of course. I came from the private sector. I came to the Serious Fraud Office because it offered something very different. We find that we get really dedicated prosecutors who actually want to serve the people. We want to do something different. We want to make a difference. I was very happy in my prior job. No one had kicked me out, I was not looking for a home. I actually wanted to add value in a way that I thought would really matter. I saw challenges. I think the Serious Fraud Office takes on some of the best cases. We are making great cases day in, day out. We are getting refugees from the bulge-bracket law firms. I go round with my begging bowl asking for secondees or people who might want to join us.

We have just advertised for a general counsel because the former general counsel is going out to the private sector. We have shown that we can be a good platform for those currently in government to go out and make possibly more substantial money than we are allowed to offer at the SFO. We are seeing a slight change. It is sometimes unkindly referred to as the revolving door. I do not like that term; it seems a bit negative. We are seeing that we are offering such great experience even to very junior prosecutors that they are able to stay as long as they want, add value, feel great about the work they do, walk with their heads held high, and if they want to go out to the private sector, they can.

The more challenging areas for us are on the tech side. We need to make sure that we stay relevant and current and are offering the sorts of opportunities that we need for the tech side, and I am spending a lot of time and energy doing that. Provisionally, I think we have the right combination in what we are offering people: job satisfaction, the future ability to do well, and the funding that Parliament has so graciously extended.

Baroness Primarolo: You paint a very positive picture for now, given the challenges that your organisation faces. Picking up the answer to a previous question, should we follow the American example where we are on a rising curve as the legislation beds down, people become more aware of it and we may see more self-reporting? Are you confident that the mechanism agreed for your core funding every year—I am not talking about the additional funding—is suitable to meet the challenge, should you find an increasing workload as more and more people become aware that they should self-report?

Lisa Osofsky: I am an avaricious prosecutor. I want more people coming to self-report. I want more people wanting to work with us to make more cases. I would be very pleased if we had the FCPA uptick. It is a well-used tool. Mind you, we are not so far behind when it comes to deferred prosecution agreements. I do not want to get too off-track—I know that was not your question—but we are second to the US in our experience with a new mechanism that is being mirrored around the world. I hope we get some of that trajectory. I already see that we are considered expert in an area that is relatively new to the legal world in general.

Look, if I need more money, I am not shy; I promise I will come forward. Right now, though, with the significant uptick, it is a big percentage of what David Green had. I want to be greedy about my cases. I do not want to be greedy about the money. I am confident that we can make it work for now. If we get lots more work, I promise I will be the first to raise my hand and say, “I need more money”.

Lord Empey: The Committee has been a bit concerned that there is no level playing field between large corporations and small enterprises. Where you have a large corporation with its own legal department and access to the best brains, is the prosecutorial side of things an even playing field and resilient enough?

Obviously, you are painting a positive picture, and that is reassuring, but there is still a feeling in the back of some Members’ heads that perhaps the playing field is not even between the large corporations and the small.

I am sure you have heard that yourself. Do you feel that you have sufficient depth and resilience to take on the big guys as well as the small guys?

Lisa Osofsky: I love nothing more than the challenge of taking on the big guys. In a lot of ways, it is easier to take them on. I want the challenge. We are happy to do it. We do try. We face other hurdles. Sadly, I had to miss Sir Brian's discussion, but it sounds as though there was some discussion about extending corporate liability. That might be an area we would want to probe together. The Bribery Act does something wonderful for us in that area that I wish was mirrored elsewhere other than just the failure-to-prevent facilitation of tax offences.

Putting that aside, it is a challenge for the smaller companies. I advised a lot of them before I got here. There is a lot of material out there on the internet. As we all know, there is a booming advisory, legal and accountancy world in London. We are lucky. We are a big city. We have lots of advisers running around. There is a certain amount of material out there. I am not saying it is as easy as when you have your own GC who can put very complicated programmes in place. My own work was typically at international banks, which have huge compliance functions. They are in the regulated sector.

There are all sorts of requirements. I hope, as I continue to do my work, getting out there and explaining what the law is about and talking to various audiences, not just the big boys but whoever will have me and wants to hear what I have to say about this area of law—Max is out there as well, publicising the importance of this kind of work—that there will be more understanding. In the SME world there is possibly a little less awareness. When you get cases made against some of the smaller organisations, I dare say that will focus the minds as well.

Lord Thomas of Gresford: You are happy that there is equality of arms for the big companies, but is there equality of arms for the SMEs, from their point of view?

Lisa Osofsky: It is difficult for them. The difficulty has to do with the legal structure. There are certain cases that I am not allowed to talk about, but we are trying to get the corporates in the dock and we have met with mixed success. We have met with much better success in the area that you are focusing on. We are finding it a difficult one for us, yet we keep trying.

If there was an extension of these rules in terms of corporate criminal liability or vicarious liability, we might find ourselves less hamstrung by the identification principles. We might make better progress against some of the larger, fair-fight opponents of the SFO. I am willing to take them on. I wish the law was completely in my court, because I would like to be able to show just how much that is a challenge I welcome. But for now it is harder.

There are fewer resources for the smaller corporates. There is information out there. Awareness-raising needs to go on. Your work as a Committee will help that; it will publicise it. I am willing to go out and talk to various audiences, including compliance-oriented audiences, not

just my own prosecutors. I am out there talking to business. I do not see David Gold here, but I was able to meet a group he has formed that is worried about governance. They are all GCs. All I can do is try to bring fair cases.

One last point is that “adequate procedures” is different for different companies. What I might require of a bulge-bracket bank when I think about a Section 7 defence is different from what I will think about with an SME. Knowing a lot about compliance because that is a strong interest of mine, I understand that SMEs cannot do everything the big boys can do. So when I look at whether an SME is a suitable candidate for a prosecution or a DPA, I will demand something different from it.

Lord Thomas of Gresford: Do you scale down your armoury for them?

Lisa Osofsky: Do I fight with one hand behind my back? I am not sure. Mind you, we have Sir Brian at the other end of that to make sure that we are all playing by the same rulebook. He has to bless whatever comes out at the end of the day, if it is on the DPA side. I would hate to think that I was acting against interest, but part of my job is to be proportionate. That means that I have to have a realistic understanding of what some of the smaller companies can deliver.

Lord Hodgson of Astley Abbotts: I am not a lawyer. I am from the business/commerce end. We have talked about sins of omission. We have talked about foreign Governments. These are sensitive matters. We have also heard that for a company—any company—dealing with allegations under the Bribery Act it is exceptionally demanding of senior management time. In a smaller company, your senior management is your management, as opposed to other companies that have many more resources. Time is of the essence.

To a non-lawyer, it looks as though these cases take an awfully long time to get to court. For a small company, that is doubly devastating. Do you have a system of making sure that the whip is applied to the horse, or are we too often thinking, “Gosh, this is difficult. We need to know a bit more about this, a bit more about that. We’d better check this. Can we check that?”, because for a small company a long period of investigation may well break it.

Lisa Osofsky: It is a great question. I have been telling the staff since I got there: “I want to be the person who leaves absolutely no stone unturned”. So your example is perfect. We need robust prosecutions; I do not want anybody in the dock who should not be there. However, our cases are, almost by definition, international. We have to rely on other countries to deliver evidence in a format that we can use in our country. That slows things down; it just does.

We are going through a more formal process. I invest as much time as possible in making sure I have good relations with my former employers at the United States Department of Justice and the FBI, where I once worked. Around the world, I am spending a lot of time making sure that we get along well and can do things as expeditiously as possible.

That said, getting it in a format that is acceptable to a court is time-consuming. I want to make sure that we are being thorough, to the point

that nobody is in the dock who we do not feel confident should be there. I realise that some amount of delay is doubly difficult for smaller companies, because, as you say, if you are taking the only three people out of the box, and they have to occupy their time with the fear of a criminal investigation, that is difficult for them to deal with.

Lord Hodgson of Astley Abbotts: When you have trouble with overseas Governments and overseas prosecutors in getting a response, does Her Majesty's Diplomatic Service help you?

Lisa Osofsky: We like to work with everybody. We work through the Home Office and try to use to our advantage all the tools that Parliament has given me. We feel that we are getting great co-operation. I have spent time with Andrew Bailey and Mark Steward at the FCA. I am from a jurisdiction where we have a lot of group work. The FSO is founded on the idea of the Roskill model, where different specialisms all sit and work together. I learned how to prosecute a case from the FBI agents who brought matters to me as a junior prosecutor in Chicago. I believe in working across different jurisdictions and sectors. We find that, when we approach it the right way, people are absolutely willing to help.

Lord Haskell: You are also an investigator. Do you have enough resources for that? Does that delay the work of your office?

Lisa Osofsky: Investigating is one of the critical functions that was part of our formation 30 years ago. We staff to investigate just as much as to go into court. We are blessed to hire some of the best and brightest from the Bar to present our cases in court. We have lawyers, investigators and accountants with their areas of responsibility, and we very much budget for that.

Provisionally, after two months in the chair, I hope that the extra core funding we were given and the mechanism at which it was arrived at is the right one for us. All I can say is: so far, so good. We are making great cases. I was really excited to see what the docket looked like and how many of us were spending time on the specialism we were trained to do. Those investigators are critical for us. We have huge document-intensive cases. One, Rolls-Royce, had 30 million documents. Think of sifting through all that.

We need those specialist skills, not just lawyers who can look through it for legal professional privilege and other things. We need to make sense of some of those ledgers. We need and rely on our investigative cohorts, so, yes, for now, if we have the right budget, I very much see investigators as critical to that mix.

Q49 **Lord Stunell:** Yes. I think your panel is well equipped to answer it. What lessons can we learn from the United States? Would prosecutions of large corporations be assisted by adopting the principle of vicarious liability of a corporation for criminal acts by its employees? I am sure you will give a good, wide answer to our question.

Lisa Osofsky: My answer is one syllable: yes. I am happy to talk more fully. Anyone who has paid attention to this area of law watched my predecessor David Green—hats off to him—bring us into a new regime where we are out in front in prosecuting in this area and looking for a

level playing field here. You only have to look at the OECD's phase 4 report, which said that the UK is out in front, thanks in large part to the practical approach of the Serious Fraud Office. We have been recognised in our jurisdiction and in the world for being inhospitable to bribery and corruption. That is good for UK plc. It is exactly what we want. It is hard for us when we cannot get the corporates in the dock, because corporations act only through human beings, from beginning to end. The identification principle made sense 100-odd years ago, when corporations were run by two, three or four people. We know, and you know from business, that that is not the state of affairs these days. We tried charging CEOs. I do not know how many people follow the press, but we are trying to get CEOs and corporates in the dock together. We are not always meeting success.

One area where we have had a huge impact is in bribery because of the failure to prevent offence. That has been not just from a prosecuting standpoint, but from that of incentivising corporates to do the right thing and get the right procedures in place. It all used to be about anti-money laundering. I was at Goldman Sachs when the Proceeds of Crime Act came out 15 years ago. We were a great jurisdiction for that. We were gold-plated, asking more of our regulated industry and way out in front. Bribery was very much in the back seat. Fast-forward to now, with this great law in place, and we are making real inroads, but I will mention an area that we still find difficult, and it is hard for us to reconcile. I am supposed to be covering not just bribery—although I know that that is what this Committee is focusing on—but also all the other economic crime areas, such as fraud and false accounting. I see a disparate ability to make the corporate pay if there is a real failure of controls or of leadership, if it is an endemic problem with the corporate. It is heart-breaking, and vicarious liability would cure it. I do not think everything is great in the US. A lot is really not great, but that is one area where, as a prosecutor, I feel as if I have my hands tied here.

The Chairman: As far as bribery is concerned, Section 7 avoids these difficult questions of controlling mind or vicarious responsibility. Do you wish to make any comments on Section 7?

Lisa Osofsky: Sure. Lest you worry, I am a qualified barrister as well, so I understand the rules in this jurisdiction. It might make sense to treat all economic crime in the same way. I realise that that is not necessarily a matter for this Committee, which is focused on bribery and the Bribery Act. It can feel inconsistent—though I do not want to say it, because they are just different rules—to treat bribery in one category and failure to prevent tax evasion, under the Criminal Finances Act in place since last year, in another. What about the other economic crimes? But Section 7 is very good for us. Using the vernacular, if I could not get vicarious liability across the board, I would certainly be happy having a failure to prevent offence that I could use throughout the economic crime arena.

The Chairman: If I understand you correctly, you are in favour of Section 7, although you think it is possibly beyond the remit of this Committee. Should the Section 7 method be extended to other crimes?

Lisa Osofsky: I do not think anything is beyond your remit. I have read all the bios of the illustrious panel before me. I do not mean to imply that it is somehow beyond this Committee's expertise. I just did not want to get us off track. Yes, we find the Section 7 offence very helpful. We have incredible levels of corporate engagement. All the big boys we talked about are coming in to talk to me. Would they talk to me if I did not have this offence? I do not think so, because they would look at the identification principle and say, "What is the chance that I'll be caught for this? I'm not going to get done for this. Why would I bother going to talk to the SFO? Why would I bother proactively cleaning up the house on the compliance side?" So I am very much in favour of the Section 7 offence and, if I had my way, I would like it to apply elsewhere.

The Chairman: Looking at the other side—controlling mind—you are not suggesting that there should be an exception for bribery, in the sense of making bribery a question of vicarious liability. If I understand you correctly, as a prosecuting authority you would like to see the question of vicarious liability extended across the board to all criminal cases.

Lisa Osofsky: I was asked the direct question, "What do you think of vicarious liability? Would you like it?" My answer was yes. It still is, because I am greedy. I am a prosecutor. My job is to make sure that bad guys are where they should be, which is—

Lord Grabiner: When you say "bad guys", is there not an important difference between vicarious liability for somebody else's criminal behaviour and a key principle of English criminal law—that it is critical to be confident, before convicting, that somebody has an appropriately guilty state of mind? You would be keen to have vicarious liability across the board because, first, it would make it much easier to prosecute and convict and, secondly, you would not have to prove guilty knowledge on the part of the corporate entity. That is not very attractive in terms of satisfying the basic requirements of English criminal law, is it?

Hannah von Dadelszen: I just want to add something to the picture that has been painted. Vicarious liability in the States operates on the basis that there must have been some benefit to the corporate in assessing whether the acts of the individual in focus can be attributed to the corporate entity. When there is a discussion of whether the corporate should really have responsibility for that individual's actions—because it was that individual who had the necessary mental state and committed the acts—there is a moral case to say it should, if the benefit is in part the company's as well as, perhaps, in part the individual's. Looking at the corporate benefit side of it is a feature of the analysis overseas.

Lord Grabiner: That is the way that English civil law works, but not English criminal law. Maybe you are right. I do not have a strong view one way or the other. I suspect Lord Thomas does.

Lord Thomas of Gresford: Vicarious liability does not suggest that there have been failures of procedures. You can be vicariously liable even if your procedures are absolutely gold-plated. Section 7 is much more satisfactory in making the company criminally liable for the act of an official way down the chain, about whom there is no knowledge and who is acting contrary to company policy. I would not seek to have vicarious

liability in this field at all.

Lisa Osofsky: I can safely say, even though I am an avaricious prosecutor, that, if we had someone way down the chain acting off-piste, we would bring a different kind of prosecution. We can and do still prosecute individuals, even when we go after the Section 7 offence. If we have culpable individuals, we will have them answer the charges they face.

Lord Thomas of Gresford: Yes, but it might depend on how much the company has gained from the action of that individual, who may have bribed his way into securing a very profitable amount of money for the company. In such circumstances, the temptation with vicarious liability would be to go for the company and get the money back.

Lisa Osofsky: To me, that would be an abnegation of my duty as a prosecutor. I have to figure out who actually did something wrong, who had the requisite mens rea. Vicarious liability never meant that I—back on the mean streets of Chicago—would go looking for the deepest pocket, which is the example you are positing. It is still my obligation as a prosecutor to make sure I have the people with the requisite knowledge, who have committed the offence I am faced with, in whichever jurisdiction I happen to be practising, in the dock.

Lord Thomas of Gresford: That means that a company may make a £2 million profit, and the individual responsible for getting that contract through bribery gets peanuts. So the company hangs on to its £2 million profit. I am against vicarious—

Lisa Osofsky: I can tell.

Hannah von Dadelszen: Our decision-making is guided by a code. We would not make decisions that are not in the public interest. Every time we assess liability in particular cases, we look at everyone and assess both the evidence and the public interest side of things. So that inequitable result would be very unlikely.

Q50 **Baroness Foakes:** Ms Osofsky, you mentioned that you quite welcome people coming into your office to seek advice. Taking it a step further, would you like to have, in this country, the United States procedure allowing corporations to seek an opinion on the adequacies of the procedures they propose to adopt?

Lisa Osofsky: Apologies if I misspoke. I do not like people coming to seek advice. I like people coming to tell me what they have done wrong, how sorry they are and how they want to make it better. You may be referring to a US Department of Justice feature that it would sometimes field questions from the outside world. The company would say, "If I did this, will you prosecute me or not?" That is not my job here in this country. I have a different job here. I think that could be a nice, helpful thing for companies to get a little comfort ahead of the curve. Do I want to get into the business of that here? I do not. I have enough work to do. Boy, it would blow my budget if I were asked to give assurance all across the piste. My prosecutors have not had the background I have had, looking at banks' compliance programmes and working at Goldman Sachs. So I do not have the requisite skill set even to give that kind of

advice, and I do not feel like using my hopefully sufficient budget to pay KPMG, Slaughter and May or whoever else to give me that sort of advice.

Frankly, DoJ is moving away from some of that. It used to have a compliance officer, a woman called Hui Chen, to give compliance-related advice along the lines of, “Does this corporate have the right procedures now? Does it really appear to be reformed or is it going to be recidivist? Does it have the right things in place?” DoJ has not filled that slot since she left in June 2017. I was at NYU School of Law last week with the number three in the US Department of Justice. It does not plan to fill that slot. It is actually doing something different. So, talking just about my jurisdiction, I do not think I have the mandate from Her Majesty’s Government or the requisite skill set or funding to offer precursor-type advice. My job is to ferret out wrongdoing, to investigate robustly and then to determine whether charges are appropriate.

Baroness Fookes: In fact, it is tailing off in the United States itself as a possible procedure.

Lisa Osofsky: I do not want to mislead the Committee. I will certainly go back to see when the last DoJ opinion was given. Let me get back to you on that one. What is tailing off is having a specialist compliance adviser in-house. That is not what DoJ is doing right now. Let me get back to you on the opinion procedure that they are following and let you know the numbers to see whether it is still an active avenue for exploration by companies.

Hannah von Dadelszen: It is not part of our function to provide an insurance policy for companies that want a rubberstamp on their compliance programmes. The adequacy of a corporate’s compliance programme is its own responsibility. If something goes wrong and that corporate has to come to talk to us, we will trawl through that programme. It is at that stage that we will ask the questions, but it is really not for us to provide that assurance before anything goes wrong.

Baroness Fookes: We fully understand that. We were asking whether you would welcome the introduction of a foreign procedure—clearly not.

Lord Grabiner: A regulated bank would have a daily relationship with the FCA or the PRA, whoever it might be. That kind of conversation would be much more understandable, but as far as you are concerned this is definitely not for you.

Lisa Osofsky: Not on the advice-giving, no.

Lord Grabiner: I understand that.

Lisa Osofsky: Thank you.

Lord Grabiner: In fact, I might even agree with it.

Q51 **Lord Hutton of Furness:** The Section 7 defence under the Bribery Act requires a company to show that it had in place “adequate procedures” to prevent bribery. Some of the witnesses that we have heard from have suggested that the term “reasonable procedures”, which is used in the analogous provisions of the Criminal Finances Act 2017, would be more appropriate. Do you agree? Perhaps Mr Hill might take that first.

Max Hill QC: Plainly, having had the benefit of the exchange between Sir Brian and the Lord Chairman on the question of adequacy versus reasonableness, I cannot pretend to improve on what was even possibly agreed around the table. Looking at the way Parliament legislated in 2010 and again last year with the Criminal Finances Act, it is not clear to us whether Parliament intended there to be a clear difference between “adequate procedures” in the Act that we are considering today and “reasonable procedures” in the CFA last year. Therefore, we take it, as a prosecuting authority, that Parliament meant what it said in 2010—namely, “adequate procedures”. We would suggest that although in the world of lawyers and the courtroom reasonable procedures and reasonableness is a very well-worked principle, which practitioners and judges deploy every day, as Sir Brian knows only too well, in the world of compliance, which we were just touching on, our suspicion is that the word “adequacy” has potentially a greater resonance than “reasonableness”.

Looking at it from the perspective of the cases we bring on behalf of the CPS, there is an argument that “adequate”—the current test—is focused on the bribery that has taken place and what should have been done to prevent it. QED, that prevention has not worked because the prosecution is on foot—a point already made. I put this out for discussion: it might be that in the business world—we are talking about bringing businesses from boardroom to courtroom—reasonableness might be thought a more theoretical test than adequacy, which we suggest is more easily digestible in a boardroom. That does not resolve the conundrum of what you then do when you take the boardroom into the courtroom. As Lord Saville has said, adequacy may ultimately come down to reasonable steps and reasonable procedures in all of the circumstances that are malleable according to the size of the organisation and the crime that you are presenting. The short answer to your question is: we are content with adequate. We think we understand what it means. We suspect that it is understood in business. We are not advocating a change per se.

Lord Hutton of Furness: That is a very interesting answer and I am grateful to you for it. Obviously, you are the prosecutor. You have to decide whether, in your view, the procedures that a company has followed meet this test, whether you bring your prosecution or not. I got the sense that you think that “adequate” imposes a higher threshold of responsibility on a company than “reasonable”.

Max Hill QC: I would look at it in terms not of elevation but of comprehension in the light of guidance that is already in place. We were just touching on whether to introduce foreign practices of prosecutors going out to give guidance. In this jurisdiction we have some pretty robust guidance because the Ministry of Justice brought it out in conjunction with the Act. The six key principles that must be features of anti-bribery procedures for any commercial organisation are well known and are there. Prosecutors do not need to tell companies what to do. Forgive me for going through the list, but they are: proportionality; top-level commitment; risk assessment; due diligence; communication; and monitoring and review. That is transparent and is what is meant by

underpinning the adequacy of your procedures with a view to avoiding prosecution.

With a view to the other route—a deferred prosecution agreement—there is the 2013 guidance. In this case, it is given not by the MoJ, but by two prosecuting authorities together through our predecessors. It is fairly prescriptive and helpful as to the circumstances in which a DPA is likely to fit and, therefore, those circumstances in which it is not. In that regard, since I was just looking at the code when Sir Brian was answering questions, how to evaluate how proactive a corporate has been is specifically dealt with in the code for the note, as I would say to a judge in court. Page 6 of the DPA code of practice says in the second footnote: “The prosecutor may choose to bring in external resource to assist in the assessment of”, the company’s, “compliance culture and programme”. There is pretty robust guidance on what to look for without us having to go any further or having to change the statutory test.

Lord Hutton of Furness: So there is nothing that would interest us there.

Max Hill QC: As I say, I give due deference to the extent to which it is quite difficult to place clear water between adequacy and reasonableness in legal terms. I go back to my first suggestion: in the world of compliance, we would suggest that “adequate” is understood in line with the guidance that has already been given by the MoJ and elsewhere.

Lord Thomas of Gresford: Can I follow that through? It seems that it comes down to what the judge says in directing the jury: “You know what has happened, members of the jury. You know what the compliance programme was. Was it adequate in all the circumstances?” That is quite a simple question. Once you start saying, “Was it reasonable?”, that introduces all sorts of different concepts. It almost becomes philosophical. It goes beyond what the procedures were. I say this having argued for “reasonable” in the 2010 Act.

Lisa Osofsky: We have also had seven years of case law. Sometimes by contra-example we know what is inadequate and what finds its way into the court system as a matter of either a guilty plea, a conviction or the subject of a DPA, where we have Sir Brian’s erudite remarks about how things were working. One more factor that would make me echo the comments I have heard here is that we have some colour to this already. We know the parameters as prosecutors. I think the business community understands that. I can safely say that all the advisers out there have been focused on this helping them to understand and implement adequate procedures.

Lord Hutton of Furness: Am I right in saying that we have not yet had any clear judicial interpretation of the meaning of “adequate” versus “reasonable”?

Lisa Osofsky: Right, and all I am saying is that we have a number of cases now that have been decided under the Bribery Act. We have looked at the DPAs. We have some sense of what “adequate” means. I do not know—I am happy to be told that I am wrong—but, evaluating one versus the other, the Criminal Finances Act is newer. We have a little

history behind us, in terms of what “adequacy” means. We have cases that may not focus exactly on whether this was “adequate” per se, and how that compares to “reasonable”, but we have a little understanding through the analysis that has gone into the DPAs and the convictions in this area. Those are just a couple of examples that help us understand what “adequate” means.

Lord Grabiner: “Reasonable” would assist defence counsel rather more than “adequate” does, in which case I understand why you would be content to leave “adequate” where it is.

Max Hill QC: We are content with where the law currently sits, although we prosecute with lower frequency than our counterparts in the corporate arena. In the most recent corporate prosecution—the case of Skansen, which might be interesting for a number of reasons—our observation was that the company was rightly convicted. As far as I am aware, there was no difficulty in comprehension at a jury level, and certainly not at a judicial level, as to what the test was, and a conviction was returned. I suppose one would have to ask the defence Bar what they regard as the difficulties they had. When robustly argued, as it no doubt was, the case proceeded on a practical level without any difficulty. There was an unequivocal decision by a jury, which perhaps touches on another area of interest to the Committee: can we take these cases in front of juries? We may touch on that later. This is positive evidence that we can. It is the job of prosecuting authorities to make this comprehensive and comprehensible to ordinary members of the public sitting as jurors.

Baroness Fookes: So you are really saying that if it ain’t broke, don’t fix it.

Max Hill QC: I suppose I am.

Q52 **Lord Thomas of Gresford:** If the European investigation order directly ceases to apply to the United Kingdom and is not replaced by a multilateral measure of equivalent effect, to what extent might this affect your investigations in bribery cases?

Max Hill QC: For many investigations that reach far beyond the EU, not at all. That, I think, is the yardstick. Both prosecuting authorities here have experience, in all those parts of the world that are beyond the European Union, in the mutual co-operation instruments and principles that allow us to reach in to other jurisdictions to bring back evidence, and sometimes individuals, with a view to furthering the investigation. Brexit will not have an impact on that. The premise of the question is: to the extent that we have ongoing investigations within EU countries, would the possible demise of the EIO—and, we might add, the European arrest warrant—have an impact? There would be an impact, because we would need to fall back on the mutual co-operation instruments that were in place prior to the EIO, which has been in force for only a year, and the EAW. Is that going to generate work? Absolutely, yes it is.

I did not intervene in the discussion of resources when you were listening to the director, but it is important to say, from the point of view of the Crown Prosecution Service, that there could very well be resource implications depending on where we end up with Brexit. As a prosecuting authority for all crime nationwide, we are preparing for every outcome,

whether that is deal or no deal. We understand that the demise of the EIO and the EAW would require 27 bilateral arrangements as opposed to a single multilateral one. We have procedures in place. We are managing our resources as best we can to prepare and protect the organisation in that event. This summer we created three new fraud centres to prepare for the future in general, and Brexit is part of the future. So it should not be a surprise if and when I say, in future, that there have been resource implications, this is what they are and we will cost them. But we wait to see. In many of the sorts of investigations that this Act presupposes, there will be little impact where they are beyond EU borders.

Lisa Osofsky: I will just add a practical note for the Committee. I do not disagree with anything my colleague has said. On an operational level, we are in the middle of all sorts of investigations where we have invested blood, sweat and tears over the years, both beyond and within Europe. We have joint investigation task forces. We have common goals. We have sat with them year in and year out, so on an operational level we are working closely with our colleagues around Europe. I do not want to be accused of being unduly optimistic, or act as if I am not seeing the realities here, but I would like to think that, having invested so much energy in working together on certain fronts, on big investigations that we are, let us say, 80% into, we are not going to down pens and cease all good work. Some of that work, on the operational level, where we work closely and well with our colleagues in Europe, will continue. We have common goals and have been working together for years. We want to see our cases through. I hope that some of that good work will continue.

Lord Thomas of Gresford: As a matter of interest, the European investigation order is very new, but do you imagine that the impact of the removal of the European arrest warrant would be much more significant? Or has the European investigation order system become much more important?

Max Hill QC: It is difficult to compare and contrast. We have been used to using one tool over a handful of years, and the other came into force only on 31 July last year. All I can say is that there would be, in this event, a definable impact in terms of resource and management. I am not sure that there are statistics that would help me here, but I do not think it is possible to say whether the demise of the EAW would be greater than that of the European investigative tool. Both would have a potential impact.

Kristin Jones: It would be a question of speed, in both cases.

Lord Thomas of Gresford: The pre-European arrest warrant system was extremely slow, by factors of many months. Clearly that would be expensive from all points of view.

The Chairman: That brings us to the end of this session. On behalf of the Committee, I thank you all very much for the valuable evidence you have given. I also make a plea that, when you receive the transcript, you provide to us as soon as possible any corrections, comments, additions or anything else you wish to make. We have a lot of evidence to assess, and that would assist us very much indeed. Thank you all very much.

Lisa Osofsky, Max Hill QC, Hannah von Dadelszen and Kristin Jones – Oral evidence (QQ 155-161)

Amanda Pinto QC, Laura Dunseath and Neil Swift - Oral evidence (QQ 162-167)

Tuesday 20 November 2018

10.35 am

[Watch the meeting](#)

Members present: Lord Saville of Newdigate (The Chairman); Lord Empey; Baroness Fookes; Lord Grabiner; Lord Haskel; Lord Hodgson of Astley Abbots; Lord Hutton of Furness; Lord Plant of Highfield; Baroness Primarolo; Lord Stunell; Lord Thomas of Gresford.

Evidence Session No. 18

Heard in Public

Questions 162 – 167

Examination of witnesses

Amanda Pinto QC, Laura Dunseath and Neil Swift.

Q53 **The Chairman:** On behalf of the Committee, I thank you for attending to assist us in our inquiry on the Bribery Act 2010. You will have received a list of the interests of Members of the Committee relevant to the inquiry. The session is open to the public. It is broadcast live and is subsequently accessible via the parliamentary website. There will a verbatim transcript of the evidence, which will be sent to you a few days after this hearing. At that stage, you are welcome to add anything by way of corrections or amplification, or new points that you would like to make to the Committee, but I ask you to be so kind as to respond to that transcript in that way as soon as possible after you have received it, because we have had a lot of evidence and it would help us in assessing what we have heard. Although we all know who you are, for the purposes of the transcript, please could you in turn introduce yourselves?

Laura Dunseath: I am a principal associate in the corporate crime investigations team at Eversheds Sutherland, which is a global law firm. I spent six years at the Serious Fraud Office as a case controller before moving to private practice more than four years ago. I now specialise in advising corporate and individual clients in relation to bribery, fraud and money-laundering issues and conducting internal investigations on their behalf if required. I understand that I have been asked to attend today as part of the team who drafted the written evidence submitted on behalf of our firm earlier this year.

Neil Swift: Good morning. I am a solicitor and partner in Peters and Peters. We are a small, boutique law firm advising corporate and individual clients on a whole host of white-collar crime and commercial litigation issues.

Amanda Pinto QC: I am a Silk at 33 Chancery Lane. I understand that I am here because of my experience for about 15 years working for and against the Serious Fraud Office and other law enforcement agencies on white-collar crime, corruption and money laundering. I am the co-author of *Corporate Criminal Liability*, which does what it says: it is a textbook on corporate criminal liability. Prior to the Bribery Act coming into force, I had many years' experience being involved with government in trying to frame it.

Q54 **The Chairman:** You will have received a list of questions, which we will put to you in turn. You are not confined to them, nor are Members of the Committee, but they are at least a starting point. The first question comprises a number of questions. A number of concepts in the Bribery Act, such as adequate procedures and associated persons, have been criticised for lacking clarity. Do you think understanding of these areas is improving with time? Should we consider replacing "adequate procedures" with "reasonable procedures", for example?

Neil Swift: You mentioned the concept of associated persons lacking clarity. I am not sure that I agree. Most businesses can easily identify who is providing services or performing them on their behalf. If the nature of the relationship between the payer of a bribe and a company that stood to obtain business or an advantage in business as a result of the payment of the bribe is so difficult to understand, that raises questions about why the company's affairs have been structured in that way. There is a risk in being overly prescriptive, in that it provides a means for the unscrupulous of navigating their way around it.

I have sympathy with concerns about the use of "adequate procedures" and "reasonable procedures" in two different failure-to-prevent offences. I am not sure of the rationale for it. As you know, in the Section 7 Bribery Act offence, there is a defence where a company has "adequate procedures designed to prevent" associated persons from paying bribes. The Criminal Finances Act has a different test. I am not sure what the difference is in practice between "adequate" and "reasonable". It makes it confusing for companies to devise procedures that have to be "adequate" on the one hand and "reasonable" on the other. There was clearly some reason for the use of different language, but I am not sure what it was. In terms of a preference between "adequate" and "reasonable", "reasonable" probably encapsulates it better. We should not criminalise a company if it acted reasonably in devising procedures.

Amanda Pinto QC: I agree. That there are different tests for different, probably overlapping, parts of a corporate's means of operating, because of the particular offence it may or may not be committing, is not helpful to business. It is not helpful to the courts or the prosecuting authorities when you are looking at what the test should be. There are other tests for corporate manslaughter and corporate homicide. All those are more difficult for business to deal with. If everything was streamlined, it is likely that there would be better understanding in the way one runs a company.

My other concern about "adequate procedures" in the Bribery Act is that, by the very nature of where they are—that is, a Section 1 or a Section 6

offence is being committed—in one sense, you could say that prima facie something has gone wrong and therefore it is inadequate, but it would be a different test for all reasonable steps or reasonableness. I watched the evidence of Sir Brian Leveson, when it was suggested that “adequate” meant “reasonable in the circumstances”. I am not sure that if a judge were directing a jury that is what they would say to it. I think—I sit as a recorder—that the judicial college would require the judge to say, “‘Adequate’ is an ordinary word. You know what it means, members of the jury”.

The Chairman: Is not the problem that “adequate” cannot mean “sufficient”, because ex hypothesi it has not been sufficient. It has to mean something else.

Amanda Pinto QC: Exactly, but my concern is that an ordinary person would think that “adequate” meant “sufficient”. I do not know what happened in the recent case¹¹ where it was dealt with, because I have not seen the transcript, but, in the same way that you do not explain what “dishonesty” means, the likelihood is that you would not explain to a jury what “adequate” meant. By its very nature, you are in all likelihood thereby criminalising a corporate without testing whether what it did was all that it should have done.

Lord Grabiner: If we look at it from the perspective of the two protagonists, the prosecution and the defence, I suspect that what concerns the defence and possibly comforts the prosecution is that “adequate” might enable the prosecution simply to say, as the Lord Chairman just said, “You’ve failed. Ex hypothesi, what you had in place was inadequate”. From the defence perspective, that is not a very attractive position to be in, but, by contrast, the prosecution might be content with it. Reasonableness as a test from the defence perspective is much more attractive, because it is highly facts-sensitive and would enable the defence to explain in great detail what mechanisms were in place and then leave it to the jury to decide whether they were reasonable. Without being overtechnical, I say there is obviously a difference between the two. I do not know whether you would like to comment on that.

Amanda Pinto QC: I absolutely agree. In fact, when giving evidence to you, the director of the Serious Fraud Office and the Director of Public Prosecutions admitted that they were very happy with the use of the word “adequate” in Section 7 and did not want it changed to “reasonable”. The question seems to be whether it is appropriate to criminalise a company, if it has done everything that it reasonably could and should have done, for an offence committed by a third party.

Lord Grabiner: So you think that it should be “reasonable” procedures and not “adequate” procedures.

Amanda Pinto QC: I do—that is my personal opinion, by the way; I am not speaking for the Bar Council. I also think it is a very ordinary word in the criminal catalogue of offences and in business, because of regulation.

Baroness Fookes: Is part of the problem that there have not been many

¹¹ R v Skansen Interiors Ltd (unreported Southwark Crown Court)

cases, and so there has been no build-up of case law that would interpret this and give a general feel?

Amanda Pinto QC: I suspect probably not. "Adequate" is something that the jury would decide, and you never know how they come to their decision.

Lord Thomas of Gresford: That is your precise point, is it not? It is a matter for the jury, and you would not define "adequate" for the jury. They must use their common sense: was it adequate?

Amanda Pinto QC: Exactly. I do not think that it is a question of the paucity in the number of cases. We are never going to be in a better position, whereas there is a lot of learning on "reasonableness" and "all reasonable steps" in the regulatory field—there are lots of cases on that.

Baroness Fookes: Would you advise us that we should seek a change in the law—not that we are able to change it on our own? Is that something to work for?

Amanda Pinto QC: I personally believe that it would be in the public interest because I do not think that the Bribery Act ought to be criminalising the conduct of anyone, including a corporate, if they have not done anything wrong.

Laura Dunseath: I agree that there is not a lack of clarity around "associated persons". I also agree that it is perhaps unfortunate that the legislators did not describe it as "reasonable" procedures rather than "adequate" procedures in the first place. I dislike the difference between the Criminal Finances Act and the test in the Bribery Act. My preference is for "reasonable" procedures.

There was also a question as to whether understanding has improved over time. We advise corporate clients, ranging from SMEs to Fortune 100 companies. My experience of advising that range of sizes of company is that there is a clear understanding at this stage. The Act has been in force for seven years and the vast majority of my clients understand "associated persons" and what is meant by "adequate" procedures in relation to the guidance, as in a compliance programme and its various stages.

Lord Hutton of Furness: I should declare for the record that for five years I worked for Eversheds.

Amanda Pinto, you said that there was a serious possibility that corporates could be criminalised, even though they had done nothing wrong, because of the word "adequate" procedures. Is that really your view? Notwithstanding the common sense of the jury, do you think that that is a realistic possibility as it is defined under the Act? Are you saying that a company that has done nothing wrong could still face criminal liability?

Amanda Pinto QC: The prosecuting authorities can look at the fact that a Section 1 or Section 6 offence has been committed and say that obviously something went wrong. Because it is a defence for the defence to prove, in one sense, you have immediately passed the evidential threshold. You would then look at what the procedures are, and it is a

question for the prosecuting authorities whether they consider the adequacy of the procedures that are in place, before you even get to it coming to a trial. The very fact that somebody has committed a bribery offence puts the boot on the other foot. My concern is that, by the use of the word "adequate" rather than "reasonable", it is in one sense obviously inadequate because it has already occurred.

Lord Hutton of Furness: So it is a kind of vicarious liability that has been created here.

Amanda Pinto Q: I would not say it is a vicarious liability, but I would be very unhappy if we ever moved towards vicarious liability for corporates in criminal cases.

Q55 **Lord Empey:** Good morning. In your experience, how effective are the UK's law enforcement organisations—for example, the SFO, the NCA, the CPS and police forces—when it comes to investigating and prosecuting bribery, both for cases in the UK and for those involving UK parties abroad?

Laura Dunseath: I think that the law enforcement agencies in the UK are very effective, in particular the SFO, in prosecuting bribery abroad, and we have seen CPS prosecutions of bribery domestically. My concern is not effectiveness once a case has been identified and accepted for investigation and then prosecution. My concern lies in the mechanism for reporting small-scale bribery.

In preparation for today, I looked last night at the SFO's website. On the page about reporting bribery, it sets out its criteria. I have experience of a client who was a victim of bribery: their employee was taking bribes to overlook poor performance and award further contracts to a supplier. It was domestic and involved in and around £1.5 million to £2 million. That would not fit in with the criteria set out on the SFO's website. You then have to think: where do we report next? If you look at the websites of the Met or the City of London Police, you will see that their reporting mechanisms are very much set up for burglary and assaults. The natural place then is an Action Fraud report, because this is also a fraud on my company, which has suffered a loss.

I have also had recent experience of reporting via Action Fraud for a client a fraud that was in and around £2 million to £3 million. We did not receive a response for three months. I have concerns about the resourcing of the Action Fraud reporting mechanism. I worry about the damage that can be done to a case—the golden hour having passed during that three months—while the report is being processed and then farmed out to whichever police force is considered to be appropriate. That is my major concern about the effectiveness of the law enforcement agencies.

Neil Swift: My comments will have to be generic because I am involved in a number of ongoing investigations for both individuals and companies. By way of general remark, I agree that there is a degree of efficiency on the part of our investigative and prosecutorial agencies. However, such investigations, particularly those undertaken by the SFO, are necessarily resource intensive and expensive. I welcome its investment in substantial technology to improve, for example, the way in which it analyses documents. That will add to the efficiency of its investigations. However,

from the perspective of individuals for whom I often act in this sort of investigation, they can be left uncertain of where their fate lies, for a number of years. It is a very stressful experience for them. The organisations themselves are best placed to say whether they are sufficiently resourced, but it would be an improvement for all concerned if things were done quicker.

Lord Empey: I am sorry to interrupt, but are you saying that there is a difference in how the prosecuting authorities deal with a large corporate and an SME? If they take on a large organisation, clearly it has its own resources, whereas an SME may not. Do you notice any differential there?

Neil Swift: If the Serious Fraud Office is conducting an investigation into a corporate body, it may have a co-operative defendant in the corporate and some of the investigative process may be carried out by and on behalf of the corporate. But the SFO still has to carry out investigations itself. Obviously, the larger the company and the larger the matter it is investigating, the longer it takes. It is dependent on a number of factors. It could be the size of the organisation under investigation or it could simply be the size of the investigation itself. Another factor is the extent to which evidence is required from overseas and mutual assistance mechanisms have to be used. Depending on the jurisdiction to which the request is addressed, that can be a significant delaying factor.

Lord Hodgson of Astley Abbotts: We have discussed the stressful nature of this for individuals and in particular for small companies. The enforcement agencies will, of course, always say that they need more resources. Is it really about resources or is it about management? There is really no excuse for not being able to get some response for three or four months. It does not have a grip of these things at all; they are just drifting.

Neil Swift: Three or four months is a very conservative estimate. I have clients who are interviewed and then will not hear anything from the SFO for 12, 15 or 18 months, or longer.

Lord Grabiner: What about the consent mechanism? Under the Act, you need consent to prosecute. I am guessing that that might be the result of history, because it was always the requirement under the pre-Act situation. Do you think that if there were no consent requirement, the mechanism would be more effective?

Laura Dunseath: I could possibly answer this, as I have been at the Serious Fraud Office. No, I do not think that that adds a particular delay. It is a fairly quick procedure. The delay in the investigation is down to the volume of evidence that has to be reviewed, the number of witnesses who have to be interviewed and the number of witness statements that have to be created. It is a time-consuming process.

Amanda Pinto QC: My experience chimes with Neil's. I have had clients who have been left adrift literally for years. In answer to Lord Grabiner, we are still waiting and we still have not actually got to the consent point. I do not believe that that is where the bottleneck is. It probably is a resource issue, in the sense that there are lots of cases going on and people get moved about. Certainly, this is true also of the CPS. My

experience is that, for some reason, there is not the drive to keep these cases on track. That is a concern.

Lord Hodgson of Astley Abbotts: Is that not management you are describing? Ms Dunseath, could I put the question to you? You are poacher turned gamekeeper and have control of the SFO. Tell us how well managed it is and how much drive there is and a wish to get things done, as opposed to drift.

Laura Dunseath: My experience, which was more than four years ago, was that there were a lot of good initiatives to drive it. There were regular case-controller meetings, at which we had to—

Lord Hodgson of Astley Abbotts: Gamekeeper turned poacher. I am sorry; I got it the wrong way round.

Laura Dunseath: We had to provide regular updates to show the progress of cases. Measures were certainly introduced under David Green and his general counsel, Alun Milford, to ensure visibility and a drive across the cases. I cannot say what has happened in the past four years. From my experience on the other side, I have seen cases drift. I have been surprised that they are not under the scrutiny that I experienced at the SFO.

It is a fair point about large corporations. If you are investigating Rolls-Royce, you can get blockbuster funding. We always hear the director say that we do not turn a case down because of lack of funding and that we can get blockbuster funding. That is true: I have never experienced a case being turned down. But I have experienced cases going slower than the blockbuster cases, usually smaller SME cases. I think that is to do with lack of resource in the SFO. It could do with more staff, better talent management and better staff retention.

Lord Thomas of Gresford: We are very familiar with the delays for people on police bail, which can last for a couple of years. I have come across that frequently. Do SFO investigators grant bail or is it just that the investigation continues without it?

Laura Dunseath: My experience is that generally it does not. The SFO can, but generally it does not, because there is an understanding that cases will take so long and that by doing that they would be making a rod for their own back.

Amanda Pinto QC: You are just under investigation.

Lord Haskell: What about the police? Do they have enough resources to deal with these cases? We hear a lot about the police being underresourced.

Neil Swift: It is a matter of priority. White-collar crime generally is not a high priority for police forces, City of London Police apart.

Amanda Pinto QC: That is my experience as well. The burgeoning of other types of serious crime means that fraud cases are not prioritised. There is also a moment at which the case is not quite big enough for the Serious Fraud Office but is big for the CPS, but it is not putting its resources in. In one sense, that is for good reason, because it has other

immediate caseloads—you cannot leave a rape case or an assault case in the same way. They probably get put to the back of the queue.

Q56 **Lord Grabiner:** Do you believe that the Section 7 “failure to prevent” model should be extended to other forms of economic crime, beyond bribery and tax evasion? Are there any risks to doing so? If I may, I will just make a comment. You find this sort of approach regularly in regulatory legislation and regulatory rules: for example, in relation to financial services. This is an absolutely standard approach that focuses on omissions rather than commissions. I wonder whether you think there might be more space for it within the criminal law.

Laura Dunseath: My recollection is that in 2014 and 2015 the director of the SFO and the coalition Government both seemed to be advocating introducing a failure to prevent economic crime test. That then turned into the failure to prevent facilitation of tax. I am not really sure why it was narrowed to a tax offence. I think that the same arguments that were raised in 2014 and 2015 still apply. I am in favour of introducing the wider offence.

The only risk I think exists is that, in cases that involve the defrauding of shareholders—such as manipulation of financial statements to inflate the share price—if you prosecuted the company later on, you could have the circumstance where the shareholder is penalised twice. They have already lost part of their shareholding and would then ultimately be the group of people that pays the fine. But I think that that could be mitigated by the fact that the public interest test is part of the prosecution test. Those are my views on this.

Neil Swift: The short answer is no. I take a slightly different view of the public interest. There is a public interest in bringing to account members of senior management. There are evidential difficulties in getting to that layer of senior management, because the evidential trail often runs to a halt before it gets to the board of directors. There could possibly be mechanisms for seeking to obtain and encourage the provision of that evidence. At one stage, the Serious Fraud Office made extensive use of co-operating defendants; these are people who are culpable for or involved in the crime but who reach an agreement under the Serious Organised Crime and Police Act. They then give evidence on behalf of the Crown against other people.

Obviously there are risks associated with that sort of evidence, but I think that the public interest is better served not by the greater criminalisation of companies but by looking for means of holding individuals to account. In the financial services regime, that has been addressed by the senior managers and certification regime, where, as well as the loss of their careers, individuals can face substantial penalties as a result of the institutions of which they have had control causing substantial damage. That serves the public interest better than criminalising companies. It will be seen as another expense of doing

business. I am probably talking a lot of lawyers out of work by not encouraging the wider application of the model. But that is my view.¹²

Amanda Pinto QC: Neil makes a really good point evidentially, because the SFO in particular often uses corporates to reply to Section 2 notices requiring all evidence of the fraud that it suspects. Obviously, if you produce that material under Section 2, at that point it effectively means that you are not a suspect. However, as soon as you are a suspect, although you can be compelled to hand material over under section 2, you cannot be compelled to answer questions or give information and that might undermine the sufficiency of the evidence in the case. Quite often it is internal documentation that nails people.

Lord Grabiner: One consequence—I suspect intended—of this sort of approach would be to focus attention on the process that has been developed by the particular organisation and to detract from the need to prove the mental element of the crime. One of you gave evidence on this earlier, anticipating the point, but you end up, effectively, with vicarious liability. That would, at the same time, avoid many of the problems that confront prosecutors in relation to proof of the mind and will of the business and the difficulties in proving criminal liability against a corporate entity. I think the SFO has recently failed against Barclays Bank on this very point. I do not know whether you have any views on that. In other words, do you think there should be more scope for vicarious liability in these offences, or would you stick to the traditional route of mens rea being demonstrated in the business itself?

Amanda Pinto QC: I would put it slightly differently. I do not think this is vicarious liability; I think this is strict liability with a defence. In the States it is vicarious liability. As soon as you are responsible, in effect, for the employee, you, the company, are liable. It is a question of where or how we want our criminal law to be. I do not think we should be going down the vicarious liability route. As I said, of course a corporate is a legal person, but what is the point of criminalising a corporate in the way suggested? If it is to get money back by confiscation and compensation, that does not seem the right reason for criminalising conduct.

Lord Grabiner: It might encourage the improvement of standards.

Amanda Pinto QC: I defer to the people on my right, but the very large corporates are the ones to which it is most difficult to attach liability by the doctrine of identification; for SMEs it is much easier. There is a huge rise in the amount of corporate governance going on now, even compared to five years ago. Ten years ago the landscape was totally different, but you would know more than me.

Neil Swift: One of the major successes of the Bribery Act was encouraging the culture of compliance by putting in the “adequate procedures” defence and echoing that in the Criminal Finances Act. It is another trigger for corporates to focus on their procedures. I agree with Amanda that that is probably more prevalent in larger companies,

¹² The other mechanism of which further use could be made is whistle-blowers. Whistle-blowers have employment law protection but they are not incentivised. Consideration might be given to adopting similar provisions to those used in the United States, contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

particularly those already used to facing potential liability under the Foreign Corrupt Practices Act, for example. One of the main problems with vicarious liability as a model is that it puts so much of the focus on the exercise of prosecutorial discretion, so it would be up to the SFO whom it decides to prosecute for particular types of conduct if it is simply a vicarious liability model.

Q57 **Baroness Fookes:** May we turn to deferred prosecution agreements? Are they working effectively in relation to the Bribery Act 2010 and is there any way of addressing the imbalances, which have been touched on, between smaller and larger firms, particularly in relation to the identification principle?

Laura Dunseath: It is too early to judge whether they are working effectively. We have not yet seen the results of any cases against individuals but we know there are prosecutions. The judicial review of the case of XYZ—the anonymised DPA—has brought to the fore the natural tension and conflict between the interests of the individual and those of the corporate. Until we see how the prosecutions of the individuals play out and the value of the co-operation of the corporate suspect or defendant in bringing those prosecutions, we cannot give a final judgment on the effectiveness of the DPAs right now. However, against that, they appear to be working fairly effectively, but that is not a final judgment.

I do not see that there is an imbalance in relation to DPAs. Again, if you look at the case of XYZ, it was a small company. When you look at the terms of the DPA, you can see that the SFO took quite a thoughtful, considered, reasonable and proportionate approach to that company. I do not doubt that it will be able to do that again in relation to further small companies.

Neil Swift: I agree that it is too early to say. We do not have a big enough body of practice yet. The DPA is a very natural bedfellow for the offence under Section 7 of the Bribery Act and the Criminal Finances Act offence of failing to prevent tax evasion. To get through the door into DPA territory, one has effectively to satisfy the public interest that it is a proper thing to do. That often means that the company has purged itself of the bad actors. The slightly more palatable outcome of a DPA and the slightly more palatable outcome of acknowledging that one has failed to prevent—rather than that one is a principal actor in—the offence are a natural combination.

Amanda Pinto QC: There is a preference towards larger corporates. There is a feeling, whether or not it is borne out evidentially, that they are more likely to be used with bigger rather than smaller corporates, despite what is said about XYZ. Really, the difference is whether you are interested in public sector procurement contracts which prevent those with a conviction from tendering. That is the only reason you would potentially go down a DPA route rather than take your chances in court. The Committee will know about the case that was going down the DPA route and was prosecuted because the SFO—

Neil Swift: I know the case you mean, but my mind has also gone blank.

Amanda Pinto QC: Was it Standard Bank¹³? Anyway, it does not matter. The case started off going down the DPA route and then the SFO said that the corporate was not being sufficiently co-operative. At that point, certainly among the legal profession, there was a lot of discussion about the fact that the corporate did better by going to court and pleading guilty. The financial situation was better for the corporate than if it had been given a DPA. It was after that that DPAs started to give more than 30% discount. Obviously, if you are going to get the same sort of discount at court as you would in the DPA, what is the point of then having to do all the monitoring and incur all the other expenses that a DPA requires?

I personally think that the DPA will work only if a greater discount is given. From a corporate perspective, why would you go down that route otherwise? There is huge expense in having the monitoring done afterwards, which the corporate has to bear. There is a huge expense in doing all the internal investigation that leads to the DPA, which you then give to the Serious Fraud Office or the Crown Prosecution Service. Obviously there are a few more that might not be public yet, but there have been only four cases in the public domain. As the Committee knows, they have all been decided by Sir Brian Leveson. There really is no breadth at all to be able to say whether, as a general tool, they are working.

Lord Thomas of Gresford: You make an interesting point that public procurement is an incentive to a company to seek a DPA. That is new; I have not heard that from any other witness. Is there a greater black mark from the conviction of a company than from it having entered into a DPA? What does it do to the commercial reputation of a firm?

Laura Dunseath: I do not think that there is a great deal of difference. One thing we see is that, when companies engage in mergers and acquisitions, the legal due diligence will quite often include the question: has the company ever been investigated, prosecuted or benefited from a deferred prosecution agreement? You can be discounted for having a DPA just as much as you can for having a conviction. It is public knowledge and you have been publicly shamed for your poor behaviour. I see there being not very much of a difference.

Amanda Pinto QC: But in relation to a DPA, the statement of facts has to accept liability for the criminal offence. In a sense, you are in no better a position with regard to the conduct that has led to the position that you are in. I think that is the fundamental reason why it would not make very much difference—I tend to agree with you.

The Chairman: You are certainly not better as far as the conduct is concerned, but could not the point be made that you are only going to get a DPA if, in effect, you truly repent as a company and demonstrate your co-operation with the prosecuting authorities? That might have a beneficial effect on your reputation, despite the fact that there has been bribery.

¹³ R v Sweett Group plc (unreported)

Amanda Pinto QC: Absolutely, but you could equally make the same point about your sentencing hearing and mitigation. Those points would be equally available, even if the prosecuting authority, the corporate and the court did not agree that a DPA was the right way forward.

Lord Stunell: There might be a point here that, in some jurisdictions, it is impossible to tender if you have a conviction. If you are exporting, it might be very important. But if a company was not likely to be exporting, are you saying that your professional advice would be for it to take its chance in court and not to bother with the DPA stuff?

Amanda Pinto QC: That is not what I am saying. It looks to me as though the Serious Fraud Office and Sir Brian Leveson woke up to the fact that, if you are not going to give any more credit to the corporate for entering into the DPA than you would in court, that might impact on whether a corporate wants to go down the DPA route. From the prosecuting authority's point of view, the benefit of going down the DPA route is that it ought to very much limit the resources that it needs to put into bringing the case to court. That is a fundamental part of the DPA. The public expense that is saved by going down the deferred prosecution agreement route is very much in favour of the Serious Fraud Office or the Crown Prosecution Service.

Lord Thomas of Gresford: And should therefore be reflected in the amount of compensation paid by the company.

Amanda Pinto QC: It gets a discount from the fine that would have been imposed.

Baroness Fookes: Could I put it another way? Would you be happy to see this tool, as you described it, dropped altogether—if not expunged from the statute book, then not used?

Amanda Pinto QC: No, I do not think so.

Baroness Fookes: You think it has some value as a tool.

Amanda Pinto QC: If you mean the deferred prosecution agreement, yes I do.

Neil Swift: I agree.

Laura Dunseath: Yes, I agree.

Lord Plant of Highfield: Could I just ask a supplementary question about the difference? You talked about the naming and shaming element and said that that is dependent on the fact of publicity, whether in the court or surrounding what is set out in the deferred prosecution agreement. When the deferred prosecution agreement is settled and authorised by a judge, it is published as a judicial report. Where in the process of arriving at that does the publicity come in? Obviously, in court, you are open to adverse publicity and commentary in the newspapers and so forth from day one. Is there anything comparable to that in relation to DPAs?

Laura Dunseath: It depends. Some SFO cases are in the public domain at the outset. In the case of Patisserie Valerie, we have already seen newspaper reports stating that it has referred to the Serious Fraud

Office—the cat is out of the bag already. Sometimes, if the SFO launches a search, it will later make an announcement that, say, a building in Bishopsgate was searched, and it was whatever bank. That will attract publicity. Some papers, such as the *Guardian*, the *Financial Times* or the *Times* will follow progress and every so often report a little on it. If it reached a DPA, there would be a bit of hush around it until the DPA is signed off and a court hearing is ready to be approved. In other cases such as that of Standard Bank, nobody really knew that Standard Bank was under the SFO's nose until the DPA was announced. It moved very quickly. Speaking with my old SFO hat on, the SFO will be alive to the fact that it does not want to destroy the reputation of a company until the full facts are ready to be announced. If it is not in anybody's interest to make it publicly known, such as in the case of Standard Bank, it will not be publicly announced.

Amanda Pinto QC: There is an issue. I have been to meetings, particularly with the press but also with organisations involved with freedom of expression and free speech, about the fact that DPAs are organised and agreed behind closed doors. That is an issue. I do not know what the answer is, but it is certainly on people's radars.

The Chairman: That is probably one reason why Sir Brian Leveson was adamant that if a DPA was going to be granted, it should always be approved by a senior judge.

Baroness Fookes: But you could not have it happen in public if you were then going to prosecute individuals.

Amanda Pinto QC: I agree, but people are concerned that, in a sense, it is not open justice.

Baroness Fookes: But you could not

Amanda Pinto QC: I agree

Lord Grabiner: Were you expecting there to be more cases? I am surprised that, although this legislation has been in place for seven years, we have had only four cases.

Amanda Pinto QC: Yes.

Lord Grabiner: Why do you think that is? Is some reason lurking there?

Neil Swift: Naturally, it takes time for conduct, which would have to have happened after implementation of the Bribery Act, to be discovered, investigated and prosecuted. It all takes time.

Amanda Pinto QC: I may be wrong about this, but it is not a natural thought for the Crown Prosecution Service. The Serious Fraud Office is alive to the possibility of DPAs; I am not sure that it is at the forefront of the mind as a potential tool in the Crown Prosecution Service.

Lord Empey: Could it be that the legislation is working and there is greater compliance with standards?

Amanda Pinto QC: It is possible.

Laura Dunseath: My experience of advising corporates is that a lot more of them are taking compliance more seriously as a result of the introduction of the Bribery Act.

Neil Swift: The SFO is still investigating and prosecuting offences under the previous legislation, the 1906 Act, which illustrates the time it takes. On Baroness Fookes's comment about publicity, particularly where individuals may yet be prosecuted, there is a contrasting approach. XYZ was necessarily anonymised because of what was going on with individuals. With Rolls-Royce, I understand that no decisions have yet been taken on the prosecution of individuals. Similarly, Tesco's DPA was announced before the prosecution of its directors for criminal offences; they are currently having a retrial. There is inconsistency.

Q58 **Lord Haskel:** This brings us back to company size. Is the Ministry of Justice guidance on the Bribery Act providing adequate and up-to-date information for businesses, especially small and medium-sized businesses? Are SMEs able to access high-quality, affordable advice on the Act when they need it? Should the Serious Fraud Office or other government organisations consider introducing more personalised advice for businesses?

Neil Swift: On the whole, I think the guidance is adequate. We are now seven years post implementation. The guidance could be updated by reference to practical experience of things that investigators and prosecutors have seen; that could certainly be put on the table. There is certainly a difference in understanding the implications of the Bribery Act between large companies and SMEs. Not all SMEs have considered what their obligations are. We see only people who walk through our doors because they want advice, but I am sure that a whole host of people could do with advice but do not take it. I am not sure that it is the job of the SFO or the Government to provide a micro level of advice to companies; obviously, it is available to them to seek legal advice from other professional advisers. There is also a fair amount of free-to-access resource out there. For example, Transparency International produces some quite helpful checklists to look at procedures.

Laura Dunseath: I agree. I think the MoJ guidance is good and does not need to be updated. It is principle-based, as it has to be. In advising a wide range of companies, from SMEs to FTSE 100 companies, one size does not fit all. It would be difficult to create advice that was manageable if it was not principle-based and wide, as is the MoJ guidance. In the case summaries provided in the DPAs, there is no detailed examination of the compliance programme that was in place. We could benefit from that. Companies would be able to look at those judgments and find what was found wanting in previous compliance programmes and what was found to be adequate. I would prefer it if the SFO provided more detail in the case summary or a standalone report following it. I do not know whether it is possible, but it would be quite good for the SFO also to provide some case summaries on cases that it has decided not to prosecute for failure to prevent bribery so that we could have a real example of what adequate procedures or an adequate compliance programme looked like. The DoJ does something similar with its declination process. I do not necessarily mean declinations, but some such practical advice. A little as

Neil was saying, perhaps the SFO could routinely provide some sort of anonymised case summary explaining the programme instead of adding it to the guidance.

Amanda Pinto QC: I have nothing really to add. I think that the guidance was designed deliberately to be applicable across any size of corporate and to fit its level. The SFO would probably balk at providing the sort of help that Laura has just suggested. It is firmly of the view now that it is not an advisory body. It does not consider it to be its job to give advice to anybody.

Laura Dunseath: This would not be advice; it would be just a factual case summary of where it has decided not to prosecute.

Amanda Pinto QC: None the less, I suspect that it would then be faced with comments such as, "Well, look, this is not so dissimilar to the one where you didn't prosecute. Therefore, why are you prosecuting me?" I think that it would resile from getting itself into that position, although I could be wrong—you would know better than me.

Baroness Fookes: I suppose that it could append summaries of cases where it prosecuted rather than those where it did not.

Laura Dunseath: Yes, a more detailed examination of that would be beneficial.

Baroness Fookes: So it would be as an appendix to, or a lead to, the general principles, which you feel should stay as they are.

Laura Dunseath: Yes.

Lord Thomas of Gresford: But I take your point that publishing a summary of where it had not prosecuted would at least give guidance as to what is considered to be adequate.

Laura Dunseath: Yes.

Lord Haskel: Do you think that this advice could be better delivered through trade organisations, chambers of commerce or organisations that smaller businesses regard as sources of information? Have you had any experience of advising any trade association or chamber of commerce?

Neil Swift: I have no experience of advising an organisation such as that. I can see how it would be potentially beneficial to share experience. The cynic in me thinks that it might be difficult for organisations participating in such a discussion to share examples with their competitors—for example, where they have had to make facilitation payments when transporting goods to a particular country. It could be used to commercial advantage by a competitor to make a complaint to the authorities. Discussion and sharing experience are good, but there are potential pitfalls.

Amanda Pinto QC: I think that any publication or greater availability of the guidance is a good thing. If chambers of commerce are encouraged to disseminate this to their members, of course that would be a good thing. I was surprised to read the statistics on SMEs knowing that the Government had published guidance on the Bribery Act—the figure was relatively low. That was quite a surprise.

Lord Haskel: So another channel of communication might be helpful.

Amanda Pinto QC: Yes. Not sharing information but—

Lord Haskel: Just another channel of communication.

Amanda Pinto QC: Yes.

The Chairman: That brings us to the end of our questions. On behalf of the Committee, it remains for me to say thank you very much for coming here and for providing interesting and valuable evidence.

Richard Rippin and Eddie McGinney – Oral evidence (QQ 168-176)

Tuesday 20 November 2018

11.35 am

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Members present: Lord Saville of Newdigate (The Chairman); Lord Empey; Baroness Fookes; Lord Gabiner; Lord Haskel; Lord Hodgson of Astley Abbots; Lord Plant of Highfield; Baroness Primarolo; Lord Stunell; Lord Thomas of Gresford.

Evidence Session No. 19

Heard in Public

Questions 168 - 176

Examination of witnesses

Richard Rippin and Eddie McGinney.

Q59 **The Chairman:** Good morning to Richard Rippin and Eddie McGinney. Welcome to the Committee. We are very grateful to you for being prepared to assist our inquiry into the workings of the Bribery Act. You will have received a list of Members' interests relevant to this inquiry. The session is open to the public. It is broadcast live and will be accessible on the parliamentary website. There will be a verbatim transcript of the evidence, which will be put on the parliamentary website and sent to you in a reasonably short time. When you get it, please feel free to correct, amplify or otherwise make comments on the transcript, or to add further views that you think ought to be expressed to the Committee. All I ask is that you try to complete that exercise and return the transcript to us as soon as possible. We have a lot of evidence to assess and that would assist us greatly. We in the Committee know who you are but, for the purposes of the transcript, may I ask each of you in turn to introduce yourselves?

Richard Rippin: Good morning, I am Richard Rippin, head of operations for the NHS Counter Fraud Authority.

Eddie McGinney: Good morning, I am Eddie McGinney, a counterfraud and intelligence specialist with the National Health Service in Scotland. My focus is on the prevention of bribery and corruption in the health service in Scotland.

The Chairman: You have been sent a list of questions. You are in no way bound by those questions but we will ask them in turn. I shall start by asking the first question, which I shall read out for the purposes of the transcript. What do the NHS Counter Fraud Authority and Services respectively do to tackle bribery in the NHS? How prevalent is bribery in connection with the NHS and what form does it take? Has the Bribery Act made an impact on your work?

Richard Rippin: Thank you. Eddie and I have been investigators for quite some time and we have cleverly already identified that there are four separate questions in there, so it is wise for us to take the first element first and give you some context. Then we will move on to the prevalence of bribery as we see it—or do not see it.

I shall start with the NHS Counter Fraud Authority, which was formed just over 12 months ago. It is the national body for tackling economic crime and leading the fight against it in England. We also provide support services to Wales. We deal with all forms of economic crime: fraud, bribery and corruption. That is our remit and, as with all forms of those crimes, our role is to identify and highlight for the NHS the risks and threats associated with fraud, bribery and corruption and to support the NHS in identifying solutions that prevent, detect and deter economic crime and target-harden the NHS against the threats of crime in general. We also have an investigative capacity at a national level. We have a national investigation service that deals with the most serious and complex fraud matters that are beyond the vires or capability and capacity of a health body in its own right.

For context, the standard NHS contract has in it mandatory clauses that require providers of NHS services to put in place and maintain appropriate counterfraud measures. That requires all providers of NHS services to adhere to a set of fraud, bribery and corruption standards, which the NHS CFA publishes every year. We also quality-assure compliance against those standards annually. We develop and issue a parallel set of standards for commissioners of NHS services across England. So we are responsible for developing, producing and publishing investigative and preventive guidance on bribery—we are talking about the Bribery Act here—and assisting those health bodies to tackle bribery and the risks they face, along with all the other economic crime risks targeted against NHS expenditure.

Eddie McGinney: The Counter Fraud Services unit in the NHS in Scotland is part of National Services Scotland, a special health board within NHS Scotland. Our remit is similar to that of the Counter Fraud Authority. We have a national and local remit to provide full counterfraud services to our 22 health board partners and other non-departmental public bodies in the devolved public sector. We provide a full range of services across prevention, detection and investigation. We do this through an intelligence-led strategy, which looks at highlighting risks to the health service from all types of financial crime, including bribery and corruption.

In relation to bribery and corruption, we have a strategy that covers efforts and actions to prevent, detect and investigate bribery and corruption across the NHS in Scotland and other public bodies. We do this through a range of measures. As Richard said, we look at risks through a continuing programme of risk assessment and then build anti-fraud, anti-bribery and anti-corruption solutions around those risks through intelligence-led and partnership work with our health boards and public sector colleagues.

The Chairman: Has the Bribery Act helped?

Eddie McGinney: Yes, certainly. My focus, which is slightly niche compared to Richard's, is almost exclusively the prevention of fraud, bribery and corruption in the health service in Scotland, and the Bribery Act has helped. Certainly, as a number of different witnesses to the Committee have said, the six principles related to the Section 7 offence have helped us to build our prevention strategy around them. The principles in general seem easy to understand; they make sense and provide a working and workable framework within which to build prevention solutions.

Richard Rippin: I would support that. Although bribery was well known and understood prior to the Act's introduction, the Bribery Act and its associated guidance focused attention on specific risks rather than the generic risk of economic crime. It certainly focused attention on the risks of bribery specifically and the causes and effects of bribery offences. The Section 7 offences focused initial attention on ensuring that effective arrangements were in place across all health bodies to make sure that they were or could be compliant and should not be in breach of the Act's measures.

In terms of focusing attention, it has helped to communicate the preventive message around bribery and corruption in general. We will come on to the prevalence of bribery, but we have not seen a significant volume of bribery offences reported across the NHS. I think Eddie will say the same for Scotland. We see significant reporting of collusion and corruption in the procurement life cycle and supply chain, which may well be linked to bribery offences when we start to explore them. However, the specific reporting and investigation of bribery matters has been exceptionally low in comparison to what we would consider the threat of bribery offences to be. We do not see a lot of reported matters that designate bribery as the primary offence. We will concentrate primarily, and certainly at a local level, on Fraud Act offences in England and, I suspect, common-law fraud in Scotland. That is where the eyes and ears are in terms of identifying inappropriate behaviour that may indicate economic crime. Eyes and ears are not necessarily on bribery offences directly. We do not see a significant volume of reported incidents of bribery, so our ability to act on the investigative side is limited.

Q60 **Lord Hodgson of Astley Abbotts:** Could I ask you to agree or disagree with this? It has been put to me that the NHS has quite a good system for identifying potential bribery but that much of it is at a local level and this requires local police forces to follow it up. The follow-up is inadequate, slow, inexperienced and lacks commitment. Therefore, much of the work you have done runs into the sand or dies away due to lack of attention.

Richard Rippin: That is a challenging statement to agree or disagree with. At a local level, and since the Bribery Act and the guidance that followed were introduced, generically in the NHS and beyond there has been a lower level of understanding of the investigative service and its implications. I would not necessarily say that there was a failure in capacity of local police forces to deal with it at a local level.

Certainly, within the NHS, if you are not aware, each individual health body across England has a designated counterfraud resource which will

investigate local fraud and economic crime. Where bribery is identified, the expectation is that it may well be referred to local police forces but, ordinarily, it would be referred to the national body, which is currently the NHS CFA. We have existed in previous iterations. Were bribery offences to be identified at a lower level, we would expect that to be escalated to the national body for it to deal with, rather than to local police forces, which may or may not be able to deal with economic crime in general, let alone bribery offences.

Lord Hodgson of Astley Abbotts: Do you expect or require that?

Richard Rippin: We require it, but we cannot compel an individual health body to refer every matter to us. They are expected to follow a range of procedures to escalate these matters. We actively facilitate and enable them to do so. However, if the body chooses to refer matters that may be associated with bribery offences or other issues that we would not deal with, such as theft or anything else, it may be that it has a better arrangement with the local police force. But the expectation is that those matters would come to us.

Eddie McGinney: In Scotland, we would challenge that view. We have been in existence since 2000. We work very closely with our partners in the health service and there is a well-worn path. Instances of financial or economic crime as serious as bribery and corruption would be reported to ourselves; we were set up to not take resources from police forces in Scotland. For economic crime, fraud, bribery and corruption, we have partnership agreements, a well-worn path and a good relationship. We would certainly be the first port of call.

If it gets to a certain level of seriousness, we do not have any powers of arrest, detention or search, so we have partnership arrangements and memorandums of understanding with Police Scotland, through which we engage with our police colleagues to work on certain aspects and executive actions that have to be taken. As for us passing reports like that to the police, I do not see any evidence of that.

Lord Grabiner: Could you give the Committee some concrete examples of the form that bribery takes in the context of the NHS?

Richard Rippin: As I said, the prevalence of reporting is relatively low but there is a higher level of reporting for collusion and corruption in the supply chain and the procurement process. We see manipulation at the pre-contract stage of procurement, including the risk of incentivisation in the tendering process.

Lord Grabiner: So the outside supplier is trying to—

Richard Rippin: It is trying to engage a level of influence to ensure that the—

Lord Grabiner: The bribee at the other end is the person making the decision on whether or not to accept the proposal.

Richard Rippin: That is exactly right. We see it in suppliers of goods, services and medicines to the NHS seeking to gain an advantage and to incentivise the individuals responsible for decision-making in that supply and procurement chain.

Lord Grabiner: Are there any other examples?

Richard Rippin: That is primarily where we see the risk. All reported matters that we have seen so far relate to that side of the supply chain, with suppliers seeking to gain influence in the procurement of services or goods.

Without wanting to jump ahead, one of the later questions from the Committee is around whether we see external people seeking to bribe NHS practitioners to obtain services for themselves. We have had no reported instances of that. We recognise quite clearly that that is a risk. There is the potential for people to be influenced by bribery, but we have no line of sight that it is actually occurring. We recognise it as a risk, but we have not seen it.

Q61 **Lord Thomas of Gresford:** Is there common policy and guidance across NHS trusts on hospitality?

Richard Rippin: There is now. There has been a thrust, certainly since the Bribery Act was introduced, to try to standardise the approach to hospitality incentives and to declarations of conflicts of interest around the decision-making process in the procurement chain. Just 18 months ago, NHS England delivered and developed policy and guidance in this area and is taking that forward.

Lord Thomas of Gresford: What is allowed for hospitality? Is there a certain level—you can go and have dinner but you cannot have free tickets to watch an international game?

Richard Rippin: There is an expectation that all such matters are declared. If you were to receive tickets for a football game or the theatre, or were taken for a meal, there is an expectation that the individual would declare that as a hospitality.

Lord Thomas of Gresford: Have you spread that policy across all NHS trusts?

Richard Rippin: Absolutely. There is a common understanding.

Lord Thomas of Gresford: A common standard.

Richard Rippin: Each individual trust will develop its own policy in that area. The trust is an individual health body and has ownership of its individual policies, but there is an expectation that there is a standard approach to the declaration of hospitality and incentives.

Lord Thomas of Gresford: Because it would not be very much in the public interest if there were variations on the acceptable level of hospitality in, say, Scotland or Wales and parts of England.

Eddie McGinney: That is a good point. Following on from what Richard said, the policy and common set of standards that have been introduced across commissioning and provision in NHS England is, in my view, very good. It is well constructed and reasonably easy to understand. There is a common definition of a gift and hospitality and a common amount at which you have to engage the policy. There is a single process to manage the interest and then decide whether there is a conflict in that interest.

In Scotland, we have taken the work done by that group and currently have a steering group at the Scottish Government level, which includes representatives of senior clinicians, senior government officials, the NHS and other public bodies. We want to try to bring the good parts, if not all of the policy, to Scotland.

Lord Thomas of Gresford: Where do you find the greatest risk? Is it in the manufacturers of equipment or in the provision of pharmaceuticals?

Eddie McGinney: There are a number of areas where there are inherent risks. It could be pharmaceuticals. The only way to base the position is on previous cases in sectors where there are case records. If you look at some of the cases across the UK, you will find them in the IT and telecommunications sector and in the provision of services to estates or facilities departments. Wherever there is the provision of that type of service, there are cases in those sectors. I think it would be in IT and telecommunications, estates and facilities, and even in finance, accounts and payroll departments.

In Scotland, wherever the health service touches commercial activity, those are the areas where you have to focus your risk assessments.

Richard Rippin: We see it across the entirety of the supply chain. The NHS is a multibillion-pound industry and almost an economy in its own right. We quite rightly expect to see risk in all areas of supply of goods and services to the NHS.

To go back to your point about policy and the standardisation of procedures, moving forward, it is of clear interest to us and extremely important to have a standardised set of procedures and an approach to hospitality. But the key measure is making sure that the arrangements are embedded and there are effective control measures in place to ensure that that policy is effectively carried out. It is no good just having a policy, even if it is great and works beautifully. The NHS is fully aware that the key challenge is that that policy is embedded in all providers and commissioners moving forward.

Lord Thomas of Gresford: Do you black-ball providers?

Richard Rippin: We do not personally. As part of the checks that people within the supply chain will do, we are asked to identify organisations that we know have a history of impropriety. It is very rare that we have knowledge or sight of a specific supplier that we would black-ball. I think the marketplace itself would do that.

Eddie McGinney: Certainly in Scotland, the procurement measures in place cater for that to some degree. Contractors or people who want to enter on to frameworks have to fill out the European single procurement document and follow the regulations. Within those regulations are statutory reasons for exclusion of certain contractors. They have to answer certain questions and make certain statements in the document. At that point, you would analyse that information to see whether they had made true and proper statements and were not hiding anything. If there are issues around that, our procurement colleagues can then come to us.

Q62 **Lord Plant of Highfield:** When you were listing a few minutes ago a

number of areas where bribery and corruption might be expected, you mentioned estates. Does this mean the running of an estate once a hospital or whatever is constructed, or does it apply to the construction of the facilities as well? If so, do you have much evidence about bribery in the construction process?

Eddie McGinney: Not in Scotland. I do not have evidence of specific instances of bribery and corruption. That is not to say that it has not happened, but we simply do not have any evidence or reports of it. It is certainly something that we would look to risk-assess as a matter of course. When I used the term “estates”, I was talking more about the sort of services that hospitals would need; for example, providing a new telephone connection, fixing a door or painting a wall, where it is generally done by small-to-medium enterprises. Sometimes it can be bigger organisations, but I am talking about that type of close commercial activity in the marketplace to get a particular service delivered. Obviously, in the NHS in Scotland, a lot of that is going on day to day.

To answer the point about prevalence, the number of reports of bribery and corruption in the health service in Scotland has been historically very low. It is important to say that. Again, that does not mean that it is an accurate reflection, but it is a source of intelligence that we have to take cognisance of.

We have one significant case in the health service in Scotland, but it is currently being considered by the Crown Office. As it is sub judice, I am not able to talk about it, but it is not the norm. Historically, the number of reports has been very low.

Baroness Primarolo: I think we have moved on to question 3.

The Chairman: And indeed question 2, I think. Never mind. Would you like to put question 3?

Q63 **Baroness Primarolo:** It has been quite widely covered. I want to ask a question associated with questions 1, 2 and 3. You describe an NHS that has national and local procurement. You then refer to NHS trusts, which are local, autonomous bodies that are required but not compelled to pass information to you. Then you state that the reporting of bribery and corruption is very low. The obvious question to begin with—I may then follow it with a supplementary—is how you know. If you do not know that everything is being reported to you because it is only “required”, you would say that reporting of bribery and corruption is low, would you not?

Richard Rippin: Let me correct a previous error. Within the standard contract applicable to commissioners and providers, they are required to promote and report either directly to us or via our national fraud and corruption reporting line—our online system. It is their responsibility to ensure that all matters of economic crime, including bribery, are actively reported directly to us, and we quality-assure their compliance against those standards. We are a national body which receives those reports and then disseminates them to the NHS. They are required to comply with those standards as part of their NHS standard contract. Across the board, we receive between 5,000 and 6,000 reports of an economic crime nature each year. The designation of those reports as bribery is exceptionally

low, but the number of reports of economic crime, fraud or other matters, as you can see from that volume of reporting, is not. We have eyes on the fact that reporting of fraud is widely promoted at a local and, obviously, a national level. Commissioners and providers are compelled by virtue of their standards to ensure that that takes place and reports come in to us. As you quite rightly say, they are independent bodies. If they take a single decision to engage a police force rather than us in respect of any investigation of a crime, they have the autonomy to do so. Primarily, they are engaged towards reporting directly to us.

Baroness Primarolo: We have just had a long and pertinent discussion on hospitality. How can you be confident that bribery is understood clearly by everybody? One thinks of the pharmaceutical industry and its ability to sponsor conferences and various nice activities for the medical profession. A behaviour and a culture have been in place for a long time, which may or may not be caught now within the Bribery Act. How can you be confident that everybody is using the same approach?

Eddie McGinney: It is more doable in Scotland given the size of NHS Scotland compared to the NHS in England and Wales. We can be confident. We have embarked on a nationwide awareness-raising and training session within prevention specifically about bribery and corruption. We first spoke to the chief executive or corporate management team in every health board in Scotland, as recommended by the Scottish Government, making them aware of bribery and corruption and specific parts of the Bribery Act that they should know about—the Section 1, 2 and 7 offences. At senior level, we have made them aware by providing briefing and training sessions and we have a rolling programme of workshops across key areas such as procurement, IT and finance. Those awareness and training sessions are ongoing in Scotland.

Baroness Primarolo: You paint a very convincing picture of your procedures. Why do you estimate that fraud costs the NHS nearly £1.3 billion a year if everything is going so well? I know that it is a big institution, but £1.3 billion is a lot of money in anybody's terms.

Richard Rippin: It is a significant amount of money. We can provide as much guidance, direction and compulsion as we can to ensure that matters are reported to us and effectively dealt with at a local level. Fraud is a significant risk across the economy. The rates of expectation that we use in respect of the NHS are not dissimilar to those for other areas across the private and public sectors in England. In fact, it is significantly less than the expectation of risk in certain other parts of the economy.

Fraud is an underreported matter, not just in the NHS but across the UK economy. It is an area of significant risk, threat and cost that requires some attention and highlighting. However, the NHS, in terms of the figures that we produce, is not dissimilar to any other part of the public or private sector. It is not unique in the fraud, bribery and corruption challenges that it faces. In fact, it is almost exactly the same as all other areas of the economy. Yes, we designate a value of fraud within the NHS, but it is not dissimilar to other designations of fraud that you would find

across the public or private sector. We must do that. The reason that we produce figures of that type is to get across the message that, annually, £1.29 billion is being removed from the NHS into fraudsters' pockets. We use that as a driving force to encourage and enable the NHS to recognise and deal with its problems, but the NHS is not unique. Fraud, economic crime, bribery and corruption cut across the public sector. Yes, of course, we would want the public sector in general and the private sector to do more in terms of their control measures to harden them to fraudsters who seek to exploit any weakness that they identify within them. We would want to get that message across to the NHS as well as to any other part of the public sector, but it is not a unique-to-the-NHS problem. We happen to publish a figure because we think that there is a value in doing so.

Q64 Lord Hodgson of Astley Abbotts: Part of the prevention of fraud has to do with how people behave. In my experience, the worst frauds have come about because Old George has been there 20 years, has always been reliable, has never let you down, never takes a holiday and everything seems okay. Then, when you introduce a fortnight's holiday requirement for Old George and someone else does his job for a bit, suddenly things start to appear. Do you have the opportunity and the capacity to say, "To prevent fraud, these are the sorts of employment practices you should be following in your local units"?

Eddie McGinney: I do not want to jump around the questions too much, but certainly in NHS Scotland one of the things most prevalent in fraud, bribery and corruption is the potential for what is called the insider threat. A person within the health service, because of their role or particular access to data or information, might use it in the successful commission of an offence. Again, we are raising awareness of that area across the NHS in Scotland. We have specific training materials on that. You can take a supportive approach in your workforce policies and governance, but if the activity goes from one form to criminality, there are steps that could be taken and flags you could recognise to intervene at an early stage—either before it has happened or at an early stage in the commission of the offence. There are steps, flags, information and intelligence out there that you can use to assist with that part of it.

I shall touch quickly on the figures for NHS Scotland. We have not yet published figures for what we believe is at risk from losses to fraud. I would not divert too far from Richard said; he covered it well. There are figures and intelligence out there. The fraud indicator report gives a figure of 4.78%; most experts would say that between 3% and 8% is lost. Certainly, I am wary of figures. You have to be careful when you publish figures in the public domain about what is lost to the NHS through fraud. It is an organisation that is of course very dear to people's hearts. In Scotland, we are doing our own analysis of the data and information. There will be an amount lost but the figure for that should be based on intelligence and data that are as good as we can make them.

Richard Rippin: To add to the original question, when investigations are undertaken across the NHS—I think this occurs in NHS Scotland as well—we ask within that investigation for the core weakness that enabled an individual to commit fraud to be identified. Only a national body could

collate that information and give it back to the NHS. Where we see generic weakness, control weakness or system weakness of any kind, it is our responsibility. An individual health body will address its weakness within its investigation, but if we do not gather that information and tell the NHS, “Here are things that are happening that enable people to commit fraud across the NHS in this area of spend”, nobody else will. It will never understand why the risks of fraud are continuing and they will never be dealt with. In a local or national investigation, the investigator or health body will deal with securing the loop at the end of the investigation, but we collect that information and tell the rest of the NHS what those weaknesses are and how it might take steps to address them. That is the role of a national body and it is absolutely what it should be doing. I think it is what NHS Scotland does as well.

Eddie McGinney: Yes, it is part of our national remit to share intelligence, learning, recommendations and information about system weakness across the whole of Scotland, regardless of which health board or public body was the victim. We will take what we can learn from it and share it widely and freely among all our health board partners.

The Chairman: We have partly touched on it but it is worth putting the second question to you.

Q65 **Baroness Fookes:** We have covered the question fairly heavily but let me put it to you just the same. What kind of anti-bribery and anti-corruption checks does the NHS carry out with respect to the contractors and subcontractors in its supply chain? We have already heard about how huge the supply chain is.

Eddie McGinney: I think I touched on that in my previous answer but maybe I can embellish it slightly. The checks and balances in the procurement supply chain in relation to crime are very much governed by the European single procurement document process and the Procurement (Scotland) Regulations. I am sure our English, Welsh and Northern Irish partners will have procurement regulations. These mechanisms are where the initial checks are done. You ask contractors and subcontractors to make statements on their financial health and accounts, the criminal history of any of their directors or officers with duties of representation or powers of management. They make statements on their criminal history, accounts, fitness and so on. These checks are made at the procurement stage—at that initial part of the process.

Those checks and balances are very important. Our part comes in potentially after that, if there are issues around it. We are currently piloting across the health service in Scotland an impact assessment document for all regulated procurements—those worth £50,000 or more. We send this assessment to everyone considering a regulated procurement and ask them set questions. Depending on the answers to those questions, they can then come back to CFS for further assistance or support in relation to further checks that can be done.

Richard Rippin: It is a very similar story in England. There are regulations and expectations that health bodies will follow. We have given guidance previously on the due diligence that should be applied in procurement. There are regulations, rules and processes to follow; the

challenge, again—we are not sighted on this because we have not explored it in great detail—is how robust is the process of due diligence followed in NHS supply and procurement chains. That is potentially where a significant weakness would lie. There are controls and balances in there—for example, cross-referencing to hospitality and gifts and conflicts of interest and where they apply. We are unsighted on that, but it is certainly a risk that we are aware of. So in answer to your question, there is a set of regulations, rules and procedures that must be followed. I could not assess how robustly they are carried out because we are not sighted on whether they are excessive or underachieving in the level of due diligence applied in all matters.

Baroness Fookes: In the news recently, there was a story about the differential in the cost of the gloves used in huge quantities for hygiene reasons. It seemed that some bodies were paying far more than others. Would that give you cause to wonder about the integrity of the contracts?

Richard Rippin: It could be a subject that required scrutiny. It is more that I would expect the individual health bodies concerned to review why they were buying at a higher cost than others. It is more likely to be an administrative procurement failure than a fraudulent one, but obviously that is a potential indicator of fraud or bribery, as are many other things that could be anomalous between one health body and another. That in itself probably would not be sufficient for us to investigate but, allied to other pieces of intelligence, it may direct us towards an inquiry in that area or cause the local health body to do likewise. I suspect that the health bodies concerned may well look at their procurement processes and why they are paying two or three times as much as others.

Lord Grabiner: Are the health bodies entitled to share that information between themselves?

Richard Rippin: I am unaware of whether they do or not; I could not answer that.

Lord Grabiner: Obviously their negotiating position would be significantly stronger if they could share the information, particularly if they are dealing with the same suppliers. More to the point, if there were such discrepancies, they would not be revealed except at your level, rather than at their level, where perhaps they should be.

Eddie McGinney: In Scotland, the process is set up so that, for example, that type of consumable is negotiated and contracted for nationally via our centre of excellence. Procurement commissioning facilities within NSS would go out and procure on behalf of the NHS.

Lord Grabiner: Is that true in England as well?

Richard Rippin: There are framework agreements within which suppliers will sit in respect of designations of whatever they are supplying to the NHS. You are not compelled to follow that and obtain somebody from a framework agreement if you think you can get a better deal elsewhere. It does not compel you to do so, but there are framework agreements within which suppliers will sit with a range of services that they designate they can supply to the NHS.

Baroness Fookes: It is still a key question. How much do you know

about what other people are doing, which is the point of Lord Grabiner's question?

Richard Rippin: Certainly from a national fraud body point of view, we would not have sight of all the discrepancies or anomalies within financial arrangements, or of the efficiencies that some people may take within the NHS, unless there is something indicative of activity that may be fraudulent in some way. If somebody informs us of inappropriate behaviour that may be indicative of fraud, we will consider it. Otherwise, we would not actively seek anomalous data between what somebody pays for the supply of one good and what somebody else pays for something else.

Baroness Fookes: Do the individual authorities doing the actual procuring know what other people are doing?

Richard Rippin: My expectation is that within NHS England they would have sight of that kind of information and material. I could not answer for what exactly they do with it, but my expectation is that, within their contract management provision, they would have sight of the range of suppliers and efficiencies that some organisations have.

Eddie McGinney: I would concur with that. In Scotland, there are regional procurement teams, as well as the national team. On a regional basis, they would share that type of information and try to get the best price for the NHS for certain consumables and items. In the commercial interests in the NHS, that type of commercial data would be shared at a regional level. Again, just because a framework is available, the contract is still with the individual health board. Having these options available for public procurement is what drives the best commercial decisions.

The point of our impact assessment is to ask questions of every regulated procurement at the early stages, to ascertain whether there are any issues at the start of a procurement that we should be made aware of and can then maybe help with. In the answering of these questions, there will be the sharing of information with CFS. It is partly because of our size. If Richard was to try to repeat that across the NHS in England, you would have to have a whole other department working on it, given the number of regulated procurements—£50,000 or more, under the regulations. But it is a start for CFS to try to engage, so that we know more at an early stage.

Richard Rippin: I think it is fair to say that our expertise here is not entirely informed. We are giving you our expectation of what we would see.

Eddie McGinney: We are not procurement experts.

Richard Rippin: I know that there are procurement hubs the length and breadth of England, but I could not answer for how they share information or what they do with it.

Q66 **Lord Stunell:** You mentioned that you had 6,000 cases a year, which is, I think, 20 a day, and many of those must have come through the whistleblowing service. How do you handle cases where whistleblowers report allegations of bribery to you, either within the NHS itself or its contractors? What measures do you have in place to ensure that these

whistleblowers are adequately protected?

Richard Rippin: I suggest that, for bribery offences, the risks are heightened. You are unlikely to see Bribery Act offences from a distance. You are more likely to be close to that act of collusion or corruption, and therefore more likely to consider yourself to be at risk or threat when making a report. We understand that there is a heightened risk in the reporting of some offences.

We have a secure and confidential national line for fraud and corruption reporting, operated by Crimestoppers. We also have an online facility, run in almost exactly the same way: you just go online and put in all the details that you wish. Within that, anonymity is allowed for. If you still have a worry that you will be identified by virtue of the fact that the matter has been reported, we have a source protection policy in operation so that the details of the individual are separated from the information that the individual supplies. Whoever takes it forward, we do not move towards an investigation dragging the information about the source with it. We hold that completely separate from the information, unless it is designated an absolutely essential part of taking it forward for prosecution.

NHS CFA is a prescribed person under the Public Interest Disclosure Act, so we allow and enable individuals, when making a report of bribery or any economic crime, to designate whether they wish to make a protected disclosure to us. In that case, we will go into the process of ensuring that, if it is qualifying disclosure, they are a protected source, and we will retain that source separately. In this financial year to date, more than 200 people have identified themselves as giving qualifying information that requires them to operate as a protected source.

We are acutely aware that, not just for bribery offences but for some corruption and collusion offences relating to all sorts of economic crime, the individual feels vulnerable and would be reluctant to make a declaration or give us any information, even completely anonymously, because they feel that they could be identified as the source. It is absolutely essential to what we do. We want people to be assured that, when they give us information and want to remain anonymous or to make a qualifying and protected disclosure, we will maintain that above all other things. I am not sure what the situation is in Scotland.

Eddie McGinney: It is almost precisely the same. We have a hotline and an online reporting mechanism, powered by Crimestoppers and available 24/7, 365 days a year. That is important for the health service. Reports made through those avenues can be treated confidentially or be provided anonymously. Since its inception, CFS has maintained that we will never disclose a source to any third party—not the health board, not the Scottish Government; no one.

Prior to the role I have at the moment, I was the intelligence manager for the NHS in Scotland, and so I handled these daily reports. We had 500 reports or so a year; a number of them were confidential and we had the same mechanisms to manage the protection of these sources. They were protected and placed somewhere in our system that only certain people

could access. We would risk-assess the nature of the information provided by the source and then, if appropriate, we would act on it.

Folk can phone the Crimestoppers hotline or use the online reporting mechanism, but we also have whistleblowing through NHS Scotland's Public Concern at Work. If, on the face of it, it initially does not look like a crime, they have that mechanism, which offers the same anonymity and confidentiality.

Lord Stunell: That perhaps takes me to my supplementary point. If you think, or have reasonable cause to believe, that there is a criminal offence, as opposed to an employment offence, is it automatic that you will prosecute?

Eddie McGinney: From a CFS point of view, that is certainly one of a range of sanctions that we would consider. We operate a sort of triple-sanction process, depending on who it is. If we are talking about a particular primary care contractor, there are regulatory matters relating to their profession. If it is a criminal matter—an economic crime or fraud-related—we would assess the facts of the case. We would certainly look to the sanction of a report—Counter Fraud Services is a specialist reporting agency—to the Crown Office. We make our own reports, gather evidence and present that to the Crown Office. We would start from that point but we would not be able to make any presumptions around it; we would follow the evidence in the lines of inquiry. If the evidence and that of the witnesses backs up the position that there should be a report to the Crown Office, we would go down that road.

Richard Rippin: That is almost an exact mirror of what we do in England. We encourage—or compel or request—the NHS to follow a route of all sanctions possible within the body of an investigation. We would encourage them towards criminal sanction, towards disciplinary or regulatory sanctions, and towards recovery of the money if a loss was subsequently found as a result of an individual's activity.

However, when we begin an investigation at a local or national level we cannot go in with the presumption that there will be a criminal outcome at the end of it. You follow and pursue all lines of inquiry in respect of that activity, whether it confirms or denies that fraud has occurred. When you arrive at the end position, whether it is appropriate for charges to be laid in respect of those individuals is a matter for discussion with the Crown Prosecution Service. We do not decide whether someone would be prosecuted. At a local level, there is an expectation that you would begin an investigation with the potential for a criminal outcome. We would expect you to comply with all elements of CPIA, for example, when you begin an investigation and, at the end, whether it is appropriate to pursue a prosecution is a matter for the Crown Prosecution Service. We do not make that decision; we present a case file to the CPS, which will make that judgment on our behalf. Our expectation is that you begin and conclude an investigation by gathering all the evidence as to whether fraud has occurred, or whether misappropriation of funds of any sort has occurred, and you present that to a prosecutor, who decides whether it is appropriate for an offence to be laid.

Lord Stunell: How possible is it to protect the whistleblower during each

of those processes? For instance, if the matter comes to court, is it not likely that the identity of the whistleblower will be disclosed?

Eddie McGinney: In cases that I have dealt with, you have to risk-assess that situation continually as you go through the lines of inquiry and take forward the investigation. An important decision must be made at the start as to who knows this information and how they know it. At that point there could be an issue as only a few people might know it and by taking further action you could, in effect, disclose their identity. If that is not an issue, as Richard said, you go through the investigation—keeping an open mind and following reasonable lines of inquiry—and you might be dealing with someone who has asked for and will be given full confidentiality. To take a case in Scotland, a select number of people—and only those people—within Counter Fraud Services would know their identity. A select number of people would also carry out the investigation. We would continually risk-assess that situation as we went through the investigation.

If we believe the decision would go against that request for confidentiality, we would have to make a decision, in conversation with the Crown Office, on what is overall in the public interest. To date, we have never disclosed the confidential details of any source in any of our cases, but it is a matter of continually risk-assessing it, because we have some legal obligations around that, such as to the well-being of the source. Obviously, under protected disclosure legislation, they have a right to no detriment.

Richard Rippin: It is almost exactly the same in England. We would seek to protect a confidential source throughout the investigation, which is why we remove the source's details from the information they provide right from the outset. If they could be identified from that, it is something that needs to be done. If they subsequently become a witness, it becomes slightly more complicated when we get to court. However, if they have made a protected disclosure under PIDA, the principles of PIDA will apply when we get to court and there is an expectation that protected disclosure will continue—I realise I am talking to legal people in this room—unless there is significant justification for why that should change and their details be disclosed when we get to a court appearance. The principle of protection, however, were it to be requested, would be maintained, whether it is a protected disclosure or not.

Q67 **Lord Plant of Highfield:** We have been talking mainly about large-scale issues—procurement, the provision of services and so on. What about individuals who may be trying to bribe officials—doctors and so on—to, say, improve their position on a waiting list in an area of high demand? There could be two sorts of people here, I suppose: people legitimately in receipt of NHS services and people who are not. They might be getting health services under false pretences, because of health tourism and the sort of thing beloved of the tabloid press. Are these concerns about individual forms of bribery just speculation, or is there evidence that it exists and, if so, what—if anything—can you do about it?

Richard Rippin: This was an interesting question—so interesting that I had to go and find out whether we had such cases or not because I had

no knowledge of it. We have not had sight of that as a specific allegation of a bribery offence: bribing a medical professional to access medical services in some way for an individual's benefit. We have not had sight of that as a reported allegation. We recognise it as a threat and risk. There is the potential for that to occur, not just in health tourism but with anyone who wants to move and access services at a higher level but does not want to wait 12 or 18 months. It is a risk, but we have not had any such reports or allegations. I had to look to make sure and I do not think we have, but I do not know. We have not had sight of that as a prevalent form of bribery that is currently a live issue or trend. We are aware of it as a risk. Your question may prompt us to do some more research in the area, but we have no knowledge of it currently.

Eddie McGinney: It is the same in Scotland. In my time managing the referrals, I certainly did not see anything of that nature in Scotland—that specific bribing of clinicians or primary care contractors to get preferential treatment or move up a list.

Lord Plant of Highfield: What about the other case, of accessing healthcare when you are not entitled to it?

Eddie McGinney: In my time managing referrals, that was certainly prevalent. We got reports of that across Scotland—of visitors to the country trying to access the health service. There is a framework, processes and procedures to manage that at primary care level—at GP level and at hospital level. There are interventions in the form of application forms and questions asked of individuals to check that they are ordinarily resident in the country and that their entitlement is therefore anchored in that. We have good relationships with the Home Office to check information and data in that respect and to make sure that the person has a legal entitlement. That was certainly prevalent, but good mechanisms and processes were in place to manage it.

Richard Rippin: It is fair to say that the current system would require that individual to bribe quite a number of people to access it. I do not think they could just go to one—it may be their GP if they are accessing primary care with an intent to move on to secondary care. There would be a range of individuals they would have to bribe. It would be a risk but it is not a risk that I am aware of.

Eddie McGinney: Yes, I agree. It is a risk and we could look at it, but it is quite a low risk. There is certainly no hard evidence to suggest that it is prevalent.

The Chairman: We have run out of time, so we are unable to go on to the sixth question, so may I ask you, when you receive the transcript, to say anything that you wish to say on the sixth question at that stage? It simply remains for me to thank you both very much for the assistance you have given the Committee. Thank you.

Roger A Burlingame and Dr Branislav Hock – Oral evidence (QQ 177-183)

Tuesday 27 November 2018

10.35 am

[Watch the meeting](#)

Members present: Lord Hodgson of Astley Abbotts (Chairman); Lord Empey; Baroness Fookes; Lord Grabiner; Lord Haskel; Lord Hutton of Furness; Lord Plant of Highfield; Baroness Primarolo; Lord Thomas of Gresford.

Evidence Session No. 20

Heard in Public

Questions 177 – 183

Examination of witnesses

Roger A Burlingame and Dr Branislav Hock.

Q68 **The Chairman:** Good morning and thank you for coming along. Unfortunately, Lord Saville, who normally chairs this Committee, cannot be here, so I have taken over the chair for this session.

A list of Members' interests relevant to the inquiry has been sent to you and is available. I remind you that the session is open to the public, is broadcast live and is subsequently accessible via the parliamentary website. A verbatim transcript will be taken of the evidence and put on the parliamentary website.

A few days after the session you will be sent a copy of the transcript to check for accuracy. It will be most helpful if you can advise us of any corrections you wish to make as quickly as possible.

Finally, if, after this evidence session, you wish to clarify or amplify any points made during your evidence, or have additional points you wish to make, you are most welcome to submit supplementary evidence to us at that time, but quickly please.

We have all read the brief on you. Please introduce yourselves briefly for the purposes of the transcript. The acoustics in this room are pretty bad, so turn the volume up if you can.

Dr Branislav Hock: I am a lecturer in counter-fraud studies at the University of Portsmouth. I have been researching the effectiveness of foreign anti-corruption law for six years. I have written several articles and I have a forthcoming book that focuses on extraterritorial enforcement of anti-bribery law. I was a researcher in the Netherlands at the Tilburg Law and Economics Center, and I am originally from the Czech Republic where I graduated in law.

Roger A Burlingame: Good morning. I am a partner at Dechert LLP. I am an American living in London. I represent British and European

companies and individuals who are facing enforcement actions by the DOJ, the SEC or the CFTC in the United States. I was a federal prosecutor in New York City for 10 years, where I ended as the chief of the public corruption section. One of the core areas in which I represent entities and people now is in respect of FCPA prosecutions and investigations.

Q69 The Chairman: Thank you very much. I will pose the first question. What effect do you think the Bribery Act has had on business practices in the UK and with international companies? How prevalent do you think bribery by UK companies is, and how are the UK's efforts to tackle bribery perceived by other countries?

Dr Branislav Hock: There are three questions there, so I will divide my response. When we speak about the effects of the Bribery Act, it is important to take into account the effect that it has had on large multinational corporations and the effect on small and medium-sized enterprises. There is a huge difference. Originally, the Bribery Act was meant to regulate large multinationals as a result of certain problems and enforcement issues, such as the BAE Systems enforcement action.

Most large multinationals already had to comply with US law before the Bribery Act was adopted, so it is nothing too new for large multinationals. What is new, however, is that the Bribery Act and its enforcement is an exemplification of more multilateral enforcement regimes. It is not only the US that is enforcing law on anti-corruption; many more countries, including the Netherlands, the United Kingdom and Brazil for instance, are now enforcing it.

These large multinationals, as with Rolls Royce for example, often face multiple overlapping enforcement actions. That is the main effect of the Bribery Act: large multinationals need to take into account that, if they engage in bribery, they are likely to face multiple enforcement actions coming from many countries.

When it comes to small and medium-sized enterprises, this is very new. There are all these issues relating to adequate procedures, failure to prevent bribery, the necessity to implement effective compliance programmes. If the Bribery Act is enforced against small and medium-sized enterprises, the impact is potentially huge.

Roger A Burlingame: I agree that the Bribery Act increases the size of the footprint which the US started to create in this space in the late 1990s, picking up steam in the 2000s, with the FCPA.

Having another regulator out there with similarly large, if not larger, jurisdiction and willing to create meaningful penalties for companies—while there are differences between the laws, the same conduct will violate both—creates a bigger law enforcement footprint. It has spread the message deeper into the business community that companies have to work hard to make sure that they are policing their employees and making sure that they are not engaging in such conduct.

The Chairman: I do not think that either of you has answered the second part of the question, which was how prevalent you think bribery by UK companies is, and your assessment of the prevalence.

Roger A Burlingame: It is very difficult to tell, because you do not really know until someone is caught; in my job, I am on the receiving end. Either you are aware that you are acting proactively to prevent yourself from having an FCPA or Bribery Act problem by educating your workforce on what the problems are, or you have already had a problem and are trying to remediate or deal with the fact that the enforcement authorities are coming after you.

Given the rewards out there for self-reporting and the penalties if you are caught not self-reporting, it is fairly rare for someone to turn to someone like me and say, “We have a problem and we’re not going to do anything about it”.

It is clearly out there. Obviously the net is not catching 100% of the bribery that is going on. You would need somebody with a different field of expertise to give you a good answer to that question.

Dr Branislav Hock: My personal opinion is that it is a serious problem. There is still a lot of bribery, but it is very difficult to obtain data. I have been thinking about how to prove that there is a lot of bribery and I have three arguments, briefly.

First, there is the perception. We can look into the perception of corruption and bribery from the point of view of how the UK as a country is perceived, for example with regard to the Transparency International perceptions index. There should not be so much bribery. However, the problem is that if UK businesses, or other businesses from developed countries, bribe in developing countries, they usually bribe in countries that are the lowest-ranked on the perceptions index. So there might be a problem with these perception indexes, because bribery has a supply and demand side.

Secondly, we can find out whether there is a lot of bribery by looking into cases. The problem there is whether, when we see more cases, it means that the criminal justice system is just working more effectively, or that bribery is increasing. It is very difficult.

It is useful to think about the third point: if you look into anti-trust enforcement you are looking into more developed enforcement regimes. Cartels might be linked very much with bribery. In the Petrobras case, for instance, a large state-owned energy corporation was procuring many goods and services, and suppliers—private companies—were competing for the procurements. These companies were bribing the state-owned corporation because they were bidding for contracts, so contracts were concluded that were not necessary or that were too expensive, for instance. So we can assume there is a link between cartels and bribery.

Let us look at anti-trust enforcement. We should note that not all anti-trust cases are related to bribery, but let us look at more developed regimes. The European Union has been enforcing anti-trust law since the late 1960s, so for 50 years. In 2017, it imposed sanctions of €2 billion to corporations for engaging in cartel cases. In 2016, there were €3.6 billion of sanctions. The anti-trust regime is way more developed than the anti-corruption enforcement regime, because we have a system involving the European Commission and the European Court of Justice, and states are

co-operating. We are still seeing these cases after 50 years, which is evidence that there must be a lot of bribery out there.

Lord Grabiner: That last answer assumes that in cartel action there is probably a bribery element. Is that what you are suggesting?

Dr Branislav Hock: There might be. Some criminal schemes might include more elements. Bribery is usually associated with other offences such as money laundering, export law violations, books and records violations—you do not want to say in your accounts that this was bribery, so you call it something else—as well as anti-trusts and cartels.

Lord Grabiner: So aside from anti-trust enforcement, competition law and so on, do you have any sense that, rather than use the Bribery Act, some other charge has been made—for example, under English law, misfeasance in public office which is a distinct criminal offence? Do you have any sense that the paucity of cases that have been brought so far under the Bribery Act may be, at least in part, due to the fact that some other charge is being deployed?

Dr Branislav Hock: Yes, I think so. The technique of accumulating alternative charges is very much used by United States enforcement authorities. They do not always use anti-bribery charges and books and records charges, which are provisions of the FCPA. They use export laws, RICO, which is an anti-mafia statute, and the Travel Act with some kinds of commerce.

So my answer is that we need to ask: is it functionally equivalent? Would it provide equivalent sanctions? Would it put equivalent pressure on companies? Sometimes in the United Kingdom only civil recovery orders were used, for instance, which were not considered by the OECD, the Organisation for Economic Co-operation and Development, to be equivalent to criminal charges.

For sure, there is this opportunity—we have seen it in other countries such as the United States—but we should make sure that it does not lower the standard of enforcement.

Q70 **Lord Thomas of Gresford:** How does the Bribery Act compare with equivalent legislation in other countries? Are there other approaches, regarding either legislation or enforcement, from which the United Kingdom could learn?

Roger A Burlingame: This follows on from what Dr Hock just said. There is a big distinction between the way the US uses the Bribery Act and the way the rest of the world is looking at it. There is a growing trend, and, soon, more and more countries will join the ranks of the US and the UK in enforcing these sorts of laws. In that way, England is a leader.

As far as the US perspective goes, the Bribery Act and UK corporate enforcement is in its adolescence compared to a more mature system in the US. There are two differences between the two systems that jump out at me which make the US more effective, or at least make the DOJ more effective.

First, the regime offers more certainty. It does that at a certain cost, which is taking power away from judges and giving it to prosecutors. What companies want in resolving these issues is certainty. When you are dealing with DOJ prosecutors, they can give you the deal and that will be the deal. You can often spend years hammering out what the deal is going to be and then, when you reach that deal, you know what will happen. There is more incentive for a company that is under investigation to start in on this process knowing that there can be a more certain resolution at the end of it.

The other area where there is a sharp distinction is the willingness of UK versus US law enforcement to leverage the resources of private law firms. When I was a prosecutor and graduated from prosecuting drugs, gangs and bloody things to white collar, in one of my first cases the same firm that I had started my career at, a Slaughter & May-equivalent firm in New York City, was representing the company that I was prosecuting. I knew very well what that law firm could do and what it could do in comparison to me and the two FBI agents who were part of my team. I sent them a subpoena with Herculean tasks set out for them, such as getting global email searches back within an incredibly short amount of time. The partner called me up to complain and said, "This is outrageous. How can you possibly expect us to get all this for you?" I said, "I remember what you can do. This is going to be a big billing opportunity for the firm and I'm sure you're going to be able to meet these demands".

As a result, six weeks later you get binders, perfectly tabbed, with a preliminary slice of the evidence, or at least the law firm's best effort at "Here's what we've found". It is incredibly helpful. As the prosecutor you do not then say, "Great. Let me take these binders and march into the Grand Jury", and, "This is my entire case". It is your starting point, but it gives you leverage and a resource to investigate that you are otherwise incapable of.

Using that technique allows DOJ prosecutors to do so much more work than their British counterparts, who are much less willing to trust the work of the equivalent UK firms in this area. I have sat on panels with members of the FCA and the SFO defending their position, and I find ridiculous the idea that a senior partner at Slaughter & May who is making X million per year is going to put their and their family's livelihood at risk to deep-six a document to try to save the company that they are representing some monetary liability.

It could happen theoretically; it is easy to imagine. But the incentives for companies to co-operate in a straightforward and compliant way are so strong and the penalties so enormous that the partner in effect is presented with the option of, "Either I can go to jail for obstruction of justice if I am found to have got rid of this document, or I can reach a successful resolution for my client by providing helpful co-operation to the Government and reaching that resolution", which is all the client really cares about in the long run: putting an end to the misery. That is an area where the differences in development between the two systems really jump out.

Lord Thomas of Gresford: You will appreciate that you are suggesting plea bargaining, and that the criminal law of this country has always set its face against plea bargaining. That is why the deferred prosecution agreements are so tightly drawn and require the consent of the judge.

Roger A Burlingame: Yes.

Lord Thomas of Gresford: But you obviously think that plea bargaining would be a good thing.

Roger A Burlingame: There is a downside. The white collar enforcement area in the United States is now a gigantic industry, and it is growing and becoming much bigger here. There are incentives to young prosecutors to put big cases together, because they can then say, "I'm the guy who did that big case", and the law firm is interested in hiring as their newest partner the person who just did the big case.

There are cases that I have been involved in where you would welcome judicial oversight to prevent prosecutors from overreaching, because if you give them that power of certainty you are also relying a lot on the good faith of the prosecutors not to get overly enthusiastic and to appropriately seek justice rather than to win, which is their job but can be a problem when you have ambitious and hardworking people who are struggling to get to the bottom of a situation.

I am not saying that it is always about career advancement and malign motives. It is not that there is a right answer to that question but that the benefit of the way it has evolved in the United States, with judges essentially excluded from the process, is that it allows the machine to run more efficiently and to produce an outcome that is more attractive to a company weighing up whether or not it wants to turn itself in and engage in the nightmare process of investigating itself and coming to a resolution.

Lord Thomas of Gresford: But you recognise that it has its dangers.

Roger A Burlingame: Yes.

Lord Thomas of Gresford: The second aspect that you talked about was employing large firms that are defending their clients almost as if they were agents of the prosecutor by demanding things from them instead of the prosecutor doing the investigation. Do I understand you correctly?

Roger A Burlingame: I am the prosecutor, and you are using the firm as a tool for your investigation, which is how it works in every case in the United States. You realise that the firm—

Lord Thomas of Gresford: This is the defence firm.

Roger A Burlingame: Correct. When you are investigating company A and asking its lawyers to collect emails, you agree on the search terms and you put constraints around the investigation that they are doing on your behalf to make sure that they are conducting the investigation or carrying out your orders in a way that you are happy with.

Lord Thomas of Gresford: Is there not a conflict of interest with the firm representing the defendant in such circumstances?

Roger A Burlingame: Ultimately, no. The way it works out is that in the end there is an agreed upon set of facts. As I said, it is rare that a reputable law firm, which is not in the business of doing just this one investigation—there are practices doing this over and over again—will say that up is down or black is white, or hide evidence or obstruct the investigation. In these investigations you tend to get an agreed upon set of facts, and the advocacy comes in where there are differing interpretations as to what the penalties should be for those facts, how the facts are appropriately characterised under the law, and whether there was a violation or not.

As for just using the law firms as a tool for fact gathering, the law firm's job is not to behave in the public interest; it is to represent their client. But it is a disaster for their client if they do anything other than behave in a transparent manner with the prosecutors and conduct the investigation in good faith, especially when what is being produced is emails and sets of employees who have been interviewed to determine the scope of their responsibilities. Anyone or any email that looks interesting you follow up, and do the investigation yourself from that point forward.

My take, on discussing this question with British law enforcement folks, is that it tends to be looked at in a very black and white way; either law enforcement is ceding its authority and farming out its investigative responsibilities to private practice, which is outrageous, or it has to do everything itself. When I was a prosecutor, I was not overly trusting of the companies that were conducting these investigations at my direction, but I could do 10 times as much work if I gave them a lot of work to do. I then thoroughly tested the evidence that they were giving back to me to decide whether it was trustworthy and I believed it.

If you want to see what the client company's ultimate objectives are, in one instance in my career I thought that the lawyers were being overzealous and getting in the way of me getting to what I wanted to find. I wrote a letter saying, "I'm troubled that it does not appear that the company is interested in proceeding in a co-operative posture". The lawyers were fired the next day and a new firm came in.

Lord Haskel: The process that you describe sounds very expensive.

Roger A Burlingame: No. It is much cheaper for the Government; it is very expensive for the client.

Lord Haskel: Exactly. Does that not put a small firm at a big disadvantage?

Roger A Burlingame: Do you mean if a smaller company is under investigation?

Lord Haskel: That is right.

Roger A Burlingame: It does, but the scope of the investigation also varies with the size of the company. Where a massive multinational is involved, collecting the relevant individuals' emails can be a three-month process, often requiring sifting through millions of emails, but if you are a 30-person entity, that job can be done in a couple of weeks. It is still no fun paying lawyers to do this work for you, but it is a lot less work.

Lord Hutton of Furness: Roger, you have given us a clear insight into how the system works in the United States, but you have described a very different system, with plea bargaining and whole range of differential characteristics. Given where we are in the UK, with no plea bargaining and a deferred prosecution agreement structure, do you think it likely that the framework in the UK will be as effective in tackling some of these problems as the framework in the US? You described our system as relatively immature.

Roger A Burlingame: I meant no disrespect.

Lord Hutton of Furness: I am sure that none of us took it that way. Can it become as effective a tool?

Roger A Burlingame: I think it will inevitably end up in the exact same place. The overwhelming majority of cases that I have described in the US end up with a deferred prosecution agreement, with its close cousin the non-prosecution agreement, or with some corporate plea, which is effectively the same thing: that is, a way to resolve the situation that prevents a company being indicted and potentially going out of business.

The main difference between how cases are resolved in the UK and in the US at the moment is that greater judicial oversight makes for a more cumbersome procedure, but I think that the more cases there are the clearer the ground rules will become. Once there is a real sense of, "Here's the terrain I'm facing. Here's what the result will be", it becomes much more attractive for corporates to opt in and wipe this liability off their books rather than live with the tell-tale heart beating somewhere within their company.

As you get more corporate self-reporting, either the SFO's budget has to go way, way up or you have to rely more on law firms to leverage the manpower of the SFO in the way that I am describing. As the SFO goes through this procedure more and more, I think it will realise that the firms that it is dealing with are honest brokers in this arrangement and in a way all shooting for the same thing, which is coming to a quick and fair resolution. The different parties might have a different idea as to what "fair" means, and there can be robust debate on that, but I do not think it requires a different route to get there.

Baroness Primarolo: In the UK system, if a company wants a DPA, it has fully to co-operate: that is, its representatives have to disclose to the SFO what is required in the investigation. Does that not produce a similar result within the constraints of UK legislation to the one that you are describing? If it does, I do not quite see why you would want to leverage any more from the defence lawyers.

Roger A Burlingame: I think it does. The incentives to co-operate are the same in both the US and the UK, but my understanding of the way the SFO is handling that is not to dole out as much work to law firms and to keep more of it for itself, meaning that it can prosecute far fewer cases because more of its time is being handled with its own people doing that work. Some of that work is scut work, which can be handed off without engaging a lot of the issues that we are discussing. I am sure it is already happening.

Baroness Primarolo: Essentially, your point is that, as the system matures and confidence in the mechanisms builds, we might see more of the type of leverage that we are talking about.

Roger A Burlingame: Yes. The revolving door is always raised as a horrifying thing, but you can see it starting to grow [here]. I have been in the UK for six years, and just in that time I have seen more people coming out of the SFO and going into law firms. They understand how things work inside the SFO. More people are heading into the SFO with the idea that they may come out later. You get more trust between the private legal community and the enforcement authorities, which also leads to that mechanism.

Q71 **Baroness Fookes:** We have been given evidence about the opinion procedure in the United States, where a company can seek advice from a government authority on whether what it is proposing to do is likely to fall foul of bribery legislation. How effective do you think this is in the United States? Do you suggest that the UK follow that example?

Roger A Burlingame: It is helpful. It is not used quite as frequently as one might think. It tends to be used in the corporate acquisition context, because, if you buy a company, you buy its historical liability. Some companies discover the hard way that it is not pleasant to buy a gigantic amount of FCPA liability.

In a number of those opinions, company A will say, "We're thinking of buying company B. Here's what we've discovered in looking at company B. Are we going to have an FCPA problem?" So they can get reassurance in that context, which is helpful for the acquiring company. The more transparency there is in how the law is going to be applied, the more helpful it is for the business community in figuring out how they should train their employees to comply with the law, how they will be treated, whether they have a problem and whether they should self-report. To the extent that it increases transparency, it is helpful

Baroness Fookes: We do not have such a system in the UK. Would you advise that we consider it?

Roger A Burlingame: I do not think there is any harm in it. In the way the DOJ has structured it, whereby you do not submit hypothetical examples—I could see that becoming a nightmare for the division tasked with answering such questions—if a company is willing to say, "Here's a real-life problem. I swear to the facts that I am putting in front of you", and in that way put its own skin in the game, it is helpful for everyone.

Baroness Fookes: Dr Hock, do you agree?

Dr Branislav Hock: I would not recommend the opinion procedure. We have more important problems. I think the Department of Justice last issued an opinion in 2014, which is four years ago. Since the 1980s, when it was introduced, there have been some 60 questions. There is the worry that if I ask the Department of Justice, I can direct prosecution and am more likely to be asked to self-report.

It is also not very timely; sometimes, eight months are given for a response. It might be useful in some ways, but it has just not been

working for many years in the United States. In the United Kingdom there are other issues to consider at this point. That is my opinion.

Baroness Fookes: Presumably it could make it more expensive for the prosecuting authority if they have to give opinions.

Dr Branislav Hock: I agree.

Lord Grabiner: For what it is worth, we have had evidence from the Serious Fraud Office and others; they are very uninterested in setting up an opinion department because they think that it would distract their attention from the things they should be focused upon. I suspect there is also a money issue; I do not know.

I do not know what you think about the reality of this proposition in the English, or UK, context as opposed to the American one. The impression I have from both your answers is that they have not been doing much of this in the United States for some time now. In this country, it looks as though the relevant authorities are not particularly interested in engaging in that direction.

Roger A Burlingame: I think it is harmless, and if anything only beneficial, but it also often boils down to a “will you or will you not self-report” question, as you were pointing out. It often becomes irrelevant, because if you have discovered a liability you just engage in starting on the co-operation dance as opposed to seeking the opinion.

Dr Branislav Hock: There were questions that were unclear four or five years ago, such as in mergers and acquisitions: “Am I liable for bribes of a company that I am acquiring?”—these kinds of questions. Most of these issues were solved because often, if you see a problem, you just self-report it. That is an answer.

Q72 **Lord Haskel:** How effective do you think the OECD’s anti-bribery convention is? Is there any reason to believe, as some have suggested, that bribery from OECD countries is decreasing and that there has been an increase in bribery from non-OECD countries? Do you think we can do anything about this?

Dr Branislav Hock: In speaking about the effectiveness of international treaties, we should first think about what we mean by effectiveness. What is the treaty about? What is it supposed to achieve? The OECD anti-bribery convention is about market regulation. Its objective is to create a level playing field between corporations. It is a very specific instrument that focuses on bribery in international business transactions. I think it has been the most effective anti-corruption treaty in history; it has achieved the most out of all these treaties.

We should understand the convention in its historical context. The United States adopted the FCPA in 1977 because of internal American problems related to the Watergate scandal. Surprisingly, US businesses then started lobbying for more international action against corruption, because they felt that corruption could give them a competitive disadvantage against their European competitors. So in fact it was the US business lobby that facilitated the process. It led 20 years later, at the end of 1997, to the adoption of the OECD Anti-Bribery Convention.

What does this convention do? It says that foreign bribery should be criminalised and it operates on the principle of functional equivalence. For its members, that means that you do not really need to implement the provisions exactly as they are written in the convention, but they should be functionally equivalent. You can see that in Germany, for example, where you do not have the criminal liability of corporations. You do in many other countries, but it is still considered to be functionally equivalent.

That was the key thing that the OECD Anti-Bribery Convention did. Before the adoption of the convention, and even before 2007, there was perhaps not so much enforcement as could be expected. It is only in the last 10 years that we have seen these huge enforcement actions. It was one thing that enabled the United States to enforce these large cases, because other countries had to co-operate with them; they provided them with evidence and became co-operative. After Siemens received sanctions of some €1.4 billion in 2007 or 2008, also involving the German authorities, we started to see these large enforcement actions.

The United States had waited 30 years to achieve really large enforcements. The United Kingdom had had its problems with BAE Systems, when for political reasons the enforcement was closed, but the United States authorities then came and took the enforcement over and sanctioned the company instead of the UK. The OECD, based on its monitoring peer-review system, harshly criticised the United Kingdom, since part of the reason for the wider Bribery Act that it had adopted was in order to change ineffective laws.

Lord Haskel: When you say that the OECD rules are helping regulation, what other aspects of trade are they helping?

Dr Branislav Hock: The question of competitive disadvantage is still important. The other part of your question was about what to do if we assume that you take risks as a company if you are in a market where there is bribery. You might not want to invest in that market. What might happen instead is that black knights come into these markets that do not have to comply with the OECD Anti-Bribery Convention.

Already in 2007 there was empirical evidence that companies with headquarters in countries with relatively low levels of corruption tend to invest more in countries with relatively low levels of corruption. On the other hand, companies based in countries with relatively high levels of corruption tend to invest more in countries with relatively high levels of corruption. In other words, corruption invites corruption.

It is all based on perceptions. Still, we see that despite the fact that some companies need to comply with strong clauses and other companies do not, the less corrupt companies are still investing in these problem markets. So on the one hand the obligation to comply is only one element of a much larger regulatory package; you might need to have higher-quality products or comply with environmental obligations but it is only one part.

On the other hand, the key thing that I see in my research is that the competitive disadvantage is not so huge, because many non-OECD companies with headquarters in non-OECD countries need to comply with

the US Foreign Corrupt Practices Act. The difference between the US Foreign Corrupt Practices Act and the Bribery Act is that the Bribery Act has not been enforced by non-UK corporations. In my research, I see that the majority of corporations sanctioned by the United States authorities were non-US corporations. Between 2008 and 2015, \$4.4 billion in sanctions were awarded to non-US corporations, or corporations that had stronger ties to countries other than the United States, while only \$1.4 billion was imposed on corporations that are US-based.

I do not say that this is protectionism, but it might be, because, as was mentioned, having a strong compliance programme is a huge business in the United States. Maybe French companies 10 years ago did not have a compliance programme at the level expected by the Department of Justice, but it is just a fact. I do not think that the fact that some non-OECD country is not enforcing its laws against its corporations is necessarily such a huge problem.

One small remark: I see a number of non-US corporations being prosecuted in the United States, and sometimes the basis for the jurisdiction is doctrinal or for science fiction reasons—it might be because of wire transfer and it might be that strong conspiracy laws are being used. In other words, if my business partner bribes, I am part of the conspiracy and the US Department of Justice or the Securities and Exchange Commission has jurisdiction. There is no explanation of why Chinese or Russian companies, for example, are not prosecuted in the United States.

I assume that some of these corporations bribe. Japanese corporations are sanctioned in the United States, based sometimes on these science fiction jurisdiction reasons, but Chinese or other companies are not. Maybe those companies would not be willing to pay the sanctions, because they do not have such strong ties to the United States, or maybe there is a problem with the contracts. What would happen if Chinese prosecutors started to enforce their foreign anti-corruption laws against UK or American corporations? That could be part of some trade war, if you consider enforcement as an economic sanction, as some scholars wrote five years ago.

The Chairman: Mr Burlingame, do you have anything to add on this?

Roger A Burlingame: No.

Q73 **Lord Empey:** Some countries, such as France, have started to make anti-bribery policies compulsory for companies, backed up by a regime of inspections and fines for those that do not comply. Is this an example that the UK should consider following?

Roger A Burlingame: The professor probably has a more studied response, but my shooting-from-the-hip response is that your money would be better spent on prosecutions. If you can increase the number of companies that feel that they are at risk of facing draconian penalties for engaging in this behaviour, they will figure out how to avoid those problems. That has already happened with global companies, multinational companies and large domestic companies, so what you are talking about is diving deeper down into the pool of smaller companies.

My sense is that creating this regime and putting these regulations in place would be a fairly expensive and resource-consuming thing to do, whereas taking that same money and prosecuting half a dozen companies that are caught violating the law will cause them all to behave much better. The professor can probably back this up with more reasoned analysis.

Dr Branislav Hock: It could be a good idea, but we need to ask why we would want to do that, perhaps from a deterrence point of view. First, it could be useful in some form if we are speaking about large multinational corporations. In France, this applies to companies with more than 500 employees or with a turnover of €100 million, I think.

Lord Empey: Yes.

Dr Branislav Hock: It could make sense then. It would not make sense for small and medium-sized enterprises at this point, but it would for large corporations. We need to ask why. There are four reasons. From a deterrence point of view, I agree with my colleague. These large multinationals already need to have these compliance programmes. If they do not, they do not get compliance credit and they are in big trouble anyway. What do prosecutors want to do with the information? Why would they want to go into companies and ex ante say, "With your compliance programme, why did you make this decision? We don't think it's good and you're going to get sanctioned"? That may add a bit of deterrence, but it would not be significant.

But there are three perspectives on why this should be done. First, you may want to do it to get some information from corporations. It would be part of the reporting obligations. If the corporation is socially responsible, it should report and share with others how it prevents corruption, supports human rights and deals with the fundamental rights of its employees in developing countries, for instance.

That regime already exists. There is a new European Union directive on non-financial reporting for exactly the same type of businesses as affected by Sapin II. These large corporations already need to start reporting, but it is information to investors and consumers. This is a kind of marketing; there is no information about what to do with that information. So corporations already have some obligation to report, but not in the same way as banks do when it comes to money laundering.

Thirdly—this is getting interesting—we get, from the other angle, to the privatisation of enforcement tasks. In the United States, companies bring in files and self-report. There is an internal investigation, which makes it easier for prosecutors. What I mean is that, if a prosecutor comes into a company, there might be some chance of establishing a public-private partnership. We might be interested in certain types of information. Again, anti-bribery and anti-corruption become part of some self-regulating mechanism similar to the ones that banks have—large multinational corporations might be able to see bribery within a supply chain, for example, or bribery of one of their business partners. All that can be caught by the compliance programme. If, as a matter of prevention, the enforcement authority comes and says, "You should report something", it might be useful in this way.

Fourthly, we have discussed the compliance industry—it is a huge business. If I am supposed to conduct a financial audit, I should not at the same time be an adviser or consultant to that company, as that might be a conflict of interest. As we saw yesterday, a large audit company is facing prosecution in the United Kingdom for a conflict of interest. So this might be used in that way. We may want to start asking the following questions. Who is advising me? Who is in charge of the compliance programme? Is it only a compliance officer? Is it an audit firm? Is it a law firm? When should the internal investigation start and who should conduct it? Is there a rule of confidentiality when the lawyers come in to start the internal investigation? Should it be separate? Should a public authority have some control over that? Is a consultant the same as an auditor? Are consultants and auditors the same as lawyers? Who should be part of this?

Those are the considerations that should be taken into account when thinking about this. It is not that it should be exactly as it is in French law, but there should perhaps be some regime under which a public authority could require ex ante certain information about compliance.

Q74 **Lord Grabiner:** Are there lessons that the United Kingdom could learn from other jurisdictions on the use of deferred prosecution agreements and other comparable mechanisms? The other comparable mechanisms that we have heard about include—you will have more knowledge of this from the American perspective—the concept in the States of non-prosecution agreements, which are similar to DPAs, as we understand it, but do not involve the need, in effect, to plead guilty. Also, something that has been separately suggested, although I do not think that it exists in the States, is a corporate probation order.

Roger A Burlingame: Sure. The non-pros is very similar to the DPA. The DPA, as it works in the United States, is essentially a confession of conduct. If the company survives a period of what is usually a period of three years without any further trouble, the charges go away with the payment of the fine. Non-pros is essentially the same mechanism, but it does not involve court oversight. If you had a violation during the relevant period, it could be used against you to secure a criminal conviction [in either instance].

Lord Empey: Sorry for interrupting, but is there no judicial oversight of that?

Roger A Burlingame: When you have reached resolution with the DPA, you go to court and present the agreement and the court blesses it. There is some discussion among judges about whether they should be rubberstamps in this process. As a practical matter, judges do not play a role. They do not rewrite the agreement, dictate the terms or say whether they are fair. They could reject the agreement, but it is difficult for the judge to do because they are not presented with any information to judge whether it is a correct deal.

The only other area that we have not talked about and that fits into this question is whistleblowing, where the UK seems to have taken a very principled position. The US has taken a more practical position on whether it is appropriate financially to incentivise whistleblowers. Part of

the success from a law enforcement perspective of the FCPA is in providing incentives to people potentially risking their livelihoods and career progression in coming forward to report wrongdoing. It is a notable difference, and one where the United States has an advantage in what prosecutors would think of as the intake—there are just more cases coming in the door because there is a greater incentive for people to bring the prosecutor's conduct.

Lord Grabiner: The American approach is obviously strongly tied to the plea bargain concept, which, as Lord Thomas indicated earlier, we do not have in this country. Do you think we should have a plea bargain mechanism? Would that improve the speed of resolution or be a more just way of going about dealing with such cases?

Roger A Burlingame: I think of the DPA as being essentially a plea bargain. The UK system is not so far apart as far as corporates are concerned and how the process works out, the main distinction being the increased role of the judge in reaching such an agreement.

Lord Grabiner: But there is a difference between the DPA and your NPA, which is that you do not—if you will forgive the crudeness—cop a plea to secure the NPA.

Roger A Burlingame: Right [in court].

Lord Grabiner: We obviously regard that at the moment as an important red line. Do you have a view about that?

Roger A Burlingame: The Department of Justice has more tools by which to punish or reward a corporate's behaviour. The corporate enforcement policy is now in place, where if a company comes in, fully co-operates, self-reports in the first instance and follows the other dictates laid out, the presumption is that it will get a complete declination of prosecution.

One can also make companies plead to criminal wrongdoing, which is the result that a company least likes and is hoping to avoid. If it has not behaved well during the investigation or has made an effort to hide the conduct and prevent it being discovered, that is a more likely result. If it has behaved perfectly from the beginning, the non-pros is the more likely result and the prosecutor has a wider spectrum of options.

The DOJ would look at that as incentivising companies to do the right thing. If the ultimate purpose of the law is to eradicate the behaviour, farming out the on-the-ground enforcement responsibility to companies that are highly incentivised to avoid it in the first place or at least be rewarded for their good corporate conduct is the way most effectively to avoid the behaviour taking place.

Lord Thomas of Gresford: Is a penalty paid on a DPA in the United States? It is a feature of the deferred prosecution agreements here. In addition to paying compensation for any profit, it would be a penalty equivalent to a fine.

Roger A Burlingame: Yes. Then there is a multiplier based on how good or bad your co-operation is deemed. One of the more controversial features for the past few years is that such co-operation now entails

providing human beings for the Government to prosecute. There was a view that these were in effect corporate speeding tickets: that a company could engage in wrongful conduct and then write a large cheque. People were saying, "Well, if there's criminal activity going on here, some human being is engaging in this criminal wrongdoing. Why are none of them being prosecuted?" That has now created this incentive for companies to provide human beings to prosecute in order to receive full co-operation credit, which brings along its own host of problems.

Dr Branislav Hock: I did not speak so much about deferred prosecution agreements, but I want to make a few notes. It is not only about effectiveness; we are speaking here about effectiveness, but there are other values, too. Ultimately, it is about a choice between effectiveness and the rule of law. I do not think that there is much rule of law in the US system. It is really a business deal. That is fine, because such large enforcement schemes can hardly be tackled if we stick to classic concepts of the rule of law.

What is inside these deferred prosecution agreements? Most of them involve more than \$30 million. I started asking, "What is a foreign bribery case?" I got lost. What is inside those agreements? It is not that somebody bribed somebody else in a certain market. Many of them may include 100 schemes in 20 jurisdictions. They happened in the 1990s, the 2000s and the 2010s and could involve conduct that lasted for 20 years. In fact, it summarises how business was done for the past 20 years in some really large cases.

In terms of what information is publicly available, just some of those schemes are explained. I call them anti-bribery bundles. A prosecutor will have many different charges to pursue, with some conduct falling under US jurisdiction—statutes of limitation, for instance, play a role. Still, overall, it is value-maximising for the corporation to agree to enter all such schemes, and somehow the sanction is determined.

Do we want a system like this? When it comes to multinationals, it is probably the only way to be really effective, because then, of course, the corporation has the information advantage with prosecutors. That is one thing to note.

The second thing to note is that it is not only about corporations. We should not forget that behind corporations are people. Not so many individuals, as opposed to corporations, are prosecuted. Now, we increasingly see more individual prosecutions in the United States, but what is worse: to get a \$50 million fine or to get five top managers who were involved in bribery sent to jail? What is the greater deterrent in terms of future mis-conduct?

We should not forget about physical presence. If someone could go to jail for 20 years or 10 years, they would be more reluctant to admit all their actions. A paper published by a Harvard University scholar suggests that if the Department of Justice engaged in more enforcement against physical persons, it would ultimately lead to more adjudication of these cases. As a result, prosecutors could get weaker in relation to corporate cases; it might impact on corporate cases. So it is not all about effectiveness: there are other considerations.

The Chairman: Is there anything else you would like to tell us before we finish?

Dr Branislav Hock: I would like to mention one important thing as a suggestion. When we see what the United States authorities are doing, as opposed to those in the UK, we see that they are much more active; they are actively co-operating, educating and training their counterparts in other jurisdictions. In exchange for that, they have gained more trust and more co-operation in those jurisdictions. They are able to operate more effectively. In most cases, the evidence lies outside the United Kingdom or the United States. There have been developments—there are task forces; there is close co-operation between Australia, the UK, Canada and the United States—but I am thinking about central and eastern Europe, central Asia and other jurisdictions. It would make enforcement much easier if co-operation extended there.

Secondly, joint investigation teams are crucial. With some new enforcement actions, the easiest thing is to join some enforcement conducted by the United States and others. One could even negotiate: “Oh, you’re going to get 20% of sanctions and the United States 50%.” You could perhaps do it more actively as a leader and not as a follower of the United States. The United Kingdom jurisdiction could then create its own policy. It could start co-operating more closely with France and other enforcement authorities on cases where there is shared jurisdiction. There are many such cases, because jurisdiction for the Section 7 offence of failure to prevent bribery is so broad that UK enforcers might ask, “Do I want to prosecute that corporation?” Jurisdiction is not limited any more.

The Chairman: Thank you very much. As a non-lawyer, could I ask one question? It is about triggers. When FIFA—where there were undoubtedly some difficulties—was prosecuted in the United States, was that because the DOJ would have nudged somebody’s elbow or because a bank had said, “We may have been dealing with this company and we are therefore in some difficulty”. Or would it be grandstanding by some district attorney, thinking, “This is a good way to build my reputation?”

Roger A Burlingame: I am trying to remember how it actually started because it was my old office. The prosecution was led by a guy who I recruited and who spent years working on that case. Everyone said, “What’s happening with your supposedly fantastic FIFA investigations?” He said, “It’s gonna be good one of these days. You’ll see”. And he was right. I probably should not be disclosing it anyway if I could remember, but I cannot. Often in such cases, somebody is prosecuted for something totally different. They agree to co-operate to try to secure a better deal for themselves and they happen to know something about a wildly different set of facts. That would be a way for such a case to come about.

The Chairman: Thank you very much. I thank you both very much for your most interesting evidence.

Donald Toon and James Mitra – Oral evidence (QQ 184-190)

Tuesday 27 November 2018

11.45 am

[Watch the meeting](#)

Members present: Lord Hodgson of Astley Abbotts (Chairman); Lord Empey; Baroness Fookes; Lord Gabiner; Lord Haskel; Lord Hutton of Furness; Lord Plant of Highfield; Baroness Primarolo; Lord Thomas of Gresford.

Evidence Session No. 21

Heard in Public

Questions 184 – 190

Examination of witnesses

Donald Toon and James Mitra.

Q75 **The Chairman:** We thank both of you very much for coming along. I am standing in for Lord Saville, and before we begin I will read out some introductory remarks. A list of Members' interests relevant to the inquiry has been made available to you. This session is open to the public. It is being broadcast live and will be subsequently accessible via the parliamentary website. A transcript will be taken of the evidence and will be put on the parliamentary website. In the days following the session, you will be sent a copy of the transcript to check for accuracy. It would be most helpful if you could advise us of any corrections you wish to make as quickly as possible. Finally, if, after this evidence session, you wish to clarify or amplify any points made during your evidence, or to make any additional points, you are most welcome to submit supplementary evidence to us then.

Could you introduce yourselves briefly, and then we will get to the questions?

Donald Toon: Good morning. I am the director of prosperity in the National Crime Agency and the National Economic Crime Centre. I have responsibility for the response to major economic crime threats to the UK through the determination and co-ordination of a law enforcement response.

James Mitra: I am senior operations manager in the NCA's international corruption unit. I have day-to-day oversight of the international corruption unit's casework.

The Chairman: I am pleased, Mr Toon, to discover that you are the director of prosperity. That is indeed a good title to hold.

Donald Toon: I wish I knew where it came from, Lord Chairman.

Q76 **The Chairman:** What kind of bribery cases does the NCA typically handle, and what trends have you observed since the Bribery Act was enforced?

Has the Act made securing convictions easier?

Donal Toon: In describing the case load, it is probably easiest to put it into two forms. One aspect of bribery and corruption casework is within the UK and the use of bribery as a facilitator of other forms of serious and organised crime. We have regular and routine casework on issues involving, for example, the bribery of officials at the border to enable goods or people to be smuggled in. That is a standard and long-standing aspect of serious and organised crime casework.

Alongside that, we have specific responsibility in relation to international corruption. That is discharged principally through the international corruption unit, which was established in 2015 in response to the Government's UK anti-corruption plan. That role is fundamentally about international cross-border bribery, rather than purely domestic matters. It tends to involve investigations into the laundering of the proceeds of corruption into and through the UK, investigations into overseas bribery by UK persons or entities, cross-border bribery that has a United Kingdom nexus of activity, and support to foreign law enforcement agency counterparts.

It is best described this way: there is a particular cycle that we intervene in, in the sense that there are situations where a UK national or corporate entity might be involved in bribery overseas. That bribery is of members or officials from an administration, and its proceeds are then laundered into the United Kingdom and may become assets of the UK.

In principle, in that space, you would expect the NCA and the international corruption unit to focus on working with the national law enforcement agencies in that country and supporting activity against the members or officials of a regime who are accepting bribes, and on the laundering of the proceeds into the UK. The Serious Fraud Office position is more likely to be the investigation of bribery by a UK corporate entity overseas. Those are the obvious parts of the chain.

However, it is a little more complex than that, in that our expertise as an agency, alongside the international corruption unit, is in the investigation of ongoing crime in action using the covert intelligence tools available to us. That includes things such as communications interception, covert audio or video and the use of undercover officers online. We operate in that kind of space, as opposed to the Serious Fraud Office focus, which is most heavily on reactive and heavy documentary cases. That is probably the best description of the type of casework.

Trends are incredibly difficult to describe at this stage. We have had an interest and engagement in this as an organisation for some three years. Bearing in mind the scale and complexity of most investigation work, we are still working through casework towards final prosecution and, we hope, conviction. If we look at the types of activity that we are identifying, we see that we are not really identifying new trends or changes. We are identifying and uncovering the scale of the problem, the way in which it manifests itself, and the involvement of external professionals and agents as part of the process. I do not think I would describe that as identification of new trends.

The Chairman: Mr Mitra, do you want to add anything?

James Mitra: No, not at all.

The Chairman: One question put to us is that there are opportunities for the UK to have joint investigative teams working with Eurojust. Some suggest that that facility has not been used and could be a very effective way of pursuing bribery and corruption. Is that a correct assertion and, if so, why we have not used it? Will Brexit—if I dare mention it—have any effect on developing that?

Donald Toon: Joint investigation teams under the European construct are available and are appropriate in some circumstances. As an agency, we use those structures where we can be clear that it is the most effective approach to investigating the crime.

To the best of my knowledge—James, you might be better placed on this—we have not gone down that route.

James Mitra: We have in one case.

Donald Toon: In one case. Do you want to comment on the rationale for that?

James Mitra: Yes. This was a situation where bribes had been paid in a developing-world country at a senior level of its officialdom. The bribery came about because a company in a European country initiated the corruption in question, and did so using a third-party agent who was of that nationality but was working out of the UK. He had inroads into the politically exposed people in the third country, so he helped the company in Europe to arrange the corruption through which the bribes were paid.

We started looking into the chap in the UK who had in effect channelled the bribery and had therefore fallen foul of offences here. In the course of that, we realised that the European country concerned had an interest, and we shared information with them. They decided to open their own investigation. For a period, we ran those investigations in parallel, but it has become clear that the overlaps between the two areas are such that it is better to have a joint investigation team, and over the summer we signed the agreement to that effect.

Donald Toon: We have no objection at all to working to a joint investigation team structure where we identify that that is the most effective route for the crime under investigation. A huge proportion of the work done is on corruption that does not necessarily involve other European countries. A large proportion of what we do involves activity in countries in Africa and south Asia. Often there is a strong direct relationship between the country and the UK, so it does not necessarily lend itself to a European construct. Where it works, we will certainly take that route when it is available to us.

You raised the Brexit issue. I think the only thing that we can say on that is that we will continue to use the joint investigation team capability as long as it remains available. As far as I am aware, the indications are that, should the planned deal go forward—that is a matter for Parliament—we would retain that capability during the implantation or transition period, but with no certainty of what the position would be thereafter.

Lord Hutton of Furness: You said earlier that you have a better sense of the scale of the bribery problem you are faced with. Could you elucidate a little further on that? What is the scale of the problem?

Donald Toon: What we really have is a much clearer understanding of the extent of corruption-related money laundering, in which the activity of UK-based professionals is critical to the chain. The scale is demonstrated really by the type of casework that the SFO has spoken to you about. There are clear instances in which significant, well-known companies have been investigated, and in some cases action has been taken against them in relation to bribery. That has clearly come to the fore following the passing of the Bribery Act.

From our perspective, it is fundamentally about the extent to which we see the involvement of members of overseas Administrations. We see that in a number of countries. I have to be a little circumspect, simply because most of our casework is currently in the active investigation phase. We are not yet in a position where we can speak publicly about the actual position. However, in a number of countries, largely those with historical links to the UK, we have seen a number of problems in or close to government Administrations, and we have then seen the situation facilitated directly by UK-based professionals.

I should make it very clear that this is exactly what we see in complex money laundering more generally. If you are going to be involved in significant money laundering, whether it is bribery related or not, as soon as you get out of the world of cash, you need the services of professionals, be it legal professionals, accountancy professionals, or trust or company service professionals. Certainly, we see that as a critical issue in the facilitation of effective bribery and corruption internationally.

Yes, it is a problem. Overwhelmingly, however, we are talking about professions in which the members of that profession are entirely innocent and their objective is to carry on with their legal business. There is a small proportion of people within those professions who are wilfully blind or complicit. That is a critical issue for us in relation to the corruption space.

Q77 **Baroness Primarolo:** You describe clearly the role that you are seeking to investigate, both in the UK and cross border. In particular, you have returned again and again to the point about serious organised crime and common facilitators once we move into that field, whether it be bribery or corruption or both.

In your view, is the NCA's funding model capable of delivering that effective investigation and enforcement? It is a highly complex, hidden world that you are describing. You will need sufficient staff with the expertise to conduct these investigations.

Donald Toon: In common with any public sector organisation, you could always do more with more. That will always be the case.

Baroness Primarolo: Indeed. But will you at least be able to do it adequately?

Donald Toon: At the moment, specific activity through the international corruption unit is effectively funded. There is always the opportunity to expand that specialist capability, but it is an effectively funded position. It is very heavily funded by the Department for International Development and is seen as an absolutely integral part of the UK's overseas engagement. It is supported directly by access to the NCA's core capabilities in intelligence and broader investigation, including covert tools.

We operate in close partnership with the other law enforcement agencies that work in this space, most notably the Serious Fraud Office. We operate in a partnership structure. We would say that the funding model is effective, but there is always a choice to be made over scale. Fundamentally, that is ultimately a determination beyond the National Crime Agency. However, we are clear that we can deliver an effective response on the basis of the funding model that we have.

Baroness Primarolo: You are describing potentially very large and complex cases that cross not just one border but borders. One case could consume a phenomenal amount of your resource and expertise. How do you make a judgment about what you pursue and where you work in partnership? Ultimately, we are looking for prosecutions and publicity, and to make sure that this acts as a deterrent in itself. Where do you sit in that chain of actions?

Donald Toon: We sit very firmly in a situation where the priority attached to an individual set of allegations is determined in partnership, generally between us and the Serious Fraud Office, through the bribery and corruption clearing house. We will determine the most effective response, which partners are required to deliver that response, and whether an investigation leading to prosecution is the most effective response.

It is also worth saying that there are areas where the involvement of regulators, including the Financial Conduct Authority and the Solicitors Regulation Authority, is the most effective response from a UK perspective. We are also in a position where we can draw on broader law enforcement agency capability to deliver. It is not just about the capability of the international unit but about the capability of the entirety of the NCA. It is not just us and the SFO, but the rest of UK law enforcement.

Through the position of the National Crime Agency and the joint structure in place, known as the bribery and corruptions sanctions threat group, we can triage casework, determine who can deliver most effectively against it and make a choice. We have not to date been in a position where we have seen serious, credible allegations and have had to say that we cannot take the investigation forward due to a lack of resources. That is the critical point.

Baroness Primarolo: In conclusion, you could conduct a lot of the investigations, but then it could be decided that the SFO continues with the investigation and the prosecution role. Is that what you are saying?

Donald Toon: We would start from the perspective of developing the intelligence position. At that point, we would determine the most effective

response: a full investigation by the National Crime Agency, an investigation that should be taken forward by one of our partners, or a joint investigation. We would also determine whether the most effective response from the UK angle might be the involvement of the regulators that deal with the professionals who may have been involved.

Lord Grabiner: Your Bribery Act workload is increasing. Does that mean that there is more bribery or that you have become more efficient at detecting it?

Donald Toon: I would go back to what I said about trends. We are still a relatively young organisation. Our involvement in this area, particularly on major bribery, came with the creation of the international corruption unit in 2015. From that perspective, it is that we have been uncovering more of a problem, rather than the suggestion that the problem itself is increasing.

Lord Grabiner: So would you say that the Bribery Act is effective?

Donald Toon: We would say that the Bribery Act is effective from the perspective of our investigations at this stage. The areas of the Bribery Act that we are talking principally about are the core bribery offences themselves and those involving foreign elected officials. We would absolutely say that the Bribery Act is effective from that perspective.

Lord Empey: Is there any evidence that any of the cases you are dealing with have elements that go back prior to the Bribery Act 2010 and that were being followed up under previous legislation?

Donald Toon: That is possible.

James Mitra: None of the cases that we currently have under investigation has, that we are aware of, a history that pre-dates the Bribery Act. We have locked on to cases that are available for investigation.

Lord Empey: So those older cases have worked their way through the system.

James Mitra: Quite so. We inherited our remit from the City of London Police's overseas anti-corruption unit. As it starts to tail off with its cases, we are building up our case load. We have very much looked for more recent offending.

Donald Toon: And had no difficulty finding it.

James Mitra: Indeed.

Q78 **Baroness Fookes:** We have already had some information this morning about the need for co-ordination, and we have heard previous evidence on that. Do you feel there is a case for more co-ordination and for a lead agency in these matters, either yourselves or a police force?

Donald Toon: That takes us immediately to the creation of the National Economic Crime Centre. The bribery and corruptions sanctions space fits firmly within the responsibility on economic crime.

We launched the National Economic Crime Centre earlier this month. It is fundamentally the mechanism by which we can triage, assess and task

the response to a broad range of economic crime offences, including bribery, corruption and financial sanctions. It involves us directly with a range of partners. The key agencies as core partners of the centre are: the National Crime Agency; national policing, through the National Police Chiefs' Council's lead in the City of London Police, Commander Baxter, and the lead for financial crime, Assistant Chief Constable Downing; HMRC; the Serious Fraud Office; the Crown Prosecution Service; and, crucially, the Financial Conduct Authority.

We have in that structure the core agencies involved in the delivery of a response to bribery and corruption. We have a bribery and corruption threat group, comprised of those agencies and others as necessary. We operate between us a clearing house, which is about understanding how cases should be allocated and developed.

We think that the co-ordination mechanisms are reasonably good at the moment, and we expect them to be strengthened.

Baroness Fookes: This is fairly new, is it not?

Donald Toon: We have been co-ordinating in this space since 2015, but it has become much stronger and tighter with the advent of the National Economic Crime Centre. The co-ordination structures that were in place before are now stronger and all the partner agencies are directly involved. We are already prioritising activities in this space across the partner agencies. It will take time for the NECC to develop and become an established and clear part of the landscape, but it immediately gives us a much stronger and clearer route into co-ordination, and it enables us to draw effectively on other aspects of our core mechanisms.

One of those is the Joint Money Laundering Intelligence Taskforce, for example, which we operate from the National Crime Agency but which is a partnership between law enforcement, the regulator and banking. There are two sides to that. The first is direct intelligence and information sharing on specific cases, and it has assisted in 500 cases so far in their development for law enforcement. That includes bribery and corruption.

It also has a specialist working group, bringing together private sector interests relating to bribery and corruption. That working group is critical, both to our understanding of how bribery and corruption affects the UK and to give the banking sector much clearer information about the types of account structures and transaction structures that it should be concerned about and, as they are identified, be flagging to the NHCA through suspicious activity reports or through the closure of accounts or restrictions on accounts.

I think we have that capability now. We do not see any need for the broader identification of a lead agency. The NCA's responsibility is, first, to understand the important serious and organised crime threat that is affecting the UK, and then to secure an effective response to it. Major bribery is absolutely a serious crime threat. It is our responsibility to drive an effective response to that, and we have been doing that through co-ordination. We now have, through the National Economic Crime Centre, the capability to really strengthen the tightness of that co-operation and joint prioritisation.

Baroness Fookes: You are very confident that the bribery and corruption issue, which is our main interest, will be at the centre of these activities and will not be sidelined in any way.

Donald Toon: I see no reason for expecting it to be sidelined, for a couple of reasons. One is that it links very closely to the overall problem of complex money laundering, which is itself a nationally prioritised organised crime threat. It also links to the work that we are leading and co-ordinating on in tackling corrupt elites and identifying and removing the proceeds of corruption from people in the UK.

The Chairman: Going down from the very high level to the slightly lower level, you referred to local police forces. It has been suggested to us that there has been quite variable enforcement—we are talking about minor levels compared to some of the more glamorous stuff here in London. Do local police forces ask for help and get it, or is there a tendency for them not to wash their dirty linen with you or for you to overlook them because they are peripheral or small?

Donald Toon: That is quite a complex question requiring a complex answer. We certainly do not regard local policing as peripheral or small. Local policing involves a range of capabilities, from rural forces to the Metropolitan Police. We are talking about a broad range of capability. Our principal partnership is through the regional organised crime units, which are structured around the UK. If a force identifies a problem that is beyond its capacity—it does not matter whether it is bribery or anything else—it would normally go to the regional organised crime unit. It would become an issue for the NCA if it had to scale up to the national or international level. There is ROCU—or regional organised crime unit—involvement in cases.

Bribery manifests itself in whole range of ways and on different scales around the country. The response will be based firmly on a force's assessment of the impact and credibility of the allegations made to them. That there is a variable response to some extent reflects the fact that there is a variable problem as well.

We certainly do not undermine or belittle anything that forces are doing. A structure is in place to support forces through the regional organised crime units. There is then the capability to involve the National Crime Agency if the matter gets to the national or international level. It is not just about our direct investigation capabilities but about the work that we are able to do to facilitate overseas inquiries. It is worth noting that the NCA has officers overseas—I think we are pushing towards 200 countries—where they are accredited and able to facilitate inquiries. That route is available to forces, to regional organised crime units and to national agencies.

Baroness Fookes: Mr Toon, you mentioned a close connection between bribery and money laundering. Is it possible to give a simple example of how that connection arises?

Donald Toon: Let us look at cases whose investigation we are involved in—I am not going to specify names. An overseas Government is involved in issuing licences and contracts for exploitation of natural resources. Companies may pay a bribe to ensure that they get a contract or licence.

That then goes to Ministers or officials. We then see the money moved through banking or company structures into the UK—that is the money laundering mechanism, to conceal the source of the illicit payments. We then see the money used for lifestyle activity—anything from high-value goods through school fees to property acquisition. That is a very visible route by which the payment of bribes becomes money laundering and the problem of corrupt assets held here in the UK.

Baroness Fookes: It does not necessarily arise from drugs, which is what we usually think of in layman’s terms as the main reason for money laundering.

Donald Toon: That is absolutely right. Any form of acquisitive crime gives rise to money. Money is the purpose behind the vast majority of serious and organised crime. We would normally exempt child sexual abuse and exploitation from that, but, even there, we now see people making money and then laundering it to hide the original basis for its acquisition. From our perspective, bribery almost automatically leads to money laundering—people have an unexplained level of wealth. If anyone were to take bribes in cash at a higher level for their activity in the UK, the first people to ask questions would be the bank that they tried to put the money into.

Q79 **Lord Plant of Highfield:** What would be the impact on the investigation and prosecution of bribery cases both nationally and internationally if the European arrest warrant, European investigation order and other EU law ceased to apply in the UK? How might we mitigate that impact? Would we, for example, revert to mutual legal assistance, which those other mechanisms displaced? But was not mutual legal assistance applicable between member states? After Brexit, we would no longer be a member state, so could we assume that we would revert to that?

Given the present set-up of the European arrest warrant and European investigation orders, I presume that the authority of that machinery is determined ultimately by cases that are brought to the European Court of Justice, but it is a central aspect of the Government’s policy over leaving the European Union that the Court of Justice will have absolutely no jurisdiction in anything to do with the UK and its exercise of its sovereign powers. In those circumstances, do you see European states—the 25 that are part of the existing machinery—being willing to co-operate when they are under the auspices of the European Court of Justice and we are not?

Donald Toon: I am conscious that this is a highly politically sensitive and difficult area at present, so I will try to deal with the questions piece by piece. Mutual legal assistance operates worldwide. We are able to obtain mutual legal assistance, subject to certain safeguards, almost worldwide.

It is, however, dependent on the willingness of the state at the other end to provide material in an evidential format. Most mutual legal assistance from our perspective starts from intelligence, an exchange of information, between law enforcement agencies. That is more commonly known as police-to-police contact and happens all the time. It happens with a large number of states throughout the world—there are a couple of exceptions. It is then followed up by a request for mutual legal assistance, which is normally to ensure that the material provided for intelligence purposes

can be provided in an evidential format for use in front of a court. That happens on a worldwide basis and is perfectly normal.

On the position after Brexit, the worst-case scenario is that we will be dealing with these matters as we would with any other country in the world rather than it being a specific European issue. On the position as I understand it at the moment, I am not an expert in the issues surrounding Brexit but our agency is certainly involved in the co-ordination of the law enforcement position on Brexit.

As I understand it, should the deal that the Government have secured be accepted and implemented, there would be very little change to current processes and procedures for the period of implementation or transition. The only change that we would see in that space would be in our level of influence in Europol. Nothing at all would change in our practical impact.

The position thereafter is a matter for determination by negotiation between Governments. From our perspective, it is clear that the tools available through European structures—Europol, the European Arrest Warrant, access to the Schengen Information System, the European Investigation Order—are useful, effective tools to simplify the international aspects of investigation. We know that the Government's position is very much either to be able to continue to utilise those tools or to replace them with equivalent tools. From a law enforcement and effectiveness perspective, we would want to preserve the capabilities as much as we could. But that is absolutely not a matter for us; it is a matter for the Government.

The Chairman: I do not want to cut you off, but we have two more questions and I have an eye on the clock. It would be helpful if you could bring your comments to a sharp point.

Donald Toon: We do not have any major issue with the use of the tools at the moment. They are effective. We will deal with whatever tools are in place post Brexit.

Q80 **Lord Hutton of Furness:** What impact has the decision to transfer responsibility for mid-level foreign bribery cases from the City of London Police to the NCA had on the investigation and prosecution of these cases? Do you think this transfer of responsibility has been a success?

Donald Toon: The short answer is yes. We think it has been a success because it has created a single integrated structure between responsibilities that formerly sat with the City of London Police, the Metropolitan Police and the Serious Organised Crime Agency. They have been brought together in a single unit, in which James is the senior operational manager. We believe that that international corruption unit gives an integrated capability where people have specific skills in all the operational aspects around international bribery and corruption. We think that it works and it is more effective.

Lord Hutton of Furness: On the number of cases, throughout its responsibility for these cases, the City of London Police unit dealt with cases that accounted for more than one-third of the individual foreign bribery convictions in the UK since 1999. As I understand it, you have yet to secure any convictions.

Donald Toon: That is absolutely correct, but bear in mind the length of most bribery and corruption investigations, particularly complex investigations. The OECD suggests that on average it takes about seven years. This organisation has been in place for less than four years at the moment.

Lord Hutton of Furness: But you inherited the cases.

James Mitra: When we took over from the City, there was a phased transition that is, in some respects, still going on. The City continued with casework that it had open at the time. So you will see that there will still be some City of London cases—

Lord Hutton of Furness: So these are all cases that you have initiated.

James Mitra: We have started from scratch. It is worth bearing in mind that, as I understand it, in its first four years of operation the overseas anti-corruption unit was successful in one conviction. Most of its convictions came after 2010, when it had been up and running for about four years. By comparison, the international corruption unit is three years in, and we are now at a point of having some cases considered by the CPS for charge. I feel like we are working to a similar arc.

Lord Hutton of Furness: Do you have any specialist foreign bribery investigators working for you? I understand that you are a team rotated around different jobs. Have you looked at whether you might want to develop some specialisms among your investigators? This is specialist crime, is it not?

James Mitra: We have very much done that. When we first set up the unit, we recognised that this was an area of work that was new to us. We asked the City of London Police for help in expanding our knowledge base, and with its help we have developed a training course in the investigation of foreign bribery, which everybody in the ICU has to attend in order to work in the unit. We find that that is very helpful.

Donald Toon: It is also worth noting that we draw on the skills, knowledge and expertise available in the private sector on bribery and corruption, foreign bribery and corruption in particular. We also draw on expertise from the NCA's "specials" cadre. We recruit people as volunteers where they have particular skills in an area that is of interest to the National Crime Agency. We absolutely draw on that in relation to foreign bribery and corruption and money laundering, as we do in all our core areas of crime.

Lord Hutton of Furness: But we should judge you on your success in convictions, should we not?

Donald Toon: That is absolutely right. We have cases with the CPS at the moment that are awaiting decisions on charging.

Q81 **Lord Grabiner:** Do you believe that the Section 7 "failure to prevent" model should be extended to other forms of economic crime, beyond bribery and tax evasion? Are there any risks to doing so? Failure to prevent, of course, looks at people's omission rather than their commission behaviour. Do you have a view on that?

Donald Toon: We certainly supported the SFO's detailed response to the Ministry of Justice's call for evidence on the change in the law on corporate criminal liability. We can see clearly the weakness in the identification principle, where corporate criminal liability does not extend beyond either tax evasion or bribery. We see a logic there, and we have provided evidence that would support that argument for extension.

Yes, we support it, but we think that it has to be done very carefully. There is a need for real care around how any broader offence is structured and focused, and the level of preparation that would be required for its introduction—that is, the level of attention that would have to be paid to understanding what mitigations are needed in corporate structures against the risk of becoming involved in wider economic crime. Yes, we support it, but we think it is complex and will need to be thought through and will take time. We await with interest the MoJ's response to the consultation.

We use a range of other legislation beyond the Bribery Act and the historic legislation. The Criminal Finances Act introduced capabilities in the form of unexplained wealth orders and account-freezing orders, and we use those capabilities now in relation to activity that links directly to bribery and corruption.

The Chairman: Is there anything else you want to tell us before we close? We have evidence that some of the mechanics of reporting fraud are not as good as they might be. For example, we are told that the Action Fraud reporting line does not have the ability to record calls alleging bribery. Is that true? If so, should it be put right?

Donald Toon: I do not know whether that is true.

James Mitra: I do not know.

The Chairman: Would you like to investigate?

Donald Toon: We can check and will certainly come back to you. We are happy to write to you and make the position clear.

The Chairman: Thank you very much indeed. We are most grateful.

Edward Argar MP, Ben Wallace MP, Kelly Tolhurst MP and Baroness Fairhead – Oral evidence (QQ 191-201)

Tuesday 4 December 2018

10.30 am

[Watch the meeting](#)

Members present: Lord Saville of Newdigate (The Chairman); Lord Empey; Baroness Fookes; Lord Grabiner; Lord Haskel; Lord Hodgson of Astley Abbotts; Lord Plant of Highfield; Lord Stunell; Lord Thomas of Gresford.

Evidence Session No. 22

Heard in Public

Questions 191 – 201

Examination of witnesses

Edward Argar MP, Ben Wallace MP, Kelly Tolhurst MP and Baroness Fairhead.

Q82 **The Chairman:** On behalf of the Committee, good morning to all four of you and thank you very much for attending to assist us in this session of our inquiry into the workings of the Bribery Act 2010. You will have received a list of the interests of Members relevant to this inquiry. As you no doubt know, this session is open to the public. It is broadcast live and there will be a transcript subsequently available on the parliamentary website.

A few days after the session, you will receive a transcript of the evidence that you have given, and we would be very grateful if you could check it for accuracy. At the same time, if there are matters that you wish to correct, amplify or add, please use that opportunity to do so. I simply ask you on behalf of the Committee to return the transcript as soon as possible with any additions that you wish to make—I know how busy you all are—because we have received a lot of evidence and we have to assess it within a limited time.

We on the Committee know who you are but, for the purposes of the transcript, may I ask each of you in turn to introduce yourselves so that it is on record, in no particular order?

Baroness Fairhead: I am the Minister for Trade and Export Promotion in the Department for International Trade.

Ben Wallace MP: I am the Minister of State for Security and Economic Crime in the Home Office.

Kelly Tolhurst MP: I am a Parliamentary Under-Secretary of State and Minister for Small Business, Consumers and Corporate Governance.

Edward Argar MP: I am Parliamentary Under-Secretary at the Ministry of Justice and standing in for my colleague Lucy Frazer, whose policy area this is. She sends her apologies as she is in a Bill committee this morning.

The Chairman: Thank you very much, Edward Argar, for coming in at short notice. We appreciate that this subject is not within your brief, but I understand that you have very kindly undertaken to give us further written evidence if there are questions that you feel you can answer more fully, having been briefed later.

Edward Argar MP: Indeed, Lord Chairman.

Q83 **The Chairman:** We are very grateful for that. You will all have received a list of the questions. I shall start by asking the first, which I will read out again for the purposes of the transcript.

Prosecutions for offences under the Bribery Act require the personal consent of the DPP or the director of the Serious Fraud Office. The City of London Police have told us that requiring this consent means that the use of the Bribery Act 2010 by the police is reserved “only at the highest echelons”. What is the Government’s view? Why is such a high level of authorisation always required?

Edward Argar MP: We were always clear, and the Government at the time were clear, that the purpose of this legislation was to consolidate and modernise the law. It should therefore not necessarily be judged by the number of prosecutions brought under it.

We believe that there is a range of offences alongside this Act that can be used to prosecute bribery, fraud or corruption. Under the previous legislation—in the Acts of 1889, 1906 and 1916—the level of authorisation, which this replaced, was actually that of the Attorney-General, so in a sense, removing that to the director of the SFO and the DPP slightly lowers the level of authorisation required.

However, given the complexity of many of these cases and the level of resource required to investigate and prosecute them, it was felt at the time, as I think was reflected in debates on the Bill, that this was an appropriate level of authorisation.

Lord Grabiner: Obviously the consent requirement adds another level of administration. However, as another question indicates, we know that bribery can be at a petty level but that it can also be at a major international level, involving foreign Governments or foreign government officials. Is there a justification for retaining a consent requirement in relation to substantive cases but not so in relation to petty cases, or is that not a meaningful distinction in context?

Edward Argar MP: My contention—my colleague the Security Minister may add the international angle—is that it is probably an artificial distinction. Given what is in the Act, particularly Sections 6 and 7, and given the complexities and the number of investigations and subsequent prosecutions, the workload in looking at those is not deemed to be too heavy; it actually presents a blocker to these being taken forward.

My understanding from previous evidence, both in writing and orally, is that it has not been suggested that the authorisation of either the DPP or the director of the SFO is proving an obstacle where the evidence is there. My feeling is that the bar is probably correctly set and operating in a way that allows it to be used efficiently.

Lord Hodgson of Astley Abbotts: This is probably an unfair question, and you may wish to write in reply to this, but clearly the position in Scotland is different.

Edward Argar MP: Yes.

Lord Hodgson of Astley Abbotts: It would be helpful if you could explain why the England and Wales system is better than the Scottish system.

Edward Argar MP: You tempt me, my Lord, but I hope you will forgive me if, on a Tuesday morning, I resist temptation and offer to write to you and the Committee.

Ben Wallace MP: Just on the international issue, because investigating international bribery is complex and probably very resource-intensive, and in some cases probably very hard to gather information on, authorisation at a high level is probably appropriate, given what you will unlock to do so.

Earlier on, and this is probably in some of the other questions, tasking is as important as the authorisation process for a prosecution, in so far as when the police force or National Crime Agency is setting about deciding which crime it is going to task and investigate as opposed to one that it might not, that is the key moment when resource is put to issues.

Also, domestically, we should not forget that there are offences other than bribery. Misconduct in public office, or indeed fraud by abuse of position, is an existing offence for which some people are prosecuted. There are annual prosecutions for that. Some 106 occurrences of misconduct in public office were reported to police last year alone. So there are other offences that might deal with that lower level.

Lord Grabiner: Does that mean that in what I might call a petty or domestic case without any international ramifications, for convenience's sake the charges are made under one of the other issues, such as misfeasance in public office, rather than using the Bribery Act?

Ben Wallace MP: It may well be for prosecution. The petty bribery may well be accompanied by a more serious crime related to organised crime—for a major fraud or a theft. Obviously prosecutors will want to produce a range of offences, but the bigger offence is the more important and carries the heavier sentence anyhow, so why whack the little bit with the Bribery Act when you can lock them up for theft or whatever, I suspect.

Lord Thomas of Gresford: If the rationale is that the investigation of bribery cases is very complex, the DPP's consent is required after the investigation is completed, is it not? The DPP does not come in before that stage, so it is not a proper rationale for giving consent.

Ben Wallace MP: With all due respect it is, because, as I said earlier, the first part, the decision to investigate, is the key point, which the DPP would not do. Having investigated, perhaps because the evidence was gathered abroad and is therefore harder to test the DPP will, of course, be important at the end of that process, in so far as evidence has been gathered, we got it from a country in Africa, let us say, and we have

witness statements, but it may be hard to bring the witnesses to the country, so when we decide to proceed, the likelihood of success is as important at the other end of the process.

Edward Argar MP: The director of the SFO also plays a role here. It has an operational investigatory role as well as being an authorising personage.

Lord Thomas of Gresford: I follow that.

Lord Empey: Because prosecutions under the Bribery Act could be very complicated and resource-intensive, for the reasons that you stated, might there be a temptation to aim a bit lower with an existing piece of legislation rather than the threshold required for the 2010 Act?

Edward Argar MP: The reality is that decisions on which Act, which piece of legislation, to use sit with the SFO, the CPS and the prosecuting authorities, which make their decisions on the basis of the code for Crown prosecutors, so on the basis of the evidential base and which offences they think they have the greatest opportunity to prosecute and secure a conviction under, and the public interest test

Of course, it is the Attorney-General who oversees the SFO and the CPS, given their operational independence. In a sense, we, as Ministers, as a Parliament and as a Government, have provided the tools, and it is an operational decision for the prosecutors to determine which Act, which piece of legislation, they think will be most effective for securing a conviction and the right outcome.

Baroness Fookes: One reason one or two witnesses gave for not using the Bribery Act was that it took so long to get the clearance from that very top level.

Edward Argar MP: We have not seen evidence of that from them. The SFO's and the CPS's position, as I understand it, is that they believe they are able to make decisions expeditiously and efficiently—

Baroness Fookes: Are you asking the right people?

Edward Argar MP: —but we will, of course, reflect very carefully on the evidence that you have heard in this Committee.

Q84 **Baroness Fookes:** We have already looked at issues relating to petty bribery, and my question is this. Witnesses from a number of industries, particularly shipping and construction, have drawn attention to the prevalence of petty bribery in their industries. On the other hand, there are not many petty bribery prosecutions. Do you have any reasons for why the number should be so small?

Edward Argar MP: My colleague in the security ministry alluded in his answer to the previous question to one element, which is that there are a number of other offences on the statute book that can also catch some of what might be deemed petty bribery crimes. There were 106 referrals to the police for misconduct in public offence, for example. The fact that they are not necessarily prosecuting under this Act does not mean that they are not prosecuted under other pieces of legislation. But I can see that interrogating the statistics is not easy.

Baroness Fookes: No, and they can be misleading.

Edward Argar MP: As with all statistics.

Baroness Fookes: Yes. As Churchill once remarked.

Edward Argar MP: Yes.

Baroness Fookes: But a number do seem to get away with it. I am thinking in particular of the problem of facilitation payments, where one is not asking officials to do anything but their duty and they fail to do it unless they get a bribe.

Edward Argar MP: I may be wrong, and my recollection may not be perfectly accurate, but I think evidence was given to your Committee about, for example, the Suez Canal, pilots and packets of Marlboro.

Baroness Fookes: Yes. More the canal, I believe, because of the number of cigarettes.

Edward Argar MP: We are very clear at the policy level as a Government that petty bribery is as illegal as any other form of bribery, and we in the UK, perhaps differently from some other countries, do not agree with the concept of facilitation payments. I know that the US takes a slightly more nuanced or different line on that.

As I say, we believe that a range of offences can be used, rather than necessarily just the Bribery Act, to prosecute those. I do not know whether colleagues want to come in on the international angle.

Lord Haskel: But there is a temptation to go with the flow if they are minor matters, if the bribery is minor.

Ben Wallace MP: There is a public interest test, which again is quite important. If you are, let us say, a journalist and you are going to cover floods in Kashmir, for example. You turn up with your film crew, you need to expedite yourself through the airport, and you are covering a humanitarian disaster. An individual is demanding a backhander to get your bags released at the airport, and while we do not support paying a facilitation payment and think that would be a criminal thing to do, there is a public interest test in the prosecution: would it be in the public interest to prosecute that BBC reporting crew who are going to cover a humanitarian disaster, if in the first place you could gather evidence about it? That is quite an important element and why the public interest test is in there, if my memory serves me right.

The Chairman: That question of the public interest perhaps supports the idea that there is a need for consent at a high level, which was our previous question. But you get cases, and you have given us an example, where ship owners arrive at ports with perishable cargo, and they are not going to get port clearance unless they hand over a couple of bottles of whisky or the like. It seems that they are between a rock and a hard place in those circumstances.

Ben Wallace MP: I used the example of the humanitarian issue, because we are trying to harden the environment and send a message that the British flag means something, and that you should not ask us for a bribe because you will put the ship owners in an impossible position, and if

someone does not start doing that, who will? I am not the one carrying the risk—I am not the tanker owner, et cetera—but it starts with a couple of bottles of whisky and ends up escalating into transiting human beings or drugs in some of the organised crime groups that I see.

There is a difference when you are talking about humanitarian disasters or a certain cargo. If the cargo were bandages and tents in the event of a hurricane or something else, I would expect that the public interest would probably be met. However, remember that the person shipping is also making a profit out of the activity.

Lord Hodgson of Astley Abbotts: But the Chairman's point is that the rock and the hard place are that the owner of the vessel may say, "No facilitation payments"; the charterer, who has perishable goods on the ship, says, "Get this stuff ashore"; and the master is in the middle of this. That is the difficulty: that somebody has said, "Don't do it", but another person to whom you are responsible says, "Do it. I must get my goods ashore or they will be wrecked". That is a very difficult position for the master of a vessel to be in.

Ben Wallace MP: I am sure it is, but if my memory of the Bribery Act being introduced and then implemented by the coalition Government in around 2010-11 serves me right—I am sure my colleagues will correct me—there is an element of failure to prevent in it.

The failure to prevent is as much about the message from the leadership, and the organisation and the structure making sure that people are not put in a tight spot. The risk is carried as much by the collective as it is by the individual. You must have protections, processes and clear policies in place about bribery and yourself as a company. If you do not, you can be liable for failure to do that under this Act.

Obviously things are difficult on the ground, but I see organised crime groups exploiting that. Bribery in a place like Heathrow is really dangerous, not because it may start off with a couple of bottles of whisky but because of what could happen if baggage handlers do not ask what they are putting on. What if, rather than a couple of bottles for an auntie who likes her whisky, it turns out to be an explosive device?

I visited an African port a couple of years ago where there were dozens of vehicles—brand new, luxury cars that had been stolen from the United Kingdom and shipped into this port. The National Crime Agency and the local police had done a great job in discovering these brand new Range Rovers, but we could not get them released to come back, funnily enough, because the officials involved were themselves corrupt. The problem is that if we do not send that message, tough as it may be, we end up fuelling more organised crime. You will pay for it in the long run.

Edward Argar MP: That is absolutely correct. If I recall, Section 7 of the Act, which was an innovation, deals with that failure to prevent. Will we touch on that in Question 11, Chair?

The Chairman: We will come on to that.

Edward Argar MP: I think that section helps to address the question of who is directing that petty corruption, as well as the point about the person caught in the middle.

Baroness Fookes: Is there any way in which our embassies and missions could give practical help?

Baroness Fairhead: We try to offer practical help on the ground in a number of ways, but we have been very silo-ed. DfID, the Foreign Office and DIT have their own guidance, but it is not co-ordinated. On an ODA-funded project, we have developed the Business Integrity Initiative, which has all those government departments working together to have a consistent set of guidance and support, for small businesses in particular.

That means a team at the centre and signposting the areas of advice; there are four different external sites that we signpost small businesses to. We are also asking whether we can do something more significant. We have a pilot, established in Kenya, Mexico and Pakistan, which is looking at how we can create really hands-on support and advice for small business in those countries. Those pilots kicked off in October, following the Prime Minister's announcements in Nairobi earlier this year. It will take about 18 months to do the pilot. Then we will see if we can take that and roll it out.

In addition, we have 108 posts around the world, and we do various teachings or engagements where we think that local companies, organisations and institutions and UK businesses are interested in coming together. An example is Burma. So we are trying to make it more joined-up, work across government and offer more practical guidance.

Your Lordships alluded to this difficulty with facilitation payments, because of the difference between a hard line that says that any form of corruption is criminal and the practicalities on the ground in some nations. The Government's policy is very clear that if you allow facilitation payments, that is a criminal act under the Bribery Act, but as your Lordships are aware, that is very difficult on the ground, particularly for small and medium-sized businesses. We are trying to provide that advice but in a much more consolidated way.

Lord Hodgson of Astley Abbotts: What is a pilot project? It is a great phrase, but does it mean simply better guidance, or somebody on the ground in the embassy specifically tasked with it?

Baroness Fairhead: Within this initiative, there will be one person on the ground tasked with pulling it together. There will be advice on three basic areas. One is risk mitigation—how you can mitigate the risks. One is about compliance and prevention. One is about encouraging collective support. If you are on your own, and everybody else is doing it, then it is very hard. But if there is collective action and support, there is a higher possibility that things will change on the ground. We are trying here to provide guidance but also, where possible, to change the culture and approach, which is a longer path.

Baroness Fookes: Does that not mean leaning on the local or central governments of the countries you are dealing with? If they employ corrupt officials, that is.

Baroness Fairhead: We try to work to increase the overall attitude to anti-corruption. Burma is a very good example. We work with local

institutions there and run workshops demonstrating the long-term negative effects of corruption in all its forms.

Another country with which we have done specific work is China. I think this is a DfID-led project, but it is prosperity funded. We worked with Renmin University and the Great Britain China Centre, focusing on how you can stop it in a systemised way. Obviously, you have to have buy-in from the parties, but we are trying to work with them.

Lord Grabiner: I would just like to pick up on a point that Mr Wallace made. Am I right in thinking that you are firmly in favour of the consent mechanism, not least because of the prosecutorial discretion carried with it? There may be cases that are unsuitable for prosecution and others that are suitable. The fact of needing consent is an important control.

Ben Wallace MP: Yes. I would say that we are collectively in favour of it—the MoJ, in the sense that it is the guardian of the law, and me, in the sense that I am the guardian of the people who are trying to prosecute and bring cases. With its impact on behaviour, yes, I would say that.

We all remember complex fraud trials that have collapsed and how damaging that is to reputation. Making sure that we are spending the right money in the right place to get a result, and that the result is achieved, is a really important thing to do. With the public interest test in there, that is important.

Lord Thomas of Gresford: But the public interest test, of course, is applied by every prosecutor. I am sure that a prosecutor who feels that important issues are involved can send the decision up to the chief prosecutor, who can send it up to the DPP. Where one is dealing with whether public interest is against prosecution in a bribery case, would it not probably be sent up the line anyway?

Ben Wallace MP: I would start up the line, send it to the DPP and work down, given that the public interest may be broader. I know that both Houses often get into massive debates about whether we should define the public interest in relation to national security. This is one of those areas, given the nature of bribery and the fact that many cases happen overseas and are about the other, competing interests of UK plc. The DPP is therefore perfectly positioned, as a senior national office, to be able to make that decision.

Lord Thomas of Gresford: The question was about petty bribery, of course, and small rather than large cases.

Ben Wallace MP: If it is petty, it will not take the DPP much time to make the decision.

Q85 **Lord Grabiner:** Some witnesses have suggested that the UK should adopt an opinion procedure based on the US opinion procedure release programme, which is effectively about the possibility of providing a safe harbour if a suitable opinion is secured. Do you think the UK should follow this example? Alternatively, do you think that other forms of more personalised advice on the current Bribery Act could be provided for businesses?

Edward Argar MP: We are not convinced that the US opinion procedure release programme would be right for this country. My understanding is that even in the US there is movement away from it—I believe there have been no releases since 2014. We do not think it is the right approach, because we do not think that it mirrors, or meshes well with, how our criminal justice system, decisions on prosecution and court system work. In this country, people do not approach prosecuting authorities for advice. We do not wish to get into a place where the advice given could, to use your phrase, provide a safe harbour and limit the options of prosecuting authorities and others.

We have taken the approach, and believe it is broadly the right one, to issue both headline guidance—a quick guide that may be easier for small and medium businesses—and full guidance, which, according to feedback that we have received, gives a pretty clear framework for understanding the Act and compliance with it. In complex situations, it is of course entirely open to companies and individuals to seek their own legal opinion on that. We do not believe that it is for the Government to provide case-by-case, individual guidance.

Lord Thomas of Gresford: Is the guidance revised in accordance with the cases that have occurred?

Edward Argar MP: It has not thus far been revised, but you are absolutely right to highlight that. This guidance is a relatively new piece of statute law. Off the top of my head, I think it came into force in July 2011, only about seven years ago. As various cases go through the courts—I think we are into the 40s now—there is a case for us to continue to revise the guidance to see whether, in the light of judgments, opinions and those cases, it remains sufficient or whether there is an opportunity to update it to reflect reality.

The Chairman: Lord Haskel was going to put the fourth question, but it seems that that question has largely been answered.

Lord Haskel: Yes. The information about the business integrity project answered the question. Unless the Committee wants to discuss it further, I think it was a very adequate reply.

Q86 **Lord Hodgson of Astley Abbotts:** The City of London gave evidence to us suggesting that the lack of a lead force has led to an “intelligence gap” on occurrences of bribery. Why do we not have a lead force for bribery, as is the case for fraud?

Ben Wallace MP: The Government have decided that for bribery we will have a whole-system response within economic crime and corruption. That is why we have set up the National Economic Crime Centre. It sits within the NCA, which is effectively the lead for economic crime and corruption and will set the strategic direction on that.

Within the National Economic Crime Centre will be the SFO, the City of London Police, the police as a whole, HMRC, the FCA—the regulator—and maybe even, to some extent, parts of the private sector. They will all link in to the regional organised crime units in every force. We took the view that that is the best way to meet the tasking, which is so important, to tackle these issues.

I accept that there is not enough intelligence on bribery. Our knowledge of that landscape is not good enough. That is why, alongside the NECC, there will be the NAC—forgive me; I do not make these things up—the National Assessment Centre for economic crime, including bribery. This is about understanding the intelligence that we see and putting together threat pictures and help for investigators. I do not disagree that there is an intelligence gap. The City of London Police themselves will be in the NECC. That is why we think that is a better way of doing it.

We have had a lead force on fraud for many years, but we do not have a good response on fraud from our police. It has not been a great success. We have the SFO for complex fraud, but the most common grumble on policing in my mailbox from my constituents at the moment is on cyber fraud and fraud. We all know the problems we have had with Action Fraud and trying to improve that. So having a lead force in these cases has not been a solution. We need better tasking, bringing all the different capabilities we have into one place and applying what fits best.

Lord Hodgson of Astley Abbotts: So does the NECC's remit cover training and service level agreements in regional and local forces? Is that part of what it will do, to make sure we raise the game across what are often quite small local police forces?

Ben Wallace MP: We have leads in the form of financial investigators. The people sitting in a regional organised crime unit dealing with bribery, corruption and economic crime will be the financial investigators. We are increasing the number of those up and down the country. There is in effect a police lead for asset recovery, which is where people are given better training. I do not think it is envisaged at the moment that the NECC or the NAC will run one-size-fits-all training for individuals, but as an intelligence product it will provide investigators with what to look for and tell them what the current trends are in bribery and where there is a threat.

The key advantage over a lead force is that the National Crime Agency and the NECC can potentially match the intelligence they see on occurrences of crime with where to go after it. For example, an increase in drugs coming through the baggage halls at Heathrow would imply that we need to look for bribery or corruption among the officials working there. That is not a real example. But marrying the two is really quite important, and the NECC will be able to do exactly that.

Lord Hodgson of Astley Abbotts: We took some interesting evidence from the National Health Service, a big organisation right across the country with all sorts of opportunities for petty bribery of one sort or another. Will it link in with those fraud investigators and those sorts of organisations?

Ben Wallace MP: Yes, it will, including through the regions. Very often, unless it is major, a lot of fraud is tackled regionally anyhow and the regional organised crime units will have a lot of those relationships locally. Say that there is a corrupt local authority or a corrupt pharmacist in the NHS, for example, that will be linked up to the regional hubs. Our organised crime response is organised through nine regional organised crime units across the country, where all the forces are together and

elevate their more serious and complex crimes into those hubs. There is one for the north-east and the north-west, et cetera. They are where you find a whole range of investigations, from investigations into complex drug-smuggling operations, for example, to weapons smuggling and human trafficking, but also to complex fraud and complex cybercrime. You may often see misconduct in public office offences being investigated in them, because doing it too locally is too close.

Q87 Lord Thomas of Gresford: We received evidence from the Director of Public Prosecutions which suggests that the loss of the European arrest warrant and the European investigation order will slow down extradition and have resource implications for the Crown Prosecution Service. How are the Government planning on mitigating this impact?

Ben Wallace MP: First, we are seeking in our political declaration and the following negotiations, if the deal on the withdrawal agreement is passed by Parliament next week, to have something as near as similar to the European Arrest Warrant. I am the first to say how useful the European Arrest Warrant has been. I would like to keep it if possible, but if the European Union Commission will not allow us to do that, we have to try to get to a place where we do exactly the same thing.

The Chancellor has allocated each department a Brexit budget; I do not have the figures but can certainly write to the Chairman. In the Home Office, we will spend that budget on more investment at the borders and in the Border Force, because we will have to do more checks there. Indeed, as highlighted by Lord Thomas, if there is more resource in processing these requests, we will have to do that. I can get you the figures which the Chancellor has allocated.

If there is no deal, I think we will be in a very much worse position. Some people do not realise that we will be shut out of these arrangements; it is not a case of whether the European Union member states wish us to belong to them. Certainly in the short term we will become a third country overnight, and as such we will not have access to the European Arrest Warrant. That is a fact, whether people wish it to be so or not, and it would have a degrading effect on our ability, as would being without ECRIS on criminal records and passenger name records, and all the other things that we would be shut out of pretty much overnight.

The mutual legal assistance request—the MLA—is another route, but it is slow. I know that your Lordships have already had in this House the COPO Bill, on production orders, which had its Second Reading taken in the Commons just last night. I took it through and it is an example of trying to mitigate some of that. We do not want to lose the European Arrest Warrant, but we are set to lose it. However, the political declaration sets in place a willingness by both parties to try to find something similar.

Lord Thomas of Gresford: Are you planning for 27 bilateral arrangements?

Ben Wallace MP: No. At the moment, our negotiation is with the European Commission, and if there were to be any changes across Europe the Commission is empowered to do that. It does not need a change to the fundamental treaties of Europe to do it, which would mean

all 27. Of course, the Commission itself would no doubt need to get it signed off—

Lord Thomas of Gresford: It would need authority to do that.

Ben Wallace MP: Yes. I have not met a single counterpart of mine or anyone in a foreign intelligence service, or foreign police service, who has not said that they would like us to have the tools that we currently have. It is about whether that is pushed up into their system to communicate to their member states and commissioners that it is important for that to happen.

Lord Haskel: As with Galileo, we just may not be able to participate in the most security-sensitive parts of the arrangement.

Ben Wallace MP: Yes. The Prime Minister has been quite clear that it would be deeply to be regretted and counterproductive for the European Union to do it. I should declare an interest: I used to work for QinetiQ in aerospace and we did a significant amount of work on Galileo. Europe would cut off its nose to spite its face. It would lose the capability that we have given as a country, but have also been paid for in other areas, if it were to do that.

Lord Haskel: They have done it.

Ben Wallace MP: Well, everything is negotiable—says the man who is supposed to talk about bribery, but it is. We will continue to press, but we are not without our own capabilities. It is not the only geopositioning system on earth, and it is still not working.

Q88 **Lord Stunell:** Section 13 of the Bribery Act provides a defence, based on the proper exercise of any function of an intelligence service or the proper exercise of any function of the Armed Forces when engaged on active service. Has the Section 13 defence been used, and in what circumstances would the security services use the defence? Do you agree that it could unnecessarily discourage prosecutions related to the defence industry?

Ben Wallace MP: I will give you the simple reply, I am afraid: it is obviously there to be used. It will have been used, and has been used. We do not comment publicly on how many times and how it is used, or on what issues. That is obviously in the nature of our intelligence services. The Intelligence and Security Committee has the ability to scrutinise and ask the intelligence agencies about how many occasions they have used it and why. I think it was in the law for a good reason: to make sure that our Crown servants, in carrying out their most important duty of protecting this country, have the facility to do what they need to do to keep us safe.

Lord Stunell: That is a good answer, obviously, but the area of risk, it would appear, is the number of civil servants who move into the defence industry and vice versa. There is a possibility that, under the cloak of this provision, other offences might be disguised or mitigated. Would you like to comment on any safeguards that you believe exist to prevent that happening?

Ben Wallace MP: If I may, we should ask my colleague in the Ministry of Defence to write to you, unless DIT knows something from its DSO. I can

talk only on behalf of the intelligence services in this area, not on whether the MoD has used it. I suspect that when that legislation was written, some of it was about the simple area where if you are delivering humanitarian aid or are a soldier at a time of war, you probably do not have much choice but to go down the road you need to go down, whether for your own safety or somebody else's.

The broader issue is in relation to the aerospace industry and that relationship. The best thing is to get the MoD to reply to you on that. It is not my portfolio. I can only say that, to the extent it affects the intelligence services, that is my answer.

Q89 Lord Plant of Highfield: As I am sure you know, the OECD has reported that there is insufficient co-operation between enforcement agencies, most notably the Serious Fraud Office and the Financial Conduct Authority, in enforcing the anti-bribery convention. Do the Government recognise this issue and, if so, how do you plan to remedy this lack of co-operation if that is what it is? How do the Government plan to increase co-ordination between Scotland and England and Wales, and increase awareness of the memorandum of understanding that is supposed to govern this relationship?

As a rider to the question, we received evidence earlier in our evidence-gathering that there seemed to be a poor understanding—a lack of recognition—that the memorandum of understanding applied in Scotland. People who one might have thought ought to know these things seemingly did not.

Edward Argar MP: Of course, the CPS and the SFO operate independently and sit under the Attorney-General, so I do not have direct responsibility for how they operate. Expanding slightly on the points you asked about, I am aware that this question was raised with representatives of the CPS and the SFO in your evidence session—on 23 October, I think. If I recall, neither of those agencies accepted that element of the OECD's challenge. We were pleased about and welcomed virtually everything the OECD said in its report, but inevitably there were one or two bits where we did not entirely share its view. I do not think the SFO or the CPS accepted it as an issue.

Lord Grabiner: Nor did the FCA.

Edward Argar MP: Indeed. I understand that, following on from its evidence, the FCA will write to the OECD to further clarify that issue and the response to it. It will keep the Committee copied in on that.

Going back to the answer that my colleague the Security Minister gave to question 5, as he set out then, we believe that there are effective intelligence-sharing mechanisms in place between the enforcement agencies, including the SFO and the FCA. He talked about the NECC hosted by the NCA and similar work. As he set out, we continue to build on those mechanisms to ensure that they are as effective as possible. On the memorandum of understanding in tackling foreign bribery, my department is not a signatory of that memorandum. It is signed at an operational level by a range of prosecuting authorities; it is handled at that level.

On the specific matter of Scotland, which the noble Lord alluded to, I note that the Lord Advocate told the Committee that he was confident that he had good channels of communication with counterparts in other parts of the UK and that there remain well-established channels of communication between prosecutors in the Crown Office and Procurator Fiscal Service and counterparts in England and Wales. I would, if I may, defer to his evidence as supporting our contention that the understanding, co-operation, communication and co-ordination are good. We will be gently but politely clarifying—that is perhaps the best way of putting it—our views on that with the OECD.

Lord Plant of Highfield: It is good, but it is slightly alarming that some people do not seem to know about it.

Edward Argar MP: There is always more that can be done to raise awareness of these things. Part of what this Act has done is push bribery and the practices that are going on higher up in the consciousness of the public and the enforcement agencies. But, as the Security Minister said, we look to see how we can strengthen further those information-sharing co-ordination mechanisms.

Q90 **Lord Empey:** Evidence provided to the Committee suggests that there is a “sense of unfairness” among small businesses, given their relative lack of resources for implementing anti-bribery procedures. Do the Government accept that official guidance should be clearer on what is expected of SMEs when implementing adequate procedures, as is the case in guidance related to the failure to prevent tax evasion offences?

Kelly Tolhurst MP: First, I think we all recognise that when you are running a small business it is, in some cases, really difficult to keep updated with all the regulation related to that business, particularly when new elements and requirements come through. So it is a challenge. In the short time in which I have had this role, I have definitely identified that we need to make sure the flow of information from our department, particularly to small businesses, is as good as it can be. That is one of my particular priorities. Obviously, we have guidance available. The MoJ has direct guidance for small businesses, including the quick start guide, which is quite concise. It can hopefully help a small business to assess quickly whether or not it needs to delve further into something.

Touching on something that Baroness Fairhead highlighted, we also have the great gov.uk website. On entering the site, any small business looking to export will clearly see that they can go and look at information about compliance. It clearly directs companies to some outside resources for training individuals within a business.

As I have highlighted, we are always looking to make sure that the guidance to business is as good as it can be. I meet the representative bodies regularly. This has not yet been brought up directly within those meetings, but we meet regularly—weekly, in some cases—and we also have the small business advisory board. It is something I am willing to bring up at advisory board level. We can always continue to work with the MoJ or even facilitate the MoJ contacting those representative bodies. We are committed to making sure small businesses get access to the

right information, but I recognise that it is a challenge and that some of those businesses can sometimes be hard to reach.

Lord Empey: Reflecting some of the evidence that we have had, there is a sense that a large international corporation will have a legal department and all that apparatus at its disposal; in many cases, this apparatus is better than what the state or its agencies might have. There has been the suggestion about deferred prosecution agreements and there was a sense that, while taking on some of these big corporations is difficult and resource-intensive, Joe Bloggs who is selling bits and pieces around the world is an easier hit. Are you satisfied that there is a level playing field for these businesses, given that it is more difficult to take on a big international corporation, which might be the same size as some Governments?

Kelly Tolhurst MP: I completely agree. Before being elected as an MP, I ran a small business and dabbled in exporting to some different areas, including some where it is more challenging to do business than it is in the UK and Europe. At BEIS, working across government with our colleagues in DIT, we are constantly looking at how we can make it fairer for small business. That is definitely on our agenda every day. In my short time in this role, I have been thinking about the direct impact on small business. There is a perception out there of potential unfairness.

We do not just have the MoJ guidance; we have a small business support line, which enables small businesses to get in touch directly for specific advice or signposts. I am straying into Baroness Fairhead's area, but this is important. Exporters, or small businesses that are exporting, will be more aware, especially those doing business with less developed countries. I have first-hand experience of dealing with DIT officials from a business point of view, and you are able to get that advice and information on the ground when you ask about your particular business. That is available. I am not saying that nothing needs improving, and obviously we are always keen to review, but there will always be that perception of unfairness, and my department is completely committed to working with colleagues to alleviate that.

Baroness Fairhead: I do not know the prosecution numbers and statistics but, if there is a sense that large companies are protected, just look at the cases against Rolls-Royce and Airbus. They suggest that there is not a reticence to prosecute if evidence is discovered. It is currently subject to investigation, so I will not comment in any detail, but in the DIT we have UK Export Finance. On the Airbus case in particular, some information came to light through UKEF—we have a due diligence process—that there may be bad practices. We raised that with the SFO, which decided to launch a criminal investigation. We are also working alongside France and Germany. The pieces of evidence that I have do not suggest that big companies are given protection. In fact, those are the cases that I know most about.

Edward Argar MP: That is absolutely right. I think there have now been 4 to 5 prosecutions of large companies—a significant number. The decisions are taken by the director of the SFO or the Director of Public Prosecutions. There have been only a very small number of deferred

prosecution agreements. Some were large companies, as I recall, and one was a small to medium-sized company. There is no aversion to prosecuting large companies, and a large number have been prosecuted under this Act. Similarly, there is not a preference for DPAs. Both are looked at objectively by prosecutors, who look at the evidential test and the public interest test for prosecutions. There are a number of factors with DPAs. Self-referral is one, but it is not the only consideration. Exceptional co-operation is part of it, so a company does not have to self-refer to be considered. There are a range of factors that the prosecuting authorities will consider at an operational level. I do not think the evidence thus far on prosecutions and DPAs bears out the suggestion that this is weighted against smaller companies.

Baroness Fookes: Could we look at it from another angle? Is it possible or likely that small firms, which might be a bit intimidated by the thought of exporting in the first place, would find the possibility of dealing with bribery the last straw and would not wish to do it at all?

Kelly Tolhurst MP: A small business asks itself a number of questions before it looks to export. Yes, of course, any potential liability, challenge or risk of breaking the law would definitely be a barrier putting a small business off. However, government departments are trying to tackle exactly that challenge. Some 99% of UK businesses are small. I can say from personal experience that the work that the DIT has done for exporters has changed exponentially since 2011, when, before being a politician, I had my first interaction with that department. The support given to small businesses has changed fundamentally. We want to make sure that we are empowering small businesses to believe that they can take on exporting and grow. In BEIS we take on the challenge of making sure that we are reviewing, engaging and tackling situations where small businesses believe they have a lack of information or a fear. We try to put measures and guidance in place to enable them to deliver.

Lord Haskel: Do you find that small business organisations such as the chambers of commerce, trade organisations and knowledge transfer networks are helpful in this, or are they lagging?

Kelly Tolhurst MP: As I outlined, the small business community can in some cases be hard to reach, so we rely on representative bodies such as the chambers of commerce to be a conduit, to impart information and deliver services to their memberships. They work closely with us. We meet them weekly or monthly to talk about issues facing small businesses. As you would imagine in the current climate, with the advent of Brexit, the ability to do business outside Europe is very much on the table. The Bribery Act has not been mentioned to me specifically. I am happy to bring it up at my next advisory board.

The evidence and stats suggest that people who have read the MoJ guidance find it useful and that it works. Part of the risk analysis laid out in the MoJ guidance deals with exporting to places such as China and some of the less developed countries. It is quite easy to find challenges dealing with places such as China, so businesses go out and look for the advice straightaway. While small businesses might be short of resources, they are not short of tenacity, drive and a determination to be successful

and to do things right. We can always improve our support, but I think we are better. It is a continuous journey.

Lord Thomas of Gresford: You say that small businesses are hard to reach. There is a vast array of specialised press among small businesses. Does your department ever proactively place articles advising on the risks or problems of exporting—reaching them through their own press?

Kelly Tolhurst MP: I do not have information on articles from BEIS. However, I challenge whether it would be a good use of government money to target trade press specifically. I do not have the figures in front of me, but there are numerous online and printed publications. It is an absolute minefield even within one industry, so I argue that that would not be the best use of government money. As a department, we work with our colleagues in the DIT and with business representative groups so that small businesses feel comfortable and trust that, when they are directed to our websites and our support services—even for our regional growth hubs—the information and advice they are given on gov.uk is correct.

While most small businesses may need encouragement to think about exporting and how to potentially grow, once in that mindset they will actively seek answers to their questions and look for further support before making those decisions. That is where working with our business representative organisations helps, because in many cases organisations such as the FSB or chambers of commerce will be their first port of call rather than the government departments. That is why it is a continuous journey.

I understand the challenges and what it is like, because I have been there. We are acutely aware of it in BEIS, especially in my role focusing on small business. There is a perception that the information is not necessarily always out there for small businesses, as it is for large ones. It has heartened me that, since I have had this role, the communication and engagement we have with the small business community and especially the representative bodies are far greater than I ever imagined. If there are challenges to the representative bodies, there are opportunities for us to deal with them quite quickly, especially in forms of guidance. But I have to say, going back to the original point, that the Bribery Act has not really been something that has been raised as an issue or a direct barrier while I have been in post.

Baroness Fairhead: I wanted to follow up on the previous comments. Only about 10% of companies in our country export and we want to encourage more. We looked at the barriers and one of them is attitudinal: companies do not feel able, are time-poor or do not have enough opportunities and do not wish to export. Anything that acts as a deterrent or point of resistance is something we try to work on. Looking at the statistics, when they are reporting, a lot of companies will say this is not an issue, but there is a quiet noise of companies saying this is just another factor you have to think about if you are working in those nations.

We are trying to have a much more hands-on approach. I should have mentioned, and I would like to have this on the record, that we also offer

up to five days of consultancy services under the Business Integrity Initiative. It is match-funded, so small companies will have to make a contribution, but that sort of hands-on guidance is what we are looking for. In addition, and this kills two birds with one stone, we have UK Export Finance, which helps support and finance small businesses; that is another big challenge they see when they are exporting. We also make sure we refer to the Bribery Act on the very first page, and make sure they understand they have to self-declare. That creates some of the learning you talked about. UK Export Finance also works with other bodies to make sure the OECD anti-bribery and corruption guidelines are raised. We have guidelines which are above the current level. A new text has just been agreed and we were very active in supporting it. Again, we are providing on-the-ground support wherever we can and are trying to change the environment and culture in whichever way we can.

Lord Haskel: Could you send us that text?

Baroness Fairhead: I believe I can, as it was agreed. We will.

Q91 **Lord Hodgson of Astley Abbotts:** This is about the Government's anti-corruption champion. This began as a Cabinet Minister post; indeed, Lord Hutton, a member of this Committee who is sadly not here today, was once the champion. It has gradually drifted down the hierarchy, ending up as a Back-Bench appointment—John Penrose. John is now combining this role with one in the Northern Ireland ministry. Does this look like a serious attempt to create a post that will energetically drive through the necessary changes in areas that are often departmentally sensitive?

Ben Wallace MP: In my view—and this is a personal view of champions—you need someone who does granularity rather than rank if you are trying to drive different departments together. Finding the £48 million we will spend in 2019-20 on economic crime—the extra money we will spend—has involved contributions from 13 different departments and agencies. No matter how good Cabinet Ministers are, their diaries are full of everything from Cabinet committees, to answering the House, to their whole portfolio—I know that from my own Cabinet Minister. Making a Cabinet Minister an anti-corruption champion might bring a sort of rank, but I promise you they simply will not have the time of day or the granularity needed to motivate, and manipulate where necessary, the different parts of the government machine.

We should not get distracted by that. The Government have made it clear that they want to tackle economic crime—I am now Minister for Security and Economic Crime. They have drawn money from across government for the NECC and bolstered regional organised crime units, financial investigation and the National Crime Agency. I think that is a better way of delivering it, while keeping an anti-corruption champion, who can effectively jump around outside government.

People often forget that champions are not Ministers, or not usually, and the Whitehall machine is set up for Ministers. It shifts to a Minister. I will say, "Let's invite the anti-corruption champion", but that is not the default setting of the machine. People say, "I am meeting the BIS Minister". Because I see the champion—I speak to John Penrose every fortnight at least—I will say, "I need you to help me with something" or

“We’ll get you along to a meeting”. He co-chairs the IMG anyhow. This is just a personal reflection on champions. For this type of challenge, which is complex and cross-government, you need someone who has the time and ability to deliver that granularity.

If John, who I think is also the Northern Ireland Minister now, finds that a challenge, he will be the first to say he cannot do both. I would then urge the Prime Minister and Number 10 to find a stand-alone champion again. I am afraid I have to admit to the departments on my left and right that I have used him very well to put pressure on departments that did not want to do what the Home Office thinks is a good idea. This Prime Minister, as a former Home Secretary, is determined to put economic crime in the right place. She has built on the excellent work that David Cameron did at the anti-corruption summit, which built on Labour’s Bribery Act, to put in place a much stronger and more in-depth approach to corruption and economic crime than we have had for 40 years. The danger is that a champion becomes about perception rather than delivery. I think having a Government who are determined to deliver, alongside a champion who does granularity, is the best relationship.

Lord Grabiner: You have come very close to what I was going to ask you about, but maybe we can pursue this a bit further. This post was invented in 2004. At that time, there was bribery legislation and a bribery offence, but it was well before the Bribery Act of 2010. You come quite close to saying that the champion is unnecessary. What would you say to that suggestion?

Ben Wallace MP: No, I think it is necessary, because the champion can dedicate time to jumping in and out of government, say things that are not necessarily comfortable, meet international bodies, spend time with the Federation of Small Businesses and validate the Government. A good Minister should challenge what is put in front of them, but—as with the review of terrorism in the other part of my world—a champion has that role of testing both sides and their allegations. So I think there is a role for them.

Lord Grabiner: But he will not have—your word—the granularity, the detail, available to him that would be available, for example, to the prosecuting authorities on bribery.

Ben Wallace MP: My point is that they have access to focus on it and more granularity, but they do not have a delivery machine beneath them. I would venture that in the past the champion could push the Government to develop a machine to deliver their ambitions. Under this Prime Minister—following on from David Cameron and the ground-breaking Bribery Act, which started to put “failure to prevent” and extraterritorial reach in place—we now have a machine underneath it. The role is therefore slightly different, but still important.

Lord Hodgson of Astley Abbotts: I understand your powerful argument that it can be either somebody at the top level, who will not do the granularity but has the clout through his or her positioning in the Government, or a person outside government, a Member of Parliament who has the granularity, but how on earth do you do it if you are a Minister as well?

Ben Wallace MP: That is a question for John Penrose and for the wider Government. I was a Northern Ireland Minister and spent a lot of my time in Northern Ireland. John has only just started, and he is the first person who will say if he cannot maintain it. The strength is that he sits alongside me on the IMG. We have met twice this year and will meet again next year. He has been incredibly good at helping people like me convince the broader part of government that this applies to them. I would like to see that continue. That may be for him, as opposed to the granularity. Whoever does it next needs to still be able to deliver that.

Lord Empey: I thought your response about a Cabinet Minister was convincing. Mr Penrose gave evidence to us at some length in the summer. I just wonder if the pendulum has swung too far. I and a number of other people felt that, as a Back-Bench Member of Parliament, he has a lack of resource. Would a middle way be to focus this responsibility with somebody, say in the Cabinet Office, who would have a degree of back-up and, being at the centre of government, would not be carrying departmental rivalries or differences? Somebody based there would be a balance between a Cabinet Minister and a Back-Bench MP.

Ben Wallace MP: Your point is well made. I do not disagree that a champion must have some element of resource. My point is that their job is slightly different now. There is resource in that there is a big machine churning on economic crime. Your point about how the Government are designed is above my pay grade. The key quality of a champion will be about granularity and understanding the landscape both internationally and domestically. I have told my officials and agencies, as long as I am the Minister, to engage with him as if he were me, so that he gets the access he wishes. I cannot speak on behalf of other departments. A Minister in the Cabinet Office is often given the job of handling cross-government challenges, but it is for the current champion to say whether he feels he can maintain what he has learned over the last two years alongside the Northern Ireland job.

Baroness Fookes: I am still not clear. What resources does he actually have at his personal disposal?

Ben Wallace MP: Not a great deal. He gets the support of some officials, a secretariat engaging in meetings and diaries. I would hope that he gets travel. I do not want to mislead the Committee, so we will set it out in detail. The point is that he does not get a great deal. If I were fired tomorrow morning and made a champion of anything, knowledge is the only weapon I would have to change a Government. If I do not have a department beneath me, it is knowledge. That is the key, and hopefully he has enough resource to allow him to gather that knowledge. If he does not, we should all ask questions.

Q92 **Lord Grabiner:** We have discussed this with a number of witnesses. Does the use of “adequate” rather than “reasonable” in Section 7 of the Bribery Act mean that the Government believe a stricter test is needed for bribery than for tax evasion facilitation? With tax evasion, there is a reasonableness test, but here there is an adequacy test. Is it intended that the occurrence of bribery should automatically demonstrate that a company’s procedures were inadequate? Are the Government willing to

consider extending the “failure to prevent” model to economic crime more broadly?

Edward Argar MP: My understanding of this is that it is not clear that Parliament intended there to be a difference between “adequate” and “reasonable”, or indeed what the consequences of any distinction might be. I read some *Hansard* transcripts going back to 2010, I think, of the debates preparatory to the Act’s passage—

Lord Grabiner: And you are none the wiser.

Edward Argar MP: I was about to say that I am none the wiser. My understanding is that the intention behind it was that they should be broadly synonymous. All of your Lordships, but particularly those who are former judges and eminent QCs, might suggest that it was an unhelpful approach by Parliament to use two different terms in different pieces of legislation, which were intended to be broadly synonymous.

In respect of this Act, my understanding is that the offence and defence under Section 7, more broadly, was based on the Law Commission’s recommendations for a new corporate offence in its November 2008 report and reflected some of the language in that report, which was also partly the basis for the Act. As we have heard, it is being used successfully in the prosecution of a number of bribery cases. The impression I get from the SFO and the CPS is therefore that they are clear that, notwithstanding a degree of ambiguity, the law still operates effectively as it stands.

On the inadequacy point that you came to subsequently, we are clear that the answer to that is a categorical no. It is not intended that the occurrence of bribery should automatically demonstrate an inadequacy of procedures. The Act was never intended to bring the full force of the law to bear on a well-run commercial organisation that experienced an isolated act of bribery or similar. This recognises the fact, and indeed the reality, of life: no bribery prevention regime, however well-designed, can be 100% capable of preventing all aspects of bribery, so that was the intention behind the adequacy element.

Your final point was about consideration of an extension of the “failure to prevent” model—essentially, the Section 7 powers on economic crime more broadly. In previous answers, the Security Minister has alluded to the Government’s position and particularly the Prime Minister’s views in this area. Following a call for evidence earlier this year, we are currently reflecting on and considering that point. We intend to publish our response to it next year. I do not know whether my colleague wishes to come in further.

Ben Wallace MP: The Solicitor-General and I are pretty keen that we explore further the failure to prevent in broader economic crime. We had a call for evidence and we are waiting for the MoJ to publish its response to the call for evidence. We raised it at the last inter-ministerial government meeting on it. John Penrose and I are keen to see this. I think we are trying to gather from the evidence at the moment on what effect it will have.

Lord Grabiner: The “failure to prevent” approach has been adopted by

the regulators, especially the FCA and the PRA. What it does is to focus all the regulated parties' attention on the mechanics of the way that they do business. It forces them to give careful consideration to what they are doing. Then if, on examination, it transpires that they have failed, it is much easier—if I may be rather crude about it—to achieve a successful criticism in a regulatory environment. In a criminal environment, it would also be easier to prosecute successfully because you do not have to get into a debate about criminal intent.

Ben Wallace MP: I could not have put it better myself.

Edward Argar MP: Without wishing to prejudge what we may say early next year, I think Lord Grabiner and the Security Minister make a powerful point

Lord Stunell: If I may add, as a non-lawyer or layperson in the street, one public policy issue is the sense that it is difficult to get the big boys for these kind of issues. The Government should very much bear in mind the importance of giving the public assurance. I do not know whether your nodding is recorded in our transcript.

Edward Argar MP: It can say, "The Minister indicated assent".

Ben Wallace MP: I am not a lawyer either, but the proving of a controlling mind seems incredibly difficult in the current environment. I think that the Americans have vicarious liability, which goes even further, but there have been big changes in the United States and it is important.

Reflecting on the small business issue earlier, before I was in politics I worked for three years in aerospace, opening overseas markets. There are two things on bribery abroad to bear in mind, where the United States Foreign Corrupt Practices Act makes a difference. One is in bidding for contracts, where in some environments bribery is more likely to happen, and the other is just selling your product. You may make shoes and want to sell them abroad into a market, not have a public contract. I used to find it incredibly challenging to go to an embassy and say, "There's a contract for aerospace equipment from this Government. Who do I speak to?" Compared to the Germans, who had rows and rows from their chambers of commerce—because all the Länder have contributed to advisers and everything else—British firms did not really get that advice. Over the last five or 10 years, including since the creation of DIT, there has been a big change in the ability to do that, which gives some reassurance to small business.

There is the same thing in failure to prevent, which is why I want to bring this in. There is an element of large businesses overplaying some of this. They may gold-plate some of the compliance issues. I do not know whether that is because some of their compliance departments like to have a big job to do. When I was working with Ken Clarke, we wrote the statutory defence guidance in a user-friendly way and it was quite clear about when corporate hospitality or interaction with your customers is not bribery. It sometimes staggers me to meet people in the City who say, "Oh, we can't go to lunch with someone because our compliance company says that's in the Bribery Act". We say, "No it's not. Have you actually read the statutory guidance?" It is not complex guidance.

Lord Thomas of Gresford: The lawyers moved in, did they not?

Ben Wallace MP: Yes, they have made an industry of it and because big sends messages to small, small businesses get scared. Doing this job, I have seen a number of functions where the FSB—not the Russian FSB, but the Federation of Small Businesses—and the CBI could play a strong role with our businesses. It is about guiding businesses, as a trade body in our own constituencies, on some basic diligence and processes, which in the past I have not seen them do. At national level, the FSB is very good but, if you go to your local ones, they are a bit hit and miss in the chambers of commerce. They could have that really strong role: to not frighten people off, so that the Bribery Act is not a scary thing. I think you can comply with it and export.

Lord Thomas of Gresford: I have taken part in a seminar where I was amazed to hear other lawyers putting the fear of death into people about it.

The Chairman: That brings us to the end of this session and it remains for me, on behalf of the Committee, to thank you all very much indeed for coming along to assist us. May I please repeat: when you have received the transcript, could you return it to us as soon as possible with any comments, additions and so on? Once again, thank you very much.

Iskander Fernandez – Oral evidence (QQ 202-208)

Tuesday 11 December 2018

10.30 am

[Watch the meeting](#)

Members present: Lord Saville of Newdigate (The Chairman); Lord Empey; Baroness Fookes; Lord Gold; Lord Grabiner; Lord Haskel; Lord Hodgson of Astley Abbotts; Lord Hutton of Furness; Lord Stunell; Lord Thomas of Gresford.

Evidence Session No. 23

Heard in Public

Questions 202 - 208

Examination of witness

Iskander Fernandez.

The Chairman: Mr Fernandez, I welcome you on behalf of the Committee and thank you for assisting us in our inquiry into the workings of the Bribery Act.

A list of Members' interests relevant to the inquiry has been sent to you. The session is public; it is broadcast live and will subsequently be available on the parliamentary website. In a few days, we will send you a transcript of the session. We would be very grateful if you would check it for accuracy. In addition, if there are further points that you wish to make, or if you wish to amplify any points that you made, please do so. Indeed, if you feel that entirely new points ought to be raised, that is the time to do it. All I ask is that you return the transcript to us as soon as possible with such additions as you may have made. We have received a great deal of evidence, and the earlier we get it back, the better able we will be to deal with the pile of material we have.

Although we all know who you are, for the purposes of the public transcript, perhaps you can introduce yourself.

Iskander Fernandez: I am a partner at BLM, where I head the firm's white-collar crime and investigations practice.

The Chairman: Thank you. You will have received the list of questions. We are not confined to them, but we will take them in order anyway. I will begin by asking the first question.

The Skansen case represented the first conviction for a Section 7 offence since the Bribery Act came into force. What does the case tell us about how the Act is operating in practice?

Iskander Fernandez: First, I will leave the issue of Skansen to one side for just a moment, because I do not think you can use that case on its own as a yardstick as to how the Act is operating in practice. There are many reasons for that. As the questions go on and I answer them, you will hear

from me that it was an unusual prosecution because of the peculiarities of the way it was handled by the CPS. That said, we respect the decision which the jury and the court came to. However, it is only right that I mention those peculiarities as I answer this question.

I think the Act is operating very well. There is greater awareness among corporates and individuals as to what they should and should not do when it comes to their business activities. With regard to corporates, I, colleagues and other professionals are seeing a greater sense of corporate responsibility by senior management, whereby bespoke ABC policies and procedures are drafted, put in place and reviewed yearly to ensure that the risks dealt with in an ABC procedure are commensurate and proportionate to the risks that that corporate faces.

We are also seeing corporates engaging more with their legal advisers with a view to getting those legal advisers to train their staff and senior management on the requirements under the Act and, again, what they should and should not do when it comes to their business activities.

As I mentioned at the start, Skansen is quite a peculiar case. Unless you think it best to wait, I will give some facts of the case and explain why it was so peculiar from a defence practitioner's point of view.

The Chairman: That would be very helpful. Thank you.

Iskander Fernandez: It is a position that has been shared by colleagues, academics and other practitioners in the field.

Skansen was an SME based in London, operating in the construction sector. It was a small fit-out company, employing around 30 employees at the relevant time. It operated in Greater London. The office space which the business operated from was probably double the size of the room we are in now. It was open plan and in one location. There were no agents or operations in high-risk jurisdictions. There were no interactions whatever with foreign public officials, other than that it operated in the construction industry, which is a relatively high-risk sector for bribery in the light of the Sweett case, which I am sure we will mention as we go on, and the Transparency International bribe-payers' index. It did not appear to have a particularly high-risk profile from a bribery point of view.

The company was labouring under incredible financial constraints at the time. It was suffering, possibly because of the downturn in the economy at the time and at the back end of that. It was simply not winning contracts as other companies were in that sector. However, in 2012-13 it won two contracts from a third-party company that, combined, were worth approximately £6 million to Skansen. From now on I will shorten the name "Skansen" to SIL—Skansen Interiors Ltd—because I do not want to draw the parent company into these discussions.

The contracts for SIL were to fit out two offices in the City. As I mentioned, the combined value of those contracts was £6 million. It transpired that two payments totalling £10,000 had been paid by a former director of Skansen at the relevant time to reward a project manager at the third-party company for influencing the tender process to ensure that SIL won

the two contracts. The payments were not made directly to the third-party individual who operated at the third-party company but to a third company, which was owned by the son of one of the defendants.

SIL was able to find information at Companies House when it undertook the internal investigation, that showed the link between the sham, or shell, company to the third-party individual who had received the £10,000. The shell company had raised three invoices to SIL on its own letterhead, purportedly for services in connection with the two projects. The services in question were for the provision of site surveys, drawings, consultancy, CAD drawings, and health and safety advice. In fact, no services whatever were provided to SIL.

Upon receipt of the initial two invoices, as was SIL's normal accounting practice they were manually coded and assigned to the project by SIL's finance team. They were then passed on for approval to a director, who happened to be the director who was found guilty of bribery. They were assigned initially to the relevant projects on the accounting system.

However, one of the project managers queried the amounts, following which the individual I mentioned who was convicted asked a finance clerk to assign the cost to a rarely used overseas subsistence code in order to avoid scrutiny. Measures were then put in place by that individual to hide the fact that those payments were made essentially for services that were never offered to the company.

There was a third invoice, but on its receipt and after the new CEO, Ian Pigden-Bennett, who I understand has provided written evidence to you, came into the business, that invoice was treated very differently. It was not paid, and it was for a larger sum of £29,000.

One of your questions addresses the fact that the City of London Police and, I think, other individuals have asked about the manner in which SIL was made dormant around the time of this offending, and questions have been raised as to whether that was intentional—I am reading between the lines here—and undertaken by SIL in order to avoid prosecution or even a penalty. I would like to say that that was not the case, and I will address that shortly.

As I mentioned at the very start, Skansen was facing incredible financial difficulties at the time—as early as 2010-11, so prior to the offending. It was quite clear that the management was finding it very hard to compete with other companies in that space. Efforts were made to try to right the financial wrongs and to make sure that the company was placed back into profit.

Unfortunately, that was not possible, so the management decided to appoint a new CEO, Ian Pigden-Bennett, who, as soon as he started, discovered a large gap in SIL's accounts that were nothing to do with bribes that were paid. So certain changes were made internally in the company in an attempt to steady the ship and to make sure that it became profitable. Some individuals were fired for gross misconduct because of the manner in which they treated those accounts and reported them to their colleagues.

A meeting of the remaining directors was then called by the new CEO, at which they were asked to present any evidence, documents or anything that they thought was relevant so that he could understand the difficulties the business was going through. At that time, the former director, Stephen Banks, who was convicted, flagged up that there was a further £29,000 payment, which I mentioned earlier, which was due to the shell, or sham, company that was, essentially, owned by Graham Deakin, the son of the other individual who was convicted.

However, he was not able to articulate convincingly the basis on which that payment was made, and he threw a number of figures and percentages about that he thought would satisfy the CEO's questions. Unfortunately, they did not. Essentially, he was told to go away, think about it some more and come back to the CEO with further evidence as to how this payment was made up and the services that it was for.

At that point, the CEO picked up the fact that something was not quite right in the discussions that were had and he started to monitor the emails of this individual to see whether his suspicions were founded on written or documentary evidence. He found certain emails going back and forth between Stephen Banks and Graham Deakin.

Unfortunately, Mr Banks's explanation as to how the £29,000 was made up gave rise to further suspicions on the part of the CEO. He immediately put in place an amended anti-bribery and anti-corruption policy, which he had pulled off the Institute of Directors' website, and he asked all employees to acknowledge receipt of that policy and to sign it off. He said that records would be kept on each individual's personnel file.

Stephen Banks received this policy, and he acknowledged that he had received it. That said, during the window when the new policy was put in place and the CEO requested that all employees should sign off on it on the basis that they understood it and would abide by it, Stephen Banks still tried to get the £29,000 payment through the accounting system.

So the argument that we raised at court was that, no matter what policies were in place, whether we look at the policies that were in place at the relevant time of the offending, which I will discuss shortly, or the amended ABC policy, which to some extent was gold-standard, Stephen Banks would still have done what he did. That was evidenced by the fact that he tried to get the invoice for £29,000 through the accounting system.

That payment was stopped, and to cut a very long story short an internal investigation was undertaken. As a result of that, Stephen Banks and another individual were dismissed. The company waited for a set number of days to see whether or not those individuals would appeal their dismissals.

Realising that that was not going to happen, the CEO immediately reported the matter to the National Crime Agency by way of a suspicious-activity report. He heard nothing more from Action Fraud or the NCA, and it was to his credit that he chased up the City of London Police and asked them whether there was an update on his report. It was only as a result of that,

we say, that the City of London Police picked up the reins on this and began the investigation.

As part of that investigation, the company, through Ian Pigden-Bennett, was asked to provide documentary evidence about the individuals concerned, the bribes that were paid, and anything relevant to the defendant that it could use to assess whether there was a case to be made and put before a prosecutor.

At all stages of the proceedings—this was before Skansen or anyone in the organisation knew or suspected that they were suspected of any wrongdoing—it provided privileged and non-privileged documents to the police as part of this effort to co-operate. I do not quote this directly, but one of the emails sent by the CEO to one of the officers in the case at the City of London Police said that, “Skansen will do anything that is required of it to fully co-operate with the investigation”, and, essentially: “If you need anything, please come back to us and we will do our best to provide you with that evidence”.

The company did not know that it was a suspect—it was essentially putting forward the individuals and the evidence that backed up the assertions that these individuals were the two to blame for the offending. Despite that, the CPS decided that it was only right that the company should be suspected of the Section 7 offence and should be investigated for it.

An interview took place with one of the shareholders and directors of SIL, and, after almost two years of investigation, the company was required to attend court to answer that allegation. It made no sense whatever from the company’s perspective, and—this is still commented on now—from a professional perspective.

The DPA guidance and the guidance from the prosecuting authorities, particularly the SFO, is: “If you co-operate and tell us something new that we do not know”. That message was recently delivered by the new executive of the SFO, Lisa Osofsky, in America, who said, “When we consider what co-operation means, it is about you telling us something that we do not know”.

We put the argument forward: “Had we not reported this, you would not have known about this offending. It is only as a result of our self-reporting that this offending came to light. In fact, we did everything we could to provide you with the relevant evidence to confirm that and to allow you to prosecute”. It made no sense whatsoever. If you look at the DPA guidance and the non-exhaustive list of conditions there, the idea was that the CPS would at least invite the company to enter into DPA negotiations. Again, this was discussed later but did not happen.

As I say, we cannot use the SIL case as a yardstick to measure how the Act operates in practice. It gave a peculiar message, and one that was not supported by the previous DPAs that had been and gone. I mention Standard Bank, XYZ and Rolls-Royce, and perhaps Tesco to a certain extent, although we do not know the precise details of the DPA, only the broad terms of what was decided there.

On that basis, the prosecution proceeding made little sense. Of course, the CPS put arguments before the court as to the reasons why that was the case, and one of them was that it was the prosecution's intention to send out a message to the public and to the construction industry that behaviour of this type was not to be tolerated. That is right, but it could easily have been done that by way of the prosecution of the two individuals, which was successful, and possibly by a DPA being negotiated, but it never got to that stage. Forgive me for going on, but I thought that was—

The Chairman: Not at all.

Lord Thomas of Gresford: Mr Pigden-Bennett says in his written evidence to us: "Despite verbal CPS agreement via their barrister in Southwark Crown Court to enter into a deferred prosecution agreement, this was reneged on by the CPS as they believed it was in the public interest to prosecute the company". Could you explain that, and could I ask you this: was it a factor in the CPS's decision to prosecute that there were no assets to pay a fine?

Iskander Fernandez: That is right. I was at court on that day when discussions were had between the defence and the prosecution counsel about a DPA and how that could work. Following a very short conversation with a reviewing lawyer at the CPS, prosecution counsel approached us and said, in the presence of Mr Pigden-Bennett, that the company would be invited to enter into discussions on whether a DPA could be entered into.

That was mentioned in court, and in fact a plea was not taken from the company on that date for that precise reason. It was mentioned to Her Honour Judge Deborah Taylor on the day that it would be best for the proceedings to be adjourned to allow those discussions to take place. Of course, there are no guarantees in that; it is just the negotiation phase.

Lord Thomas of Gresford: So it was not a verbal agreement on which they reneged, because that is quite a serious charge.

Iskander Fernandez: The prosecution counsel was quite confident in his approach to us and said, "You will be written to about discussions centring on a DPA". We went away on that basis, and the proceedings were adjourned on that basis.

A week or so later, when we had heard nothing from the CPS, further attempts were made to chase up an update on that, and, quite bizarrely, as I think Mr Pigden-Bennett says, it decided that it was not in the public interest to allow the company to enter into DPA negotiations. We pushed back on that, based on conversations that we had had with prosecuting counsel on the day at court, and essentially we asked the prosecution at the very least to sit down with us and to see how a DPA could be worked out and why it would be in the public interest. Although I cannot go into any great detail about those discussions, they were had with senior figures at the CPS. However, unfortunate though it was, the CPS decided that a DPA was not the right thing to do.

With regard to pursuing the company with the knowledge or suspicion that it had no assets whatever, we raised that argument in court. One of the

legal arguments that were raised was that had Skansen been a large company—I know that evidence has been given to this Committee on that—no doubt it would have been offered the opportunity to negotiate a DPA.

Lord Thomas of Gresford: Were you told, “The company cannot pay a fine, and that is why we will not enter into a DPA”?

Iskander Fernandez: We told the CPS that prosecution would yield nothing whatever, because the company had no assets whatever.

Lord Thomas of Gresford: Yes, but it is important for us to understand whether the CPS refused a DPA because the company had no assets.

Iskander Fernandez: It refused it on that basis and because it did not see how it would work with a dormant company. However, the regime is still very new and is being tested, and one reason why we had those round-table discussions with senior management at the CPS was to find a way around the perceived obstacles to any DPA which the CPS saw before it.

We had always said from the very start, when written representations were sent to the CPS prior to the first appearance at the magistrates’ court, because the company had no assets whatever, it would not be in a position to pay a fine or any confiscation, compensation or costs, because it had no money whatever.

In fact, that came to pass, because, as a result of hearing all the evidence, the jury, as you all know, convicted SIL of the Section 7 bribery offence. Submissions were made to the judge that the only possible sentence that could be handed down by the court could be an absolute discharge—for that reason: because there was no money whatever in the pot to pay a fine, compensation, confiscation, costs, the victim surcharge. The court accepted that and imposed an absolute discharge on the company that became immediately spent.

Lord Grabiner: In the paragraph immediately following the paragraph to which Lord Thomas referred—this is in a paper that Mr Pigden-Bennett has provided us—he says this, and I would like to know where you are on this point: “My question for the Select Committee is: is it really in the public interest to prosecute a self-reporting company? Surely this will encourage organisations to cover such activities up rather than address the issue”.

He seems to be saying that if you self-report there should be no prosecution, and that this would probably be an appropriate case either for an absolute discharge where the company has no assets or for a DPA as appropriate. Do you go so far as to support what he says?

Iskander Fernandez: I do not think I can. Just because a company self-reports does not necessarily mean that it will result in a DPA. The DPA is the very last step. There need to be negotiations before that, so I cannot, and I will not, in my position, say that just because you self-report you should be given a DPA.

In the DPA code of practice, public-interest conditions are set for and against a DPA and for and against a prosecution. Each case needs to be decided on its own merits. You cannot make the blanket assertion that just because you self-report you must be given a DPA.

Lord Grabiner: So there might be many considerations that would affect the decision whether or not to prosecute.

Iskander Fernandez: Absolutely.

Lord Grabiner: That would be a factor, but it would not be conclusive.

Iskander Fernandez: Absolutely.

Lord Grabiner: I suppose a possible explanation for what happened here is the one you indicated towards the end of your answer to Lord Thomas: namely, that because the company had no assets the DPA simply would not work at all.

Lord Gold: There is no point in it.

Lord Grabiner: There would be no point. Apart from anything else, it could not pay any penalty, for example, and it could not make any compensatory payment, so the mechanism simply would not operate in that context, would it?

Lord Gold: And you are not preserving a business; the company is dormant.

Iskander Fernandez: That is correct. I accept what you say, but, as I said to you, the discussions that we had at the CPS were to assess whether those obstacles could be overcome at that stage. As I say, the regime—

Lord Grabiner: I am sorry to interrupt, but at that stage was the CPS of the view that the company being put into the position that it was in—i.e. with no assets—was some kind of devious mechanism, or was it accepted at that stage that there was a genuine explanation for that?

Iskander Fernandez: I do not think that anyone in the CPS ever mentioned that. The first time we caught wind of that was during one of the legal arguments at Southwark Crown Court. In fact, the prosecution had to be corrected. I know that the City of London Police mentioned something very similar in their written evidence to this Committee.

That was not the case. The management of the company changed and the company itself was restructured because of the financial difficulties that it was going through as far back as 2010-11, before the offending. The reason for moving assets away from the subsidiary company was not because of the prosecution or suspicions that it would be prosecuted.

As I mentioned earlier, the company had no reason to suspect that it would be prosecuted; there was no message from the investigators at the City of London Police that it was a suspect. The company was offering all assistance that it could at the relevant time in order to assist the police. The decision had been made far earlier than that, and it is not correct, I

submit in my evidence today, for the City of London Police to suggest that that was the reason for the restructuring. It was not.

Lord Hodgson of Astley Abbotts: I have two questions. One is about background and the other is about process.

You referred to the fact that SIL was encountering very adverse trading conditions. Desperate men do desperate things. Were these activities, in your view, a last throw of the dice to maintain the company in being—that they had simply had to win these contracts, and that the alternative was administration if they were not able to win them? As background, was that, in your view, part of how this happened?

Secondly, on process, the case as you have described it sounds relatively simple; we are not talking about overseas, we are talking about a relatively compact case in a confined geographical area with a limited number of people—and it took the City of London Police two years to bring this to court? If you were defending the City of London Police taking two years, what would you say about it taking that long?

Iskander Fernandez: Dealing with the first question, I think that from Stephen Banks' point of view it was a last throw of the dice for the company. He felt as the director that it was crucial for the company to secure these two contracts to help it during those very difficult times, and I have no doubt whatever that those were the thoughts running through his mind at the relevant time.

Yes, it took an incredibly long time for the investigation to come to an end. It was an incredibly compact investigation so far as the defence was concerned. I was not part of the internal investigation. Part of the co-operation between SIL and the City of London Police was the result of a decision taken by the CEO without any legal advice whatever. Yes, it took an inordinate amount of time to come to a decision. That may well have been because the police are understaffed and financially underresourced.

A question was also raised as to whether the company that employed the project manager, Graham Deakin, could be brought in to the investigation. It could not, because the Section 7 offence does not work in that way when someone is in receipt of bribes. Conversations were had separately there, which may have stretched out the timeline. That company undertook its own internal investigation and reported its findings to the police. So there may have been that.

What I would say, and do say, to a company or an individual who is subject to these proceedings is that I will do whatever I can to chase up the police, the CPS, the NCA or other law enforcement authority for an answer. It is not unusual, and I know you have heard from two professionals previously, that when, as an example, a report is made to Action Fraud using its online portal, you are immediately told that there is a lead time of at least three months and that chasing up a response will not speed things up.

However, it is only right if you are acting for a company, a client, that you chase up to get a response, because that client, that individual, that corporate wants finality: is it going to be prosecuted, or is it not? Are

actions going to be taken against it, or are they not? The only thing that I can do, and others will be in the same position as me, is to continuously chase an answer. It is not satisfactory, but unfortunately that is where we are now.

The Chairman: Thank you very much for some extremely valuable evidence. We move to the second question, which Lord Gold is going to put to you.

Lord Gold: Mr Fernandez, how should SMEs go about developing or updating their anti-bribery and anti-corruption policies, potentially with limited resource? In your evidence so far, you told us that the company had introduced new policies. You said that they were given to Mr Banks, but the position was that he would not have taken any notice of them anyway. In answering my question, could you say how a company makes these policies and rules effective so that they will work?

Iskander Fernandez: To take the second question first, a company can send a message or tone from the very top—from senior management—saying, “This is the position that senior management will take on such issues and this is the position that the corporate will take on such issues. Everybody needs to fall in line”. Companies need to ensure that employees are aware that a policy exists and that they sign up to it. There will be efforts by corporates—more so now—to offer regular training to employees to ensure that the company’s policy and stance are at the front of their minds in their business dealings. That is what a company can do.

That is not to say that, just because you have an ABC policy in place, that situations such as SIL found itself in would not happen. If an individual is adamant and determined to undertake a particular course of action, he, she or it will do just that. You cannot account for that, but you can put robust measures in place, back them up with training and continuously assess the risk to the company to ensure that the policy or procedure still fits around what the company does.

Let me touch on your first question, which was what SMEs should do in developing and updating their anti-bribery and corruption policies. Unlikely as this is, in this day and age if a company does not have a policy or procedure in place, the first thing that we as lawyers would do would be to advise it to undertake a risk assessment, with our assistance or with the assistance of third-party providers. There is no point in putting in place a generic ABC policy that does not fit around what the company does and the risks that it faces. It would be futile, because you could still be prosecuted on the basis that the policy did not address the risks of bribery that the corporate faced.

The starting point for a company that has nothing in place is to undertake a risk assessment. Whatever policy or procedure is put in place will be dictated by the findings from that risk assessment. Before pen is put to paper, it should be noted—the MoJ guidance to the Bribery Act mentions this—that each corporate needs to take a risk-based approach.

I am straying into the next question here, but you need to take a proportionate approach to the risks that you face. There would be no point

in a company such as SIL having to put a policy or procedure in place covering the Section 6 foreign public official offence. That would be useless, because it had no dealings with foreign public officials, no officers abroad and no business activities in other jurisdictions.

You should look at the business that the corporate does, where it does that business and with whom it does that business and then have your policy fall into line with those findings.

Lord Gold: Do you agree that one policy that the company should have introduced is tight financial control?

Iskander Fernandez: That was mentioned by the prosecution. Because of Skansen's small operation and because it operated from an open-plan floor, a system of checks and balances was in place. As I mentioned to you, a query was raised about one of the invoices. The normal practice at the time—oral evidence was heard about this during the trial—was that any query should be taken up to senior management; it was for senior management to decide what to do with that.

Skansen still would have said—and the former directors may still say now—that those measures were sufficient for that particular enterprise. It may not be sufficient for a larger enterprise—I dare say that it would not be—but, for the activities that that company was undertaking at the time, Skansen was of the view that the reporting lines were sufficient. Obviously, that was not the case and, as I mentioned, the jury did not find it to be so and convicted the company.

The Chairman: To a significant degree, you have addressed the third question, but I think it is worth putting it to you in case there is anything you wish to add to what you have said.

Baroness Fookes: How important is the concept of proportionality, as contained in guidance, when companies develop these various policies seeking to cover themselves? Do you think that the Skansen case has a direct bearing on all this?

Iskander Fernandez: Just to put a bit more flesh on the bones of my previous answers, you can only adopt and implement a policy or procedure that is commensurate with the risks that your entity faces. It needs to be proportionate. As the Ministry of Justice guidance says, not all companies need to take a bells and whistles approach to their ABC policies and procedures, because risks that a larger company may face are not risks that a smaller company may face. Therefore, adapt and adopt your procedures in line with that.

The SIL case raised a few eyebrows among legal commentators. As I mentioned, and as was mentioned in court, the argument that the company put before the jury was that it had certain policies in place to remind individuals that they were not to bribe or accept bribes and that matters of that nature should be at the front of their minds in their business activities. There was a quality manual on the server. There was an ethics policy on the server. There was also a quality statement.

Coupled with that, whatever construction contracts SIL entered into were JCT—Joint Contracts Tribunal—contracts. There were ABC clauses in those contracts, again to remind those who entered into such agreements that they were not to bribe and that, if they were found to have bribed to win a contract, that contract would be removed from them.

There was also the understanding or culture that it is common sense that you are not to bribe in undertaking your business activities. Again, that was mentioned in court. To an extent, although the company did not have one ABC policy document, other policies were in place. We respect the decision that the court and the jury came to, but those were the arguments that were put: although the company did not have a document that had “ABC policy” across the front of it, other documents were in place and other messages were sent internally.

Baroness Fookes: So the advice that one might draw from that is always to have a policy set out especially.

Iskander Fernandez: I think so. The message from the Skansen case is that there needs to be a bespoke policy addressing bribery and corruption.

Lord Hutton of Furness: Is that not a good outcome of the Skansen case, if it is the signal that British companies detect? That is a public interest outcome, is it not?

Iskander Fernandez: Absolutely. Companies need to have that in place.

Lord Hutton of Furness: It probably took a case like this to establish that.

Iskander Fernandez: I do not think that it did. The tone from the likes of the SFO was, “You need to have your house in order. You need to have various policies in place”. The training that I delivered to corporates, well before this case came about, was that they needed to have a bespoke policy in place, so I do not think that this case taught us anything new to that extent.

Lord Hutton of Furness: Except that this company did not have it.

Iskander Fernandez: No, it did not have a document that it could wave and say, “This is an ABC policy”, but it relied on other documents that were held on the servers. There was an A3 laminated sheet stuck around the offices, which again sent out that message to others in the organisation about how to conduct themselves and the company’s business.

Baroness Fookes: In the official guidance there is a sentence that I would like you to comment on: “For companies of all sizes, but perhaps especially SMEs, we emphasise the importance of selecting the right partners, and this is a point that should be stressed in any future government engagement with SMEs on anti-corruption”. Do you have any further comments to make on that point?

Iskander Fernandez: The correct partners?

Baroness Fookes: Yes. I found the term rather strange, which is why I

asked you to comment.

Iskander Fernandez: I do not have it in front of me, but I would struggle to pass comment on that. I do not recall seeing it in the document.

Lord Grabiner: I think it means that you should not do business with corruptible people. I do not think it means anything more than that.

Iskander Fernandez: If that is the case, that would apply not only to SMEs but to any corporate, whatever its size. You need to be careful about who you do business with and make sure to undertake your due diligence on third parties—again, we send that message out. You need to undertake due diligence on your own employees to make sure that you have brought on board the correct individuals and that your on-boarding process is right. You need to undertake due diligence on individuals or entities that you are going to contract with, making sure that they are happy to and will abide by your stance on ABC, and that they have not been investigated or prosecuted, or have entered into any form of DPA or its equivalent elsewhere.

Baroness Fookes: Perhaps that should be added to the bespoke document that we talked about earlier.

Iskander Fernandez: Yes, but it would be in there anyway. We have seen, and I have helped to draft, policies to ensure that that is covered so that no one is under any illusion.

Lord Stunell: Obviously the term “proportionality” is a bit slippery here. Clearly, SIL and Mr Pigden-Bennett feel pretty hard done by about the outcome—I can detect that without too much trouble. However, it has perhaps also, as we have suggested to you, given the whole system a reset and has made sure that people are looking in much more depth at these issues.

“Proportional” might be about the specific risks, but it might also be about something to do with the size and the complexity of the organisation. As somebody with some background in the construction industry, it strikes me that it is quite likely that this was not the first time this had happened. Would you like to enlarge on how you see the way ahead? At the beginning of your evidence you said that we should not use Skansen to judge the whole Bribery Act.

Iskander Fernandez: I am quite certain.

Lord Stunell: What conclusions do you draw? What should this Committee say is the consequence of the evidence you have given us?

Iskander Fernandez: If a message was to be sent out to corporates that looked specifically at the Section 7 offence, it is that proportionality means that the corporate needs to look at the risks it faces and the layers of complexity within its organisation to see whether those in themselves offer any peculiar risks that have not previously been addressed.

The idea of any ABC policy or procedure is that it needs to adequately cover off any red flags that an organisation picks up as part of its due diligence,

its risk assessments, or when it is benchmarking its policies and procedures against those activities. That may mean selecting individuals at senior management or those who are front and centre when it comes to sales and/or interacting with third parties, to assess what risks they may face or have faced, and to ensure that if there are risks or red flags that have been raised, those are adequately covered in the policy that is put in place.

At the risk of repeating myself, the message has always been—leaving Skansen to one side—that you need to have a bespoke policy in place. You cannot have a generic policy that you simply pull off the internet and say, “This is it. This is where it’s going to be housed. Read it to understand it”. If that generic policy does not cover off specifics in your organisation, if a company were to be investigated that could be its downfall, simply because it was not sufficient for the business activity it was carrying out.

Lord Thomas of Gresford: Just to complete the picture, was DTZ, Deakin’s company, investigated for Section 7 offences?

Iskander Fernandez: No. I am sure the Committee understands that because of the way the Section 7 offence works, it will not necessarily apply to a company when one of its individuals, its individual or it is in receipt of bribes. It does not work that way, because, as such, no individual benefits flow up to the company itself.

Although I think that questions were raised by the City of London Police, I am not privy to that. I can go only on the documents that I considered at the time of the proceedings. Questions were asked of DTZ. The police were satisfied with the findings of the internal report that was undertaken by the company’s lawyers, and nothing further was heard.

Lord Thomas of Gresford: Your bribery policy must cover employees who receive bribes as well as those who give them.

Iskander Fernandez: Absolutely.

Lord Thomas of Gresford: Are you aware that DTZ had adequate procedures to cover that sort of situation?

Iskander Fernandez: I did not see anything, but I would be very surprised if it did not, because it was a very large organisation, and I think it has now been subsumed by an even larger organisation. I am sure it did, but I could not point you to a document that I considered.

Lord Hodgson of Astley Abbotts: My question is about guidance. Is the Ministry of Justice guidance on the Bribery Act providing adequate and up-to-date information for SMEs, or should the SFO or other government organisations consider introducing more personalised forms of advice for business? That might be by sector, in the sense that there are different types of challenges for different sectors.

I will extend that slightly by asking you what you think the role of SIL’s parent was in all this. I assume that, when you talk about 30 people, they were the SIL employees, not the whole group. How big was the Skansen Group, and what should it have done?

Iskander Fernandez: The Ministry of Justice guidance is adequate. It is quite a detailed document. It gives various scenarios of how the Bribery Act could impact on a corporate, and provides some case studies as to how the Bribery Act could work in practice. It would do no harm, seven years on from that Act coming into force, to have a review of that guidance to see whether it could be tweaked ever so slightly, given that we have now had four deferred prosecution agreements, including: Tesco, albeit that the Tesco DPA was not bribery-related; the Skansen case; and of course the Sweett Group case, which was the first conviction under Section 7 of the Bribery Act.

It would do no harm whatever to have that guidance reviewed. It may be the case that, once that review is undertaken, no further action is undertaken as a result of that review, or it may be ever so slightly addressed and amended to take into account what has been said and done in the past.

As to whether the SFO and/or the CPS should provide more personalised forms of advice, there is no appetite for that. The CPS and the SFO are in the prosecution game. They are not regulators. That said, the tone from the SFO has been very clear as to what is expected of corporates when they come across wrongdoing and what they should do when they find it.

Sir David Green, at the relevant time, was of the view that, "You need to provide us with everything that you find and leave it up to us to consider whether or not a case can then be made out". More recently, Lisa Osofsky has taken a slightly softer approach, if I can say that, and accepts to an extent that there may well be some form of tyre-kicking by a corporate and its lawyers to assess and feel around a particular issue to see whether or not there is an issue before an approach is made to the SFO.

There has been no tone or message whatsoever from the CPS. Although, unlike the SFO and the Roskill model it operates under, the CPS is not tasked with investigating criminality - that is left to the police, it would do no harm for the public and SMEs to understand the approach that the CPS would take. It is tasked with dealing with less complex investigations, such as SIL and another case that is going through the courts now involving Rapid Engineering Ltd, about which very little is known, but the CPS is handling the prosecution.

Then the question is whether there is sufficient finance or manpower resource to do that. Despite the change of helm I do not think the CPS has adequate resources for that.

Lord Grabiner: How about the other bit of Lord Hodgson's question? I also wanted to ask about this. Lord Hodgson's question was, "What was the position as far as the whole group was concerned?" I presume that SIL had its own board of directors. Was there any director from upstairs or elsewhere in the group on the SIL board? How did the board report upwards? How did all that work, if at all?

Iskander Fernandez: For various reasons I cannot go into too much detail, but to my recollection there was no cross-sharing of board

members. The parent company had very little to do with what the subsidiary, SIL, did in its own right, so they were two separate entities. The police recognised that and simply focused their attention on SIL, the subsidiary. That is all I can say on that.

Lord Gold: It begs the question whether, in putting processes and procedures in place, the parent company should have something in place that deals with the way subsidiaries operate.

Iskander Fernandez: Yes, and many do; I would like to say the majority. If they have subsidiaries operating in other jurisdictions, there will be an ABC policy in place that addresses any risks that those subsidiaries may have back up to the parent company or, more generically, to the risks that the subsidiary may face in its activities.

Lord Empey: Was the parent company effectively simply performing the role of a shareholder?

Iskander Fernandez: Yes.

Lord Grabiner: Do you think companies are adequately incentivised to report cases of bribery that they discover and be confident that self-reported cases will be handled fairly, regardless of the company's size and available resources? We have discussed this a little, and I know that Mr Pigden-Bennett would probably feel that they were incentivised but that, having self-reported, they were then somewhat cheated out of their expectations. I exaggerate, but I think that would be his position. What you say about that? We speak to you because we are not speaking to him; I hope you do not mind.

Iskander Fernandez: Absolutely not, but I cannot pass comment on what he has said in his written account.

Regarding the SFO, the DPA guidance that we have talked about mentions that if there is co-operation and, as I said to you, if the prosecutors are told something new that they would not otherwise have known about through self-reporting and through the level of co-operation, then yes, the incentive may well be that any prosecution is suspended while DPA negotiations take place and ultimately a DPA being agreed to by a court.

That was the message where Standard Bank and XYZ were concerned, because in those two DPAs the tone was, "If you self-report, if you co-operate, there will be every chance that you will be invited in to have the discussion with us about a DPA". The goalposts were moved slightly with Rolls-Royce, because, as we all know, that company did not self-report but did co-operate. I think Sir Brian Leveson mentioned that it was as a result of extraordinary co-operation on Rolls-Royce's behalf that led to consideration by the SFO and the court to confirm that DPA. So that is the tone that has been given.

To touch briefly upon the CPS's stance, I am sure that that has left a sour taste in Mr Pigden-Bennett's mouth, and perhaps many others, relating to what incentive there is if a company has done everything by the rule book,

following it to the letter and the spirit, but is still be prosecuted. Where is the incentive in that?

There is then the more recent argument about the collapse of the Tesco trial. Again, this had nothing to do with bribery as such, but Tesco entered into a DPA and questions are now being raised as to whether there needs to be some pushback from any approach of the SFO and for the SFO's evidence to be tested in court. The judge at Southwark at the recent trial of the Tesco individuals made some scathing remarks. He cited significant weaknesses in the prosecution's case that he simply could not put before a jury. The case collapsed at half-time after the prosecution had presented all its evidence.

Many may now just sit back and consider—they would be taking a gamble if they were to do this; it is a roll of the dice here—"Do we co-operate or just sit back and wait and see whether we will be prosecuted, and whether there is sufficient evidence to satisfy a court that wrongdoing has taken place?"

To an extent, we have also seen that with the Barclays case. Barclays did not enter into a DPA, as we all know; it has pushed back against the SFO's advances. There have been attempts to prosecute in the Barclays case, but unfortunately they have come to nothing at all because of that pushback. As I say, it is a gamble that a corporate would have to take, and it might not pay off. If it took that gamble, any options of a DPA being discussed would simply be thrown out the window.

Lord Grabiner: So the pushback that you are talking about is that the company might not in future do a DPA for fear that if they did and they ended up paying compensation and a penalty, there would be separate proceedings against officers or members of the business and it could then be demonstrated, for example, that there was no case to answer. Is that the sort of situation?

Iskander Fernandez: Perhaps. But it is important to note, and I am sure everyone is aware of this, that the Section 7 offence is not predicated on the fact that someone is found guilty of bribery. The issue is whether, as a result of the Skansen case or more recently the Tesco case, corporate will be more willing to self-report if it sees no incentive at the end.

Some of the fines that these corporates have paid by way of DPA agreements have been quite hefty; Rolls-Royce had £500 million, and Standard Bank, the first DPA, paid a significant amount. Standard may now not see that as an incentive, because it is quite a large chunk of money.

Lord Grabiner: There is a related point that I would like to ask you, if I may. It is a point that we have discussed for several weeks now, but it has also been raised by Mr Pigden-Bennett: the legalistic discussion about the difference between adequate procedures and reasonable procedures. I do not know if you have a view about that.

Iskander Fernandez: Yes. I have listened intently to the various commentaries that have been given. I know that the question was raised by one of the Committee members about the direction that was given in

the Skansen case when it came to that. The judge could only do what she did and direct the jury for them to decide.

The words “adequate” and “procedures” have an everyday meaning. To use the word “adequate” in the legislation is peculiar, because if, as in the Skansen case, we have individuals who have bribed and been convicted of bribery, that suggests that whatever was in place was not adequate to prevent that wrongdoing from taking place.

“Reasonable” may be the way to go, and we have seen in the Criminal Finances Act that term now being used, on the basis that a corporate can raise the defence that it was not reasonable in all circumstances to have policies and procedures in place to prevent the tax evasion offences. The reasonable approach was discussed when the Bribery Bill was being discussed many years back. It is a tough question to answer, and it has left many scratching their heads.

Lord Thomas of Gresford: Do you have the actual direction there?

Iskander Fernandez: I do, and I quote from it.

Lord Thomas of Gresford: Could you read the passage?

Iskander Fernandez: Under the heading, “What Skansen must prove and to what standard”, the judge said to the jury: “That is for you to decide, and the words ‘adequate’ and ‘procedures’ have their everyday meaning. If you are sure of what the prosecution must prove, it is for Skansen to show on a balance of probabilities—i.e. that it is more likely than not—that it had adequate procedures in place designed to prevent persons associated with the company from engaging with bribery”.

Lord Gold: Would it help a company defending a charge relating to this if it has taken advice from a firm such as yours on the procedures to put in place, your advice is that they are adequate, and it then follows that advice and strictly follows the procedures that are in place?

Iskander Fernandez: If we have assisted a corporate in putting together its policies and procedures, and only as a result of those steps that I mentioned before—the risk assessments, the benchmarking, the documentary review, speaking to the individuals in the organisation—have we put together a policy that, from what we have seen based on those documents and oral testimonies, is sufficient, proper and proportionate to the risks that the company faces, and if the company were to be investigated and subsequently prosecuted, then in principle, subject to what other evidence comes out in the wash later on as part of those proceedings, on the basis of what we have seen and on the basis that there has been no movement in the company’s activities or jurisdictions in which it does business, the advice and the policy are adequate.

Lord Thomas of Gresford: But you would still have to establish that they had communicated.

Iskander Fernandez: Absolutely. No company should see that as a defence on its own; the document will not pull it out of any prosecution. The Ministry of Justice guidance is quite clear: there needs to be training

on the policy. There is no use whatever in a thick, thin or however-many-pages document being placed somewhere with senior management or on company servers if the employees are not directed as to where it is and what it means and do not have real-life training on those policies to allow them an opportunity to ask questions about how it would impact their practices.

Lord Grabiner: Surely the mere taking of the advice by itself will not be good enough. Apart from anything else, the advice might not be good enough; it may be poor or based upon not enough information, or whatever the case may be. You cannot simply come to the court or to the CPS and say, "Well, I took legal advice. End of case". That will not be good enough.

Iskander Fernandez: Absolutely not. You have to demonstrate far more than that. It is down to the CPS to ascertain from the evidence before it whether its case is met. If a corporate relies simply on the fact that it has taken legal advice, that is not enough; it needs to demonstrate far more than that.

Lord Grabiner: One of Mr Pigden-Bennett's points—he does not actually put it this way, but I think this is, fairly, what he means—is that, whether the test is adequate procedures or reasonable procedures, he feels that what was in place at SIL was okay, to put it that way, but nevertheless there was a conviction, which he is not happy about. I wonder what your personal view is about that.

Iskander Fernandez: We considered the documents, trawled through the company's servers, pulled out these policies and took instructions from our client. It was on the basis of those instructions that the relevant advice was given that, as far as we were concerned, looking at the prosecution's case as it was then and the evidence against the corporate, there was a defence to be raised in court.

That was the advice that the company took on board, discussed and decided that it would proceed upon. It was not simply on the basis that, "This is our view of things". It was on the basis that, "It's our view of things because of X, Y and Z"—because of the documents that we had unearthed which the police had not unearthed during the 20 or so months of investigation. We delved into the corporate servers and spent many hours looking at every document and policy in place and pulling out these three documents, and presented them to the court as part of the defence.

Lord Grabiner: So this was an errant jury, was it?

Iskander Fernandez: I would not say that.

Lord Hodgson of Astley Abbots: On pushback, if you are advising a company and there is clearly a problem, is there an argument for saying, "Go for the DPA, take your punishment and move on", as opposed to a situation where you pay a fine, and your P&L and your reputation take a hit but it is finished? If you have to fight it out, with the time that these cases take—two, three or even four years—and the persistent drip-drip about the case against your company, the reputational damage over that period of time will outweigh the initial hit. There is some initial adverse

publicity as well, but it will sort of be forgotten, and you can always argue, “We weren’t prosecutors. We agreed to a deferred prosecution”.

Iskander Fernandez: Yes. It will depend. We approach that on a case-by-case basis. If it was right that, having discussed the matter with the CPS and/or the SFO, the company was given an opportunity to enter into DPA negotiations and the facts were right for that to happen, that advice may well be given to the client.

The client may well be keen to jump on that on the basis that it does not want to be debarred from competing for public contracts, which of course it would be if there was a conviction as a result of a contested trial or a guilty plea. But if the evidence does not suggest that there was any wrongdoing on the part of the company, the relevant advice would be given to the company.

Lord Thomas of Gresford: You pointed out the weakness in your case, in that there was no specific bespoke ABC policy. You were drawing this from this document and that from that document, and the jury—far from being errant, because juries are not errant—decided that that was not good enough. It was not adequate, which is a word that they were directed to interpret in the ordinary way without any particular slant being put on it at all by the judge.

Iskander Fernandez: At the time, SIL took that away with it as a result of the conviction.

Lord Thomas of Gresford: In advising it in future, would you say, as you have told us, “Have a specific policy on this”?

The Chairman: We have questions 6 and 7 to address. The first concerns the circumstances of Skansen being offered a DPA and so on, and the second refers to the City of London Police’s view about why Skansen was in effect shut down. Speaking for myself, though, you have probably answered those two questions. If there is anything else that you wish to add, please do so when you receive the transcript.

Iskander Fernandez: The only thing that I would like to reiterate is that the movement of assets and the restructuring of SIL was not because of the prosecution.

The Chairman: We have that point, thank you.

Iskander Fernandez: I have nothing further to add.

The Chairman: On behalf of the Committee, it remains for me to thank you for your most interesting and valuable evidence. Thank you very much coming to assist us.