

SELECT COMMITTEE ON THE BRIBERY ACT 2010**COLLATED WRITTEN EVIDENCE VOLUME****Contents**

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Aerospace Defence Security and Space Group – Written evidence (BRI0037)

ABOUT ADS

ADS is the trade association advancing the UK's Aerospace, Defence, Security and Space industries. ADS comprises over 1,000 Member Companies across all four sectors, with over 950 of these companies identified as Small and Medium Size Enterprises (SMEs).

The UK is a world leader in the supply of aerospace, defence, security and space products and services. From technology and exports, to apprenticeships and investment, our sectors are vital to the UK's growth – generating £74bn a year for the UK economy, including £41bn in exports, and supporting around 1,000,000 jobs across the country.

ADS AND ITS EFFORTS TO ASSIST IN ANTI-CORRUPTION

ADS has established an anti-corruption special interest group, originally known as the United Kingdom Defence Industry Anti-Corruption Forum, but now known as the Business Ethics Network, in May 2006, on the joint initiative of relevant parts of the British Government, British Industry, and related non-governmental organisations, and other interested parties. BEN seeks to reflect better and more effectively UK Industry's views on on-going business ethics-related developments in the global marketplace. Its overall objective is: *"To promote the prevention of corruption in the international aerospace, defence and security market"*.

ADS is a signatory to ASD's Common Industry Standards on Ethics, or CIS (<http://www.defense-aerospace.com/articles-view/release/3/83302/euro-industry-approves-common-ethics-standards.html>), which we helped to create back in 2006/07, which sought to create a harmonised set of standards in this arena across Europe, and we have been actively promoting the CIS to UK companies ever since. One of the criteria for companies to sign up to the 21st Century Supply Chains (SC21) initiative (<https://www.sc21.org.uk/about/>), is that they should be CIS signatories.

We have also supported the creation of the International Forum on Business Ethical Conduct (IFBEC - <http://ifbec.info/>), which has sought to establish an Industry body on such issues which is recognised around the World, and has sought to establish some Global Principles on Ethical Business Conduct (<http://ifbec.uhsome.com/wp-content/uploads/2013/06/IFBEC-Global-Principles.pdf>).

We have also produced and published a number of editions of our very own "Business Ethics Toolkit" (the latest current version of which is available from ADS' website: https://www.adsgroup.org.uk/wp-content/uploads/sites/21/2016/01/BusinessEthicsToolkit_2015.pdf). We have a special area of our website which is dedicated to anti-corruption issues.

We maintain a very close relationship with the leading anti-corruption non-governmental organisation, Transparency International (www.transparency.org.uk/), and have regular meetings with them. A few years' ago, we even temporarily seconded one of our own staff to work with Transparency International on a part-time basis. We actively encourage our Member Companies to support and participate constructively in TI's activities, such as the Defence Companies Anti-Corruption Index (<http://companies.defenceindex.org/>). We have also assisted TI in its initiative on the use of agents (<http://ti-defence.org/publications/licence-to-bribe-reducing-corruption-agents-defence-procurement/>), and the continuing development of their "Defence Companies Anti-Corruption Index" (<http://companies.defenceindex.org/>).

Back in 2014 we established a "Steering Committee" of some leading players from UK Industry involved in these matters, who are providing informed guidance our own activities in this arena and are adding new impetus to these. This Committee has established two Sub-Groups, one focused on Human Rights issues, which is endeavouring to try to identify what links these have with the activities of legitimate and responsible UK aerospace, defence and security firms, and the other seeking to identify external stakeholders on business ethics issues, with whom we should be liaising. It also helps us to put together the plans for the meetings and webinars of the Network, including identification of the themes, topics and speakers, which are focused on perceived future challenges for effective business governance.

Our "ADVANCE" publication (www.adsadvance.co.uk/) regularly carries business ethics-related articles, to help to promote greater awareness of these issues amongst our companies.

Therefore, as you can readily see, ADS tries to be very active on these matters, and I am sure that we would be keen to establish a close liaison with others on such issues, to try to identify any lessons that we can learn from what you are doing, and share any examples of best practice in this arena, for the mutual benefit of our respective industries.

CORRUPTION

Transparency International's 2015 Government Defence Anti-corruption Index (<https://government.defenceindex.org/#intro>) ranked the UK Government in 'Band A', placing it in the very low risk category for corruption in the defence and security sector. The UK 2015 country summary noted: "Overall export control policy is strong and the standard of scrutiny by the Parliamentary Committee on Arms Export Controls (CAEC) is robust..." Similarly, the organisation's 2015 Defence Companies Anti-corruption Index ranked the majority of the UK Defence companies in 'Band A' or 'Band B', with companies showing extensive or good public evidence of ethics and anti-corruption programmes.

Industry sees corporate responsibility, conducting business in an ethical and responsible way, as a fundamental part of a successful business strategy. The framing and adoption of harmonised international standards and practices would help to ensure the Industry is operating appropriately in all markets, and is not

being competitively disadvantaged. UK Industry sees good practice and high standards, in all aspects of our work, as the route to competitive advantage.

SPECIFIC QUESTIONS POSED BY THE COMMITTEE

Deterrence

1. Is the Bribery Act 2010 deterring bribery in the UK and abroad?

The Bribery Act 2010 caused a lot of interest in the anti-corruption world internationally, as there are certain elements which can be extraterritorial in nature, and, potentially impact the activities of non-UK firms and organisations. Therefore, it should be deterring any potential bribers from continuing with their activities. However, it is a well-known, and age-old maxim that the vast majority of those who commit crimes only do so believing that they will not be caught, and, therefore, at the practical level, it will only be truly effective as a deterrent if it is seen to be being actively and robustly enforced and implemented, thereby raising the perceived risk of being caught to such a level that organisations who might have otherwise been tempted to bribe decide not to do so because the risk of being caught is perceived to be too great. As with any aspect of regulatory legislation, effective and robust implementation is the key to success.

Enforcement

2. Is the Bribery Act 2010 being adequately enforced? If not, how could enforcement be improved? Do the Serious Fraud Office and the Crown Prosecution Service have the right approach and the resources they need to investigate and prosecute bribery offences effectively?

As already stated above, this is in very many respects, THE key issue about the effectiveness of The Bribery Act 2010 as a deterrent – how rigorously is it seen to be being policed and enforced? We are aware of the fact that the numbers of successful prosecutions which are taking place under The Bribery Act 2010 are increasing exponentially, but is that because we are actively seeking out these details? Ensuring that there is adequate publicity attached to successful prosecutions so that these cases are highlighted in the media would be utterly invaluable “*pour encourager les autres*” and to spread awareness of the fact that the British Government is really serious about its anti-corruption efforts.

Guidance

3. Is the statutory guidance on the Bribery Act 2010 sufficient, clear and well-understood by the companies and individuals who have to deal with it? Should alternative approaches be considered?

In general, the regulatory guidance which has been issued by the Government is relatively clear and concise, although clearly some greater clarity is needed in the area relating to the provision of hospitality, which we believe is still causing some confusion in certain circles, both within the hospitality Industry as well as wider.

Challenges

4. How have businesses sought to implement compliance programmes which address the six principles set out in the Ministry of Justice's guidance on the Bribery Act 2010? What challenges have businesses faced in seeking to implement their compliance programmes? Are there any areas which have been particularly difficult to address?

The "adequate procedures" defence from the Guidance which has been issued (and as detailed at http://www.transparency.org.uk/publications/adequate-procedures-guidance-to-the-uk-bribery-act-2010/#.W1ht_ZWWzIU), is palpably not working.

Only one company so far (an SME) has tried to avail itself of the defence since the Act came into force, and this was a dismal failure. This particular case, earlier this year, involved RV Skansen Interiors Ltd, which employed 30 people, and their defence of "adequate procedures" was rejected (http://news.cityoflondon.police.uk/r/1020/two_employees_sentenced_for_roles_in_6_4_million#).

Our assessment is that no Company can feel totally confident to put forward such a defence as it is hard to think of a scenario when it would have much chance of being successful.

As was stated by Industry representatives as the Bill was going through Parliament, companies like certainty and the "adequate procedures" defence falls far short of that. Some argued that a gross negligence offence would work better along the lines of the Corporate Manslaughter Act 2007 (<http://www.hse.gov.uk/corpmanslaughter/about.htm>), where a company can be found guilty of corporate manslaughter as a result of serious management failures resulting in a gross breach of a duty of care. However, this suggestion was rejected.

5. What impact has the Bribery Act 2010 had on small and medium enterprises (SMEs) in particular?

We believe that larger companies have the time and resources to develop their anti-corruption programmes in line with UK Bribery Act and FCPA and others, whereas SMEs may well not be able to do so. We believe that most responsible SMEs have actually taken compliance seriously and done their utmost to establish decent processes. Also, their legal advice has told them so to do. If this does not work, then they will need to start again. However, we have heard of many cases where some SMEs just do not have the people or the time to do more than the bare minimum, which may not be enough, even for SMEs.

SMEs cannot afford to spend much time and money on compliance, let alone worry whether their procedures are "adequate", or not, and we believe that this needs to be addressed by legislators, particularly as we move to a post Brexit world and exporting becomes significantly more important. To that end, we would advocate consideration on the possible adoption of some simplified

procedures for SMEs, which, whilst also not seeking to undermine the effectiveness of the Act, do offer a proportionate compliance procedure to organisations which lack the internal resources to be able to comply with the Act as it currently stands. Clearly, such a proportionate system would have to be clearly defined. We believe that SMEs should be offered an option whereby, if they have a defined zero tolerance statement signed up to by all employees, such simplified procedures might be made available to them.

For all other companies, notice should be given to what is happening in this same sphere in other nations. So, for instance, the French Sapin II law (<https://www.business-anti-corruption.com/anti-corruption-legislation/sapin-ii-law/>), which came into force on 1st June 2017, has a defined list of 192 questions issued by the **l'Agence française anticorruption, or AFA** (<https://www.economie.gouv.fr/afa>) which companies have to have answers to, and evidence for, ready at a moment's notice. The AFA have the right to attend an office of the company and ask to see the answers and evidence. If they consider the company has not got evidence to prove the answer, or it does not have an answer to a question, then the company can receive a heavy fine. So a specific checklist of adequate procedures which can be worked through by a company, evidence gathered and then given a legislator endorsement (even if for a fee) would give more certainty to a company and a serious chance of running the defence.

6. Is the Act having unintended consequences?

None of which we are aware.

Deferred Prosecution Agreements

7. Has the introduction of Deferred Prosecution Agreements (DPAs) been a positive development in relation to offences under the Bribery Act 2010? Have DPAs been used appropriately and consistently? Has their use reduced the likelihood that culpable individuals will be prosecuted for offences under the Act?

We strongly believe that the use of DPAs is the only sensible and proportional way to try to proceed in certain cases, if implemented on a case-by-case basis. To do otherwise could, in some circumstances, have potentially enormous consequences on an unintended nature. Thus, for instance, if a much harder line had been adopted against Rolls-Royce back in January 2017 (<https://www.sfo.gov.uk/cases/rolls-royce-plc/>), as some had advocated at the time, then, especially given recent reports in the public domain about its financial situation (<https://www.bbc.com/news/business-44479410>), this could have potentially undermined the very survival of the company, whose engines power not only very many civil aircraft around the World, but also the vast majority of aircraft operated by our own Royal Air Force and vessels operated by our Royal Navy, thus having very far reaching potential strategic implications for the UK's defence preparedness.

International aspects

8. How does the Bribery Act 2010 compare with anti-corruption legislation in other countries? Are there lessons which could be learned from other countries?

The Bribery Act 2010 was deemed to have set a new, higher “benchmark” standard internationally, and even to have been tougher in many aspects than the previous international benchmark, the USA’s Foreign Corrupt Practices Act or FCPA, of 1977 (<https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act>).

We are aware of an increasing number of other nations who have been seeking to identify ways in which they, too, can enhance their own anti-corruption legislations, to try to strengthen them.

9. What impact has the Bribery Act 2010 had on UK businesses and individuals operating abroad?

Where those operating abroad are aware of it and its details, we are sure that it should, and is, having an effect in the ways in which they operate. Certainly, with regard to larger UK firms, we have heard of cases where their corporate compliance staff have been going to enormous efforts to try to ensure that the compliance message and their internal corporate policies and procedures are being effectively disseminated as far and wide as possible.

27 July 2018

Affiliated Monitors, Inc – Written evidence (BRI0006)

INTRODUCTION

1. Affiliated Monitors, Inc. (AMI) is submitting this written evidence addressing the questions:
 - Deferred Prosecution Agreements – Has the introduction of Deferred Prosecution Agreements (DPAs) been a positive development in relation to offences under the Bribery Act 2010?
 - International Aspects – How does the Bribery Act 2010 compare with anti-corruption legislation in other countries? Are there lessons which could be learned from other countries?

AMI believes that the United States' enforcement of the Foreign Corrupt Practices Act (FCPA) and other anti-corruption laws demonstrates that DPAs can be effective in achieving the objectives of anti-corruption laws like the Bribery Act 2010 (Bribery Act), particularly when coupled with independent monitoring of DPA terms and conditions. Specifically, in our experience:

- DPAs can be an effective tool in enforcing the goals of the Bribery Act and guiding corporate behavior in the United Kingdom (UK), as they have been in achieving the goals of the FCPA in the United States (US).
- Independent Monitoring of corporations subject to DPAs or other forms of settlement is an essential component in US FCPA enforcement, and offers affirmative and effective oversight in the implementation of remedial actions and maintenance and improvement of Bribery Act compliance and internal controls.
- Where independent monitoring has been required as a condition of DPAs, it has resulted in stronger corporations with better ethical and compliance cultures, programs and controls.
- Independent Monitoring offers a fiscally neutral resource in enforcement for government agencies.

AMI BACKGROUND

2. For the past fourteen years, AMI has been a leader in providing independent monitoring in hundreds of matters including DPAs and other criminal, civil and administrative agreements and settlements between US and state government agencies and corporations, involving bribery, fraud and anti-corruption enforcement cases. Unlike the UK, independent monitoring in the US has a much wider application as an oversight tool by government regulatory and enforcement agencies across industries and agencies. AMI has monitored DPAs and similar settlement agreements involving multi-

national corporations with headquarters or sites across the globe.¹ Our monitoring has been utilized in civil and administrative settlements and has been used in matters involving small and medium sized entities in the US and, in many cases, individuals. AMI's principals include attorneys, investigators and compliance experts who previously had leadership positions in enforcement and regulatory agencies such as the US Department of Justice (DOJ), the Central Intelligence Agency, the United States Department of Defense, and state Attorneys General Offices. AMI and its professionals are members of, and hold leadership positions in, several international ethics and compliance organizations, and have published articles and papers on ethics, compliance and monitoring topics. AMI has a partnership with RS Legal Strategy Limited, a UK Q.C. led legal firm², and we have a presence in both Madrid and Bilbao, Spain.

3. We acknowledge that we have an interest in the UK's expanded use of DPAs in resolving fraud and corruption cases, and in independent monitoring being part of such resolutions in appropriate cases. However, we are offering evidence to the Select Committee because we strongly believe in the cost-effective value that independent monitoring brings to the government, the corporation being monitored, and the public.

DEFERRED PROSECUTION AGREEMENTS AND INDEPENDENT MONITORING IN THE UK

4. The UK authorized the use of DPAs, and the Serious Fraud Office (SFO) issued its "Deferred Prosecution Agreements Code of Practice" (DPA Code of Practice), in 2014. The SFO, in its Guidance on DPAs, articulates the key public *benefits* of DPAs:

"They enable a corporate body to make full reparation for criminal behavior without the collateral damage of a conviction (for example sanctions or reputational damage that could put the company out of business and destroy the jobs and investments of innocent people)" and "[t]hey avoid lengthy trials;"

and the SFO articulates the public *safeguards* built into the UK's DPA regime:

"[DPAs] are transparent, public events" that are "concluded under the supervision of a judge, who must be convinced that the DPA is 'in the interests of justice' and that the terms are 'fair, reasonable and proportionate.'"³

5. Significantly, the UK's DPA Code of Practice expressly contemplates and authorizes the use of monitors in appropriate cases where an investigation is resolved through a DPA, and the Code of Practice provides specific and reasonable criteria to consider in requiring and selecting a monitor. As articulated in the DPA Code of Practice, "A monitor's primary responsibility is

¹ AMI has monitored agreements involving the US government and, among others, Louis Berger, Booz Allen Hamilton, Inchcape, AT&T, Herbalife, and Walmart.

² RS Legal Strategy has, among its principals, QC Barristers Mark Rainsford, Jason Sugarman, and His Honor Geoffrey Rivlin QC, and Solicitor David Kirk.

³ DPA Code of Practice: www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/

to assess and monitor [an organization's] internal controls, advise of necessary compliance improvements that will reduce the risk of future recurrence of the conduct subject to the DPA and report specified misconduct to the prosecutor." DPA Code of Practice 7.12.

6. The UK has recognized that use of DPAs can be appropriate where DPAs incentivize corporate actors to change their behavior for the better. The potential for negotiating a DPA with the government, and avoiding trial and a finding of criminal liability, should encourage corporate leadership to self-disclose potential offenses, thoroughly cooperate with investigators, immediately and effectively remediate the bad behavior, and put into place programs and controls to prevent offenses in the future. Where this happens, DPAs are a win for the government, a win for the corporation, and a win for the public. As articulated by Director Michelle Crotty of the Attorney General's Office in her oral evidence before this Select Committee, the objective of permitting DPAs is "driving change in corporate culture." (July 3, 2018 Oral Evidence). As discussed below, we believe that evidence gained from experience demonstrates, both in the UK and the US, that independent monitors are an effective – and sometimes essential – tool in making sure that a change in corporate culture is real, effective, and sustainable as validated through a professional, experienced, independent third party's eyes.
7. We understand that since 2014, the SFO has resolved four anti-corruption cases through DPAs (three involving the Bribery Act and one involving Fraud Act offenses). One of those cases – *Rolls-Royce* – has been controversial because of the magnitude of the alleged corrupt activities and the fact that the corporation did not initially self-disclose, but only cooperated after allegations of misconduct had come to the government's attention. Significantly, the *Rolls-Royce* case is the only one to date (of which we are aware) that required an independent monitor. Lord Gold was retained by *Rolls-Royce* to conduct an independent review before the parties entered the DPA, and the SFO required as a condition of the DPA that the corporation engage Lord Gold to continue to monitor its remediation and compliance program and to implement his recommendations. Significantly, while controversial, the *Rolls-Royce* DPA was approved by Sir Brian Leveson, President of the Queen's Bench Division (as required by UK law), as "in the interests of justice." In approving the DPA, Sir Brian specifically cited the appointment of Lord Gold, his independent review prior to the DPA, his ongoing monitoring, and the "robust compliance and/or monitoring programme" imposed in the DPA.
8. We believe that in the *Rolls-Royce* case, Lord Gold's independent monitoring was and remains an essential factor in ensuring that *Rolls-Royce's* remediation measures and enhancements to its ethics and compliance procedures and culture are real, that these measures and enhancements are effective, and that the change in corporate culture at *Rolls-Royce* is sustainable into the future.
9. While admittedly a very small sample, we believe the observations by the SFO and Sir Brian of the significance of Lord Gold's independent review and monitoring of *Rolls-Royce's* compliance program and remedial measures –

both before and after the DPA – is informative of the value of employing an independent monitor in the appropriate DPA case. As further described below, it is also consistent with our observations and experience with the use of independent monitors in DPAs and similar agreements required by the US. Requiring an independent monitor as a condition of a DPA is not an end in and of itself. The significance of requiring an independent monitor in the *Rolls-Royce* case, and in many US cases, is that the independent monitor is an effective means of facilitating important public policy objectives – whether the objectives of the Bribery Act, the FCPA, or other anti-corruption laws -- and the value that good compliance and ethical practices bring.

THE VALUE OF DPAs AND INDEPENDENT MONITORING – LESSONS FROM THE US EXPERIENCE

10. While the UK's use of DPAs is relatively recent and infrequent, the US has decades of experience with DPAs and independent monitors in resolving FCPA, fraud, anti-corruption and regulatory enforcement matters. We believe the US experience reflects the success of policies incentivizing corporations to self-disclose their offenses, to fully cooperate with investigators, to remediate misconduct, and to establish robust and sustainable compliance and ethics programs and controls. An essential part of these policies and FCPA enforcement specifically has included the appropriate use of DPAs and similar agreements as alternatives to prosecution, and the requirement to use independent monitors to ensure compliance with many of these agreements.
11. Like the UK, the US DOJ has protocols and guidelines on the use of DPAs (and Non-Prosecution Agreements (NPAs)) and on the selection and use of independent monitors in DPAs and NPAs. In November 2017, Deputy Attorney General Rod Rosenstein, in his remarks to the 34th International Conference on the FCPA, succinctly articulated the policy objectives of the DOJ's enforcement program justifying DPAs and NPAs:

"The government should provide incentives for companies to engage in ethical corporate behavior. That means fully cooperating with government investigations, and doing what is necessary to remediate misconduct – including implementing a robust compliance program."⁴
12. Deputy Attorney General Rosenstein also provided statistics relating to recent DOJ enforcement of FCPA cases, and specifically the significant use of independent monitors in those cases:
 - Since 2016, the DOJ's FCPA Unit secured criminal resolutions in 17 FCPA-related corporate cases;
 - In 12 of 17, the matters were resolved through a guilty plea, DPA, or some combination of the two; and
 - In 10 of those cases, the company was required to engage an independent compliance monitor.⁵

⁴ Deputy Attorney General Rosenstein's remarks: www.justice.gov/opa/speech/deputy-attorney-general-rostenstein-delivers-remarks-34th-international-conference-foreign

⁵ Id.

We believe these statistics reflect the DOJ's recognition of the importance and value of requiring independent monitors to make sure that the conditions of a DPA are effectively and conscientiously complied with, and that the government's ultimate policy objective – that moving forward the company engage in "ethical corporate behavior" – is achieved.

13. In 2008, the DOJ issued the "Morford Memorandum," which it supplemented in 2010 with the "Grindler Memorandum," which provide guidance to DOJ's prosecuting attorneys on the "Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations" (DOJ Guidance).⁶ This DOJ Guidance recognizes the benefits of requiring an independent monitor in many DPAs and NPAs:

"The corporation benefits from expertise in the area of corporate compliance from an independent third party."

"The corporation, its shareholders, employees and the public at large then benefit from reduced recidivism of corporate crime and the protection of the integrity of the marketplace."

Add to this the obvious benefit to the government itself – that the monitor provides a responsible and credible independent reporting resource, *at the corporation's expense*, to help establish that the conditions imposed by the government in the DPA or NPA are being met.

14. The DOJ Guidance on monitoring sets out ten basic principles to support the success of monitoring engagements; we have found the following to be particularly important:

- That the monitor be highly qualified and respected and free from potential or actual conflicts of interest, so that the government's decision to agree to the DPA and the parties' selection of the monitor instills confidence for the regulator and the public at large. In the UK system, this would appear to be particularly important, where, unlike the US system, the DPA must be approved by the Court which is tasked with ensuring the DPA is in the larger public interest.
- That the monitor be independent of both the corporation and the government, so that while the monitor is responsible for monitoring compliance, making recommendations, and reporting its findings to both parties, ultimate responsibility for complying with the DPA and for an ethical culture remains with the corporation, and ultimate decision-making on whether the corporation is meeting its obligations or should be further disciplined remains with the government. In this way neither the corporation nor the government has delegated their legal responsibilities or authority.

15. How does monitoring result in a stronger corporation with a better ethical and compliance culture, program and controls? The answer is that most monitoring engagements include an assessment of the corporation's compliance program and ethical culture, recommendations for improving the

⁶ Morford Memorandum: www.justice.gov/sites/default/files/dag/legacy/2008/03/20/morford-useofmonitorsmemo-03072008.pdf; Grindler Memorandum: www.justice.gov/sites/default/files/dag/legacy/2010/06/01/dag-memo-guidance-monitors.pdf

program and culture, and the requirement that most if not all recommendations be implemented. In successful monitoring engagements, the corporation will adopt at a minimum:

- A code of business conduct and ethics, and appropriate policies and procedures, that apply to everyone in the corporation, from the Board of Directors, to the CEO and Senior Leadership, to entry-level staff, and may also apply to the corporation's suppliers, vendors and business partners. Typical policies and procedures recommended by monitors address, among other issues: how employees and others can raise concerns within the corporation, non-retaliation, preventing corruption and bribery, discrimination and harassment, and conflicts of interest;
- A dedicated internal Compliance Officer overseeing a sufficiently resourced and accessible compliance department and staff, that includes an internal auditing regimen, and that is responsible for investigating, remediating and reporting compliance violations;
- A robust compliance training program that not only educates the workforce on the corporation's compliance policies and procedures, but also instills an ethic of compliance and integrity throughout the organization.

We have little doubt that Lord Gold's assessment of the Rolls-Royce culture and compliance program, his recommendation of these types of enhancements, as well as others, to Rolls-Royce's compliance program, and his oversight of the implementation of these enhancements was a critical factor in the SFO's recommendation, and Sir Brian's determination, that resolving the *Rolls-Royce* criminal matter through a DPA was proper.

16. We have seen that the DOJ in its FCPA and other anti-corruption and anti-fraud efforts has demonstrated how effective DPAs and NPAs which incorporate independent monitoring can be in enhancing government enforcement capabilities and "changing the ethical culture" of specific corporations and the business community as a whole. We believe that the UK framework of DPA and monitoring protocols and guidelines, which are very similar to those in the US, can prove equally as effective in enhancing Bribery Act enforcement. To that end, we would encourage UK prosecutors to continue to consider, as in the *Rolls-Royce* case, the significant value that requiring an independent monitor can bring to a proposed DPA. Requiring an independent monitor can be essential in demonstrating that the DPA is in the public interest, and instilling confidence that the DPA will ensure that the corporation's remedial and compliance efforts are real, effective and sustainable.

VOLUNTARY MONITORING AND RECENT GUIDANCE ON MONITORING BEST PRACTICES

17. This submission has focused on so-called "mandatory" monitoring – monitoring required by a government agency as a condition of a DPA or similar agreement with a corporation. We have described how monitoring is successfully incorporated into DPAs and other settlements between government regulators and businesses. However, more and more,

corporations and their leadership are engaging monitors on a “voluntary” or “proactive” basis to independently assess their ethics and compliance programs and cultures, to make recommendations on enhancements to those programs, and to monitor implementation of those changes. Significantly, while a monitor was required by the SFO in the *Rolls-Royce* case, it was likely just as important, if not more significant, to Sir Brian’s approval of that DPA that Rolls-Royce had, well in advance of the DPA, “appointed Lord Gold (an expert in this area) to conduct an independent review of its ethics and compliance procedures and to act on an ongoing basis as a ‘quasi-monitor’ of its compliance programme.”

18. It would seem obvious that incentivizing corporations to voluntarily and proactively engage independent experts to assess their compliance programs and ethical cultures and to make real, effective and transparent changes makes good public policy and is a meaningful step in the direction of reducing corporate misconduct and recidivism. Both the DOJ’s Enforcement Policies and the UK’s DPA Code of Practice recognize that the existence of a proactive and effective compliance program can weigh in favor of deferring or avoiding criminal prosecution. In our view, if the *Rolls-Royce* case and Sir Brian’s approval sends the message to corporate leadership that they may avoid prosecution and harsher penalties if they voluntarily take meaningful proactive steps to assess and improve their compliance programs, that is a valuable message. In the US, we have seen the expansion of corporate compliance and ethics programs across industries. For the UK, in the long run such an approach should result in stronger corporate ethical cultures industry-wide; greater integrity in corporate governance; improvements in public confidence in the business environment; and the preservation of government resources to pursue investigation and prosecution of a smaller universe of serious offenders.

19. Consistent with this view, in 2015, the American Bar Association (ABA) House of Delegates adopted Standards for Criminal Justice for Corporate Monitors (ABA Monitors Standards)⁷, and in 2017, the Ethics and Compliance Initiative (ECI) Benchmarking Group on Monitors, issued a “Best Practices Paper” (ECI Best Practices Paper).⁸ Both the ABA Monitors Standards and the ECI Best Practices Paper set out comprehensive standards and recommendations for maximizing the effectiveness of “mandatory” and “voluntary” monitoring engagements, from the selection of the monitor through the transition out of the monitoring relationship.⁹ Donald Stern, AMI’s Managing Director of Corporate Monitoring & Consulting Services, is a former US Attorney responsible for enforcing federal anti-corruption and anti-fraud laws in the District of Massachusetts, and participated in drafting the ABA Monitors Standards. Eric Feldman, AMI’s Senior Vice President, Managing Director, Corporate Ethics & Compliance Programs, is a former Inspector General of the National Reconnaissance Office, and is the ECI’s Monitors Benchmarking Group Co-Chair; he had a leading role in writing the ECI Best Practices Paper.

⁷ www.americanbar.org/content/dam/aba/images/abanews/2015annualresolutions/108a.pdf

⁸ www.ethics.org/monitors-report-best-practices

⁹ The ABA is the preeminent association of attorneys licensed in the United States with over 400,000 members. ECI’s membership represents more than 450 organizations, and comprises three nonprofit organizations: the Ethics Research Center, the Ethics & Compliance Association, and the Ethics & Compliance Certification Institute.

The ABA Monitors Standards and ECI Best Practices Paper draw from the DOJ's guidance and the expertise of senior ethics and compliance executives.

20.If the Select Committee would like to learn more about how independent monitoring works, we would urge you to review the ABA Monitors Standards and ECI Best Practices Paper. The following excerpt from the ECI's Conclusion provides a sense of the growing acknowledgment of the value of independent monitoring:

“Executed in an optimal way, monitoring can help ensure the effectiveness of an organization's compliance risk management efforts and help enhance an organization's overall ethical culture.”

CONCLUSION

21.In our experience as a firm that has been appointed a monitor by the DOJ, the Department of Defense and many other federal, state and municipal government agencies and that has observed the impact of monitoring of DPAs and other agreements, it is clear to us that independent monitoring has resulted in stronger companies with better ethical and compliance cultures, programs and controls. This view has also been repeatedly expressed by the monitored companies themselves.

22.To that end, we share an excerpt from a letter sent to AMI recently by the CEO of a multi-national corporation at the close of a multi-year monitorship:

“[W]hen we originally met in our [office], you asked me what I hoped to get out of our relationship. My response was simple and clear – for [our company] to learn from our collaboration and to come out a better and stronger company. Today, I confirm that [our company] is indeed a better and stronger company because of our collaboration . . .”

23.We hope this evidence proves helpful to the Select Committee, and we stand ready to provide any additional information, including oral evidence, to further describe our specific experiences with independent monitoring of DPAs, NPAs and other criminal, civil, and administrative agreements resolving FCPA and other matters.

26 July 2018

Richard Alderman – Written evidence (BRI0065)

I was the Director of the SFO from 21 April 2008 to 20 April 2012. I have been following the evidence given recently to the Committee with interest. There is one point that I would like to make. This concerns a possible opinion procedure.

An opinion procedure was introduced in my time as Director of the SFO. This was in 2009. It was covered in the publication concerning the approach of the SFO to cases of overseas corruption¹⁰. There were a few paragraphs in this publication about opinions. You will appreciate that these reflected circumstances in 2009. The procedure was withdrawn by my successor.

The procedure was influenced by the opinion procedure of the US DOJ. It was also influenced by the opinion procedure introduced by the Inland Revenue some 25 years ago and the approach of the courts concerning the circumstances in which Revenue opinions would be binding.

My recollection of the effect of the SFO's procedure was that it was infrequently used. This was also the experience of the US at the time. I can recall only one formal opinion. I can recollect also however one prominent international group with a very high standard of anti-corruption which came to consult the SFO about a proposed takeover of a foreign group with many corruption issues. This was in line with paragraphs 18-20 of the published guidance. My recollection is that the group found the SFO approach to be helpful and pragmatic.

The purpose of this email is to ensure that the Committee has a complete picture of an opinion procedure and the SFO.

Richard Alderman

29 October 2018

¹⁰ https://www.millerchevalier.com/sites/default/files/resources/uk_sfo_guidance.pdf

Edward Argar MP- Supplementary written evidence (BRI0064)

I am writing further to the commitment I made at the oral evidence session your Committee held on Tuesday 4 December 2018, to write on the issue of the differences between prosecution consent in Bribery Act cases, in England & Wales and Scotland.

Section 10 of the Bribery Act 2010 reflects normal drafting practice in England & Wales. Other recent examples, with similar consent provisions, include section 18 of the Borders, Citizenship and Immigration Act 2009; sections 3, 155, 173, 196 and 224 of the Investigatory Power Act 2016; and section 197 of the Data Protection Act 2018.

It is not drafting practice to provide for the consent of the Lord Advocate before proceedings are instituted for an offence in Scotland. That drafting practice reflects the constitutional and legal position in Scotland, which is quite different from the position in the other two jurisdictions of the UK. In Scotland, the Lord Advocate has had universal title to prosecute crime in the public interest since 1587. All prosecutions on indictment are undertaken in his name; and all summary prosecutions are brought by procurators fiscal who are subject to his direction. The Crown Office and Procurator Fiscal Service, for which the Lord Advocate holds ministerial responsibility, is the sole public prosecuting authority in Scotland. A private prosecution may be brought in Scotland only with the concurrence of the Lord Advocate, or, if he refuses concurrence, with the approval of the Court. The Court has recently made clear (*Stewart v. Payne* 2017 JC 155) that it will only grant approval in exceptional circumstances, and that this would be likely to occur only if the Lord Advocate's decision not to prosecute represented an egregious or outrageous failure in the exercise of his public duty. The functions of the Lord Advocate as head of the system of prosecution and investigation of deaths in Scotland are specifically safeguarded by the Scotland Act 1998, which requires him to exercise those functions independently of any other person.

By contrast, in England & Wales, the establishment of a public prosecution service is a relatively recent creation, and private prosecutions remain competent and not uncommon. The public interest in ensuring that prosecutions are brought on a justifiable basis is safeguarded by the power of the Director of Public Prosecutions to take over a private prosecution for the purpose of discontinuing it: see, generally *R (Gujra) v. CPS* [2013] 1 AC 484.

In relation to some offences, of which section 10 of the Bribery Act is an example, that public interest is further protected by requiring the consent of the DPP (or the Director of the SFO) before proceedings may be instituted. This requirement is not necessary in Scotland, where all prosecutions are brought by prosecutors acting in the public interest, and subject to the direction of the Lord Advocate.

During the passage of the Bribery Bill, there was some discussion about the purpose of section 10, in the context of an amendment moved by Lord Henley

which, if agreed, would have meant that it would continue to be the Attorney General who would have to consent to prosecute, as had been the case in the 1906 Act. (Hansard, HL Vol. 716, Part No. 21, Column GC66 et. seq.: <https://publications.parliament.uk/pa/ld200910/ldhansrd/text/100107-gc0006.htm>).

Lord Henley, and Lord Mackay of Clashfern thought it was important that a person making decisions in this area should be accountable to Parliament (Column GC67). Baroness Whitaker surmised that the purpose of the original provision in the 1906 Act was "to prevent irresponsible private prosecutions" (Column GC68-69). Lord Hodgson of Astley Abbotts noted that there were at least three possible routes by which a prosecution could be launched, and a risk of different thresholds of prosecution being in operation (Column GC 70). There seems to have been broad agreement by members of the Committee that there was a need for a consent provision, but the question was the level at which the consent should be given. Lord Bach stated that the purpose of the consent provision was "to ensure... consistency in prosecution decisions" (Column GC71).

The constitutional arrangements for the prosecution of crime in Scotland address all of these concerns. There is a single public prosecution authority. All prosecutors within the system in Scotland apply the Scottish Prosecution Code, prescribed by the Lord Advocate, and other directions and instructions given by the Lord Advocate. There is no risk of irresponsible private prosecution. The Lord Advocate is accountable to the Scottish Parliament for the exercise of his functions. It is, within the constitutional structures applicable in Scotland, entirely a matter for the Lord Advocate to put in place systems for the effective prosecution of crime. The practical arrangements which apply to Bribery Act offences and which have been explained by the Lord Advocate to the Committee, are such as to ensure that decisions are taken at the appropriate level, and in a manner which should ensure a consistent, robust, effective and fair approach to the prosecution of these offences.

As I made clear to the Committee in my oral evidence to their question on the level of consent in Bribery Act cases in England and Wales, it was a Parliamentary decision that the high bar which applied under previous Bribery statutes should be maintained under this Act given the difficult and sensitive considerations that would normally arise. The prosecution agencies have confirmed in separate evidence to the Committee that given the fact that Bribery has never been a high-volume offence, this approach has operated effectively to date.

Edward Argar MP

14 January 2018

The Association for Financial Markets in Europe – Written evidence (BRI0012)

General comments

1. The Association for Financial Markets in Europe (AFME)¹¹ is grateful for the opportunity to provide some brief comments in response to the call for evidence by the House of Lords Select Committee on the Bribery Act 2010 (the Act).
2. We welcome the UK Government's efforts to address bribery and, in particular, the introduction of the Act. We believe that this has enhanced the UK's reputation as a world leader in tackling bribery, corruption and financial crime and therefore as a welcome place for business, in particular the financial services sector.
3. We also welcome the UK Government's initiative to engage with business to review the operation of the Act. This assists in avoiding any unintended consequences of the original legislation and allows businesses to comply with the legislation in an effective manner.

Specific comments

Question 3 (Guidance): Is the statutory guidance on the Bribery Act 2010 sufficient, clear and well-understood by the companies and individuals who have to deal with it? Should alternative approaches be considered?

4. We note that in 2010, the UK's Ministry of Justice published a document¹² entitled "Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing". We believe that the commentary and examples provided in the guidance on the six principles relevant for prevention procedures under Section 7 of the Act (Failure of commercial organisations to prevent bribery) have been helpful. However, the Ministry of Justice guidance is pitched at a high level.
5. In May 2014, the BBA published the Anti-Bribery and Corruption Guidance 2014¹³ which sets out in much greater detail practical guidance for the banking sector in complying with the Act and meeting the FCA's obligations in respect of the Act. Our members note that this has been a particularly helpful source of guidance and we suggest therefore that the Ministry of Justice may wish to refer to this publicly as a recognised source of relevant guidance.

¹¹ AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society. AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia. AFME is registered on the EU Transparency Register, registration number 65110063986-76.

¹² Available [here](#).

¹³ Available [here](#).

Question 4 (Challenges): How have businesses sought to implement compliance programmes which address the six principles set out in the Ministry of Justice’s guidance on the Bribery Act 2010? What challenges have businesses faced in seeking to implement their compliance programmes? Are there any areas which have been particularly difficult to address?

6. Our members have taken very seriously their responsibilities under the Act and sought to adopt robust compliance programmes based on the six principles set out in the Ministry of Justice’s guidance. When the Act was first introduced, members will have undertaken a risk assessment to prioritise the areas of risk within their businesses. They will then have developed and implemented internal compliance programmes addressing the areas of risk. This is likely to have involved issuing communications and implementing educational and training programmes for employees. Members will review and update their procedures on a regular basis.
7. An important area which businesses have addressed is their approach to third party associated persons. Businesses have undertaken a risk-based review of these relationships and sought to implement appropriate measures to address any risks involved.

Question 6: Is the Act having unintended consequences?

8. Members have noted that there is currently uncertainty on the application of the Act to the acceptance of corporate hospitality.

Question 8 (International aspects): How does the Bribery Act 2010 compare with anti-corruption legislation in other countries? Are there lessons which could be learned from other countries?

9. Members note that the risk-based approach required under the offence of bribing an overseas public official in the US (via the Foreign Corrupt Practices Act) works well and is worthy of further study.

Question 9 (International aspects): What impact has the Bribery Act 2010 had on UK businesses and individuals operating abroad?

10. Members have noted the extra-territorial scope of the Act, and, therefore, that the impact of the Act on their operations outside of the UK has been considerable. For example, the “reasonable procedures” required for the purposes of Section 7 of the Act have to be implemented on a global basis. If a global company has a small presence in the UK and a bribe is paid outside the UK and without the involvement of any UK based staff, the UK operation may still be within scope of the UK offence.
11. We would be happy to discuss any of the above points in greater detail if helpful.

Adam Willman

Director, Policy

31 July 2018

BAE Systems plc – Written evidence (BRI0040)

1 Is the Bribery Act 2010 deterring bribery in the UK and abroad?

In our view the Act has played a material role in encouraging UK-based companies to enhance their anti-bribery and corruption procedures and to assume responsibility for the conduct of employees and associated third parties. In addition, the Act has encouraged companies to hold to account suppliers and other commercial counter-parties for their own anti-bribery procedures. This has come about both through the direct impact of the Act on UK-based companies and the expectations of enhanced standards of compliance which the Act has created amongst corporate stakeholders such as institutional shareholders, employees and the wider public.

2 Is the Bribery Act 2010 being adequately enforced? If not, how could enforcement be improved? Do the Serious Fraud Office and the Crown Prosecution Service have the right approach and the resources they need to investigate and prosecute bribery offences effectively?

Recent DPAs and funding made available to the SFO have sent a strong enforcement message. That said, corruption cases take time to investigate and we think that it is perhaps too early to make any detailed observations on the adequacy of the Act's enforcement.

3 Is the statutory guidance on the Bribery Act 2010 sufficient, clear and well-understood by the companies and individuals who have to deal with it? Should alternative approaches be considered?

We consider the Bribery Act and its accompanying guidance to be well written and clear. We consider the guidance to be helpful, particularly in relation to corporate entertainment and the interaction of section 1 and section 6 of the Act.

4 How have businesses sought to implement compliance programmes which address the six principles set out in the Ministry of Justice's guidance on the Bribery Act 2010? What challenges have businesses faced in seeking to implement their compliance programmes? Are there any areas which have been particularly difficult to address?

For our part, we have dedicated teams comprising experienced lawyers and compliance professionals and a network of over 160 ethics officers. We have a well-established compliance programme underpinned by an uncompromising tone from the top.

Our commitment to never offer, give or receive bribes or inducements is clearly set out in our Code of Conduct and specific anti-corruption policies address the following key areas:

Advisers Policy – governs the appointment, management and payment of third parties who are engaged to assist with our sales and marketing activities. External advisers to the business are assessed and approved by our Business Development Adviser Panel whose members include senior external lawyers;

Gifts and Hospitality Policy – governs the reasonableness and proportionality of offering or receipt of gifts or hospitality;

Conflict of Interest Policy – ensures that personal conflicts of interest do not impair employees' judgement and damage the Company's integrity and interests; and
contd...

Facilitation Payments Policy – ensures that the Company and its employees do not make facilitation payments.

Other policies including our Finance, Community Investment, Procurement, Export Control Lobbying and Offset Policies include measures to address bribery and corruption risks and significant investment has been made in Business Conduct Training and our Ethics Helpline. Our compliance programme is subjected to regular internal and external audits and our yearly progress, priorities and future direction are summarised in our Annual Report.

5 What impact has the Bribery Act 2010 had on small and medium enterprises (SMEs) in particular?

This question is best addressed by representatives of the SME sector.

6 Is the Act having unintended consequences?

Not as far as we are aware. We think that the improved compliance environment encouraged by the Act has clarified the standards to which businesses are being held and our policies and processes increase the confidence of our stakeholders and customers in our business.

7 Has the introduction of Deferred Prosecution Agreements been a positive development in relation to offences under the Bribery Act 2010? Have DPAs been used appropriately and consistently? Has their use reduced the likelihood that culpable individuals will be prosecuted for offences under the Act?

DPAs appear to have been a positive development from an enforcement perspective, encouraging cooperation between commercial organisations and authorities and encouraging voluntary notification of issues.

8 How does the Bribery Act 2010 compare with anti-corruption legislation in other countries? Are there lessons which could be learned from other countries?

In our experience, the Act is widely regarded as a gold standard in anti-corruption legislation. Given its longer history, the US Foreign Corrupt Practices Act 1977 is still regarded as the most consistently enforced anti-corruption legislation.

9 What impact has the Bribery Act 2010 had on UK businesses and individuals operating abroad?

We have taken a firm and consistent approach towards our commercial counterparties in the UK and abroad with regard to the due diligence, policy and compliance standards that we require. We have found that this approach,

together with plain explanations of the requirements of the Act and other applicable laws, assists our engagement with such counterparties and has not had a detrimental impact on our ability to operate in the countries in which the Company does business.

9 August 2018

Baker McKenzie – Written evidence (BRI0030)

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Introduction

Baker & McKenzie LLP makes this submission in response to the call for evidence by the House of Lords Select Committee on the Bribery Act 2010 to share our reflections on the operation and effectiveness of the UK Bribery Act 2010 (the "**UKBA**"). This response reflects our own extensive experience of the UKBA to date and the experiences of some of our clients.

Responses

1. *Is the Bribery Act 2010 deterring bribery in the UK and abroad?*
 - 1.1 It is our experience that, for those companies that fall within the jurisdiction of the UKBA, the legislation has been fundamental in changing attitudes towards bribery and corruption, compliance and ethical conduct more generally. In particular, the awareness of, focus on and funding for anti-bribery and corruption compliance procedures and training have increased significantly, and the mechanisms through which concerns about bribery-related conduct can be raised internally have become more sophisticated and better understood. We have insufficient evidence to say whether bribery itself is being deterred as a result of these developments, although that outcome seems likely.
 - 1.2 One client commented that the UKBA and the associated guidance are helpful in creating a global compliance policy because the law is sufficiently broad that Compliance Officers can feel confident that compliance with the UKBA will help towards compliance with other local anti-bribery and corruption requirements.
 - 1.3 In our experience, the main driver behind this shift in attitude and approach has been the very broad jurisdictional scope of the section 7 "*failure to prevent*" offence. In particular, the broad definition of "*associated person*" has required companies to carefully review their engagement with third parties such as agents and consultants, especially those in overseas territories. It is apparent that such reviews are identifying bribery committed by those third parties on behalf of the companies they serve.

- 1.4 The section 7 offence has focused attention on corporate liability and caused a cultural shift in corporate culture. However, we consider it may take more time for that change in corporate culture to filter down to individuals, particularly in some less developed jurisdictions. In other words, we consider there is a time-lag between the compliance improvements we have seen at a corporate level and the tendency of employees to comply with their employer's expectations. Until high profile individual prosecutions become more regular, there is a risk that individuals will view compliance with the UKBA as a "corporate" issue, rather than one for which they are personally responsible and, potentially, may be liable. Additionally, we consider there remains a gap between the practical implications of the UKBA and the realities for the operating companies which are seeking to achieve the objectives of the company. Bridging this gap will be an ongoing challenge for companies going forward.

Enforcement

2. *Is the Bribery Act 2010 being adequately enforced? If not, how could enforcement be improved? Do the Serious Fraud Office and the Crown Prosecution Service have the right approach and the resources they need to investigate and prosecute bribery offences effectively?*
- 2.1 Our view is that, to date, the UKBA is not being adequately enforced¹⁴. In large part, this is because of the duration of SFO investigations (which we understand, based on our experience and information in the public domain, still take an average of four and a half years). We consider that resourcing and funding are key contributors to this delay. This delay creates real uncertainty for companies and individuals involved in SFO investigations. Individuals and companies are entitled to justice within a reasonable time, which we fear they are being denied by the current length of SFO investigations. We appreciate that some aspects of an SFO investigation necessarily take time to progress, e.g. obtaining evidence from overseas authorities. However, there are many other aspects of SFO investigations for which the reasons for delay are less clear. In our experience, the delay in resolving SFO cases is acting as a major deterrent to companies self-reporting breaches of the UKBA.
- 2.2 Given the significant impact that bribery investigations have on companies and their stakeholders (e.g. employees, shareholders, suppliers and customers) and their ability to conduct business, particularly where the company is listed, the current delay in resolving cases can lead to a disproportionate adverse impact on a company's business and compromise the quality and efficacy of the investigation.
- 2.3 The length of time it takes to resolve cases also does not account for the evolution of companies (i.e. often, the individual wrongdoers have left the organisation by the time the investigation is concluded, the company has undergone a wholesale cultural change, compliance processes have improved and new management may have been appointed etc.). The delay can therefore call into question the public interest in prosecuting companies several years after an incident has first been brought to light and tainting their reputation, even though they may already have undergone wholesale improvements in their compliance policies and attitude to compliance.
- 2.4 We also have concerns about the level of guidance offered by the SFO during their investigations, particularly when the company is cooperating. We believe it would be in the public interest for the SFO to offer more guidance and input into an internal

¹⁴ Our experience in this area mostly derives from interaction with the UK Serious Fraud Office (the "SFO").

investigation which is being conducted in full cooperation with the SFO, to ensure that the SFO is provided with the information it requires to enable it to make decisions.

- 2.5 Some of our clients expressed frustration with a lack of enforcement activity under the UKBA, particularly because lack of prosecutions risk undermining the good faith work being undertaken by a number of companies to combat bribery in all its forms.
- 2.6 There have been significant developments in the cooperation between agencies and jurisdictions when it comes to anti-bribery enforcement. However, some clients expressed frustration that, in the case of multijurisdictional investigations, there is still insufficient communication between agencies, such that some of our clients face multiple investigations by multiple agencies in relation to the same conduct. This is unfair and inefficient for all concerned, and is something that has been recently recognised by the US Department of Justice. We would encourage the SFO to be a strong voice in any debate recognising and addressing these issues.
- 2.7 From a UK standpoint, some believe that one solution to the aforesaid challenges may be to have a single prosecuting body that is primarily responsible for bringing prosecutions for financial crime, similar to the US model. This would enable the single body to issue a clear statement of policy and resourcing without the risk of inconsistencies and uncertainties in approach between the different agencies. However, others believe that a robust, properly-funded and resourced SFO is a better, more cost-effective means of enforcing the UKBA. Either way, resourcing, funding and better dialogue between the SFO and self-reporting companies are the keys to ensuring shorter investigations and, therefore, more effective enforcement of the UKBA.

Guidance

3. *Is the statutory guidance on the Bribery Act 2010 sufficient, clear and well-understood by the companies and individuals who have to deal with it? Should alternative approaches be considered?*
- 3.1 Responses to this question and opinions within our firm and our clients differ. Some view the guidance as perfectly adequate, helpful and clear.
- 3.2 Others felt that the guidance is not sufficiently clear and many questioned whether the result of this lack of clarity was a continued disconnect with the written procedures which are adequate on the surface, but which do not filter down to the front line business to become integrated into corporate culture.
- 3.3 Further guidance would also be of assistance as to the meaning of "*carrying on a business or part of a business*" in the UK for the purposes of section 7 of the UKBA. The guidance available on this at present is causing significant uncertainty for our clients, many of whom operate internationally.
- 3.4 Many clients are of the opinion that the current guidance is too theoretical and does not properly address concerns companies may have. Other clients are concerned at the lack of practical guidance on the need for a "*culture*" of compliance and the blend between culture and policies and procedures. There is also a concern that the guidance is already out of date and does not reflect current market practice or behaviours. A more responsive form of guidance should therefore be considered, for example working with industry to identify scenarios to form a "Q&A" style guidance. Comparisons can be drawn with the US system, which has taken a number of steps in recent years to provide greater clarity on what is required for a compliance programme to be viewed as

effective. Ultimately, the guidance should be provided in a practically applicable way for companies to understand what they can do on a day-to-day basis.

- 3.5 This issue is particularly evident in the *Skansen Interiors* Judgment which elicited questions and concerns from our clients over what equates to "*adequate procedures*", and particularly whether there are genuine benefits to self-reporting. The guidance on adequate procedures is not sufficiently clear and the discrepancies in DPA judgments (discussed in response to question 7, below) have not helped companies determine the level of compliance procedures required of them.
- 3.6 In summary, updated and revised guidance on the UKBA would be appreciated by our clients, especially as to what amounts to "*carrying on a business or part of a business in the UK*" and "*adequate procedures*". This guidance should be drafted in collaboration with companies so that it can be as practical, effective and helpful as possible.

Challenges

4. *How have businesses sought to implement compliance programmes which address the six principles set out in the Ministry of Justice's guidance on the Bribery Act 2010? What challenges have businesses faced in seeking to implement their compliance programmes? Are there any areas which have been particularly difficult to address?*
- 4.1 We have seen companies significantly increase the funding and resourcing available for compliance professionals in response to the UKBA. The primary reasons for this are typically to: (a) enhance procedures, in line with the six principles and accepted international standards of best practice; and (b) reduce risk. However, this is clearly an iterative and ongoing process and compliance programmes continue to be improved and changed in order to attempt to meet the requirements of the UKBA and "*adequate procedures*". This continued development of compliance processes is another reason why updated guidance on the UKBA would be helpful.
- 4.2 Challenges faced by our clients when implementing compliance programmes include:
- (a) the costs associated with ensuring there are the resources necessary for implementation to be effective;
 - (b) the demand placed on existing resources to focus on and implement new compliance procedures;
 - (c) counterparty due diligence and testing responses provided by counterparties;
 - (d) the corresponding pressure put on counterparties with which companies transact or do business (in the form of due diligence procedures and questionnaires etc.);
 - (e) the challenges of integrating new subsidiaries and new businesses which approach compliance in a different way;
 - (f) the lack of clarity around what will be considered proportionate for different sized businesses; and

- (g) the disconnect between what is considered a policy and what is practically and fundamentally implemented across the business (i.e. policy versus culture).

4.3 Some companies operate in jurisdictions where standards of anti-bribery compliance differ. In these jurisdictions, companies remain uncertain how to navigate around differing standards whilst remaining in compliance with the UKBA because of uncertainty about various aspects of it, including what constitutes "*adequate procedures*". Where there has been uncertainty, the response from the SFO is that companies should not operate in such markets. This is an unhelpful response for our clients, many of whom have no choice but to operate in certain markets either because of the products they produce, the sector in which they work or the contracts in which they are engaged. It is simply not feasible for our clients to just walk away from certain markets, which could have a dramatic adverse impact on the British economy. It would instead be more helpful for the government and the SFO to engage with companies to establish workable guidance that is effective in combatting bribery, but also gives our clients greater certainty as to what is expected of them.

5. *What impact has the Bribery Act 2010 had on small and medium enterprises (SMEs) in particular?*

5.1 The significant uplift in compliance overheads has a greater impact on SMEs than larger companies. Guidance on the procedures SMEs in particular are required to implement may assist in focusing attention and managing costs in a fair and proportionate way.

6. *Is the Act having unintended consequences?*

6.1 Some of our clients have not seen unintended consequences arising from the UKBA but have instead seen the intended, positive effect of companies conducting risk assessments and enhancing compliance programmes. However, some were of the view that the UKBA is acting as a disincentive to companies with a UK nexus to operate in high-risk jurisdictions due to the cost of implementing adequate compliance procedures in those jurisdictions. Clients are finding themselves losing out to overseas competitors, who are not perhaps subject to the UKBA and who are less likely to be prosecuted by their "home" prosecutors. One client thought that, post-Brexit, when the UK will seek to do more business with the rest of the world, such disadvantages may become more acute.

6.2 There was also some uncertainty initially about how appropriate business practices, such as gifts and hospitality and structures which return value to customers (e.g. rebates), were going to be viewed by prosecutors. Additionally, concern was expressed that although compliance procedures are being implemented, there is a risk that some companies fall back on treating it as a 'tick-box' exercise and do not deal with the cultural aspects. This can create a false sense of comfort regarding accountability.

6.3 Some companies have found that the increased level of due diligence can create difficulties during procurement processes because of the compliance pressure placed on counterparties.

Deferred Prosecution Agreements

7. *Has the introduction of Deferred Prosecution Agreements (DPAs) been a positive development in relation to offences under the Bribery Act 2010? Have DPAs been*

used appropriately and consistently? Has their use reduced the likelihood that culpable individuals will be prosecuted for offences under the Act?

- 7.1 It is our view that DPAs are a positive development. The use of DPAs has the potential to expedite the investigation process, save the costs of pursuing a prosecution and alleviate the burden on SFO resources. However, in our view this potential is not yet being reached and consistency in approach has only been shown to a degree. For example, concern was expressed over the difference in the approach taken to self-reporting in the *Rolls Royce* and *Skansen Interiors* cases, particularly in comparison to the approach taken in *Standard Bank* and the public statements made by key SFO individuals since the introduction of DPAs. More certainty is also required as to the benefits of self-reporting more generally, as fewer companies are seeing the overall benefits of it.
- 7.2 Steps should be taken to ensure that DPAs are seen as available for SMEs as well as large "too big to fail" corporates. It would be unfair and unjustified if DPAs only came to be associated with larger companies.
- 7.3 If the prosecutors' approach to DPAs is not consistent, companies will not be incentivised to cooperate and self-report and we are seeing this in our day-to-day practice. By way of example, precedent from cases to date suggests that companies that self-report currently have to wait several years before finding out whether they are eligible for a DPA. This does not serve to encourage cooperation. It would be far better if prosecutors would be prepared to indicate earlier in the process whether a DPA was going to be available (at least in principle). There is a fear that companies could be pressured into DPAs through the threat of prosecution, and concern that when considering whether or not to approve a DPA, the judge does not consider whether the investigation itself was fair.
- 7.4 Concern was also expressed in relation to the SFO's current approach to privilege, which is seen as threatening to undermine the fundamental principles of the protections which privilege provides. The uncertainty in the law around privilege, as well as the uncertainty around the extent to which, if at all, companies are expected to waive privilege in order to obtain maximum cooperation credit, is further dis-incentivising companies to self-report.
- 7.5 As set out above, in the context of a self-report and ongoing cooperation, it would be helpful if the SFO could provide more guidance on what is expected from organisations. General statements such as "*not doing anything that could prejudice any investigation that the prosecuting authority may wish to carry out*" are well understood. However, often there can be real uncertainty as to: (i) whether taking a particular step could prejudice an investigation; and (ii) if so, whether the perceived benefits of the step outweigh any possible prejudice to an investigation, such as conducting witness interviews with witnesses or suspects (particularly where they are external to the company). The US offers clearer guidance on what is expected from organisations. Clearer and more committed guidance from the SFO would provide greater certainty for organisations and is therefore likely to result in more self-reports.
- 7.6 On the question of the prosecution of individuals, it is our view that the likelihood of this occurring has not been reduced. On the contrary, the cooperation necessitated by the use of DPAs grants the SFO access to information which increases the likelihood of individual prosecutions and, in fact, forces companies to provide information and cooperate with the prosecutor in relation to the prosecution of individuals. This appears to be happening in practice because, as we understand it, three of the four agreed DPAs have resulted in investigations and/or prosecutions of individuals allegedly involved in wrongdoing. Additionally, DPAs operate as a separate and corporate-focused tool, which

does not negate the public and administrative pressure to hold individuals accountable where appropriate.

International aspects

8. *How does the Bribery Act 2010 compare with anti-corruption legislation in other countries? Are there lessons which could be learned from other countries?*

8.1 In many ways, the UKBA is seen as the gold standard for bribery legislation around the world. It sets the benchmark for stringent regulation, particularly with regard to the section 7 corporate offence of "*failure to prevent*". In response to this standard, a number of countries have or are adopting the UKBA and the DPA model used in the UK, including Ireland, Canada, South Africa and Bermuda.

8.2 That being said, there are key differences between the UKBA and legislation in some other countries. Notable differences are:

- (a) the Criminal Justice Reform Act in Singapore determines that companies must have self-reported and have adequate compliance procedures in place for a DPA to be considered. It does not include any guidance on what "*adequate compliance procedures*" might be; and
- (b) the Foreign Corrupt Practices Act (the "**FCPA**") in the US (in force some 30-plus years before the UKBA) has a more limited application than the UKBA and does not contain an equivalent defence to that provided under section 7.

8.3 It was the opinion of some that, if the aim of the UKBA is to increase prosecutions, its stringency (particularly in comparison to the FCPA) is beneficial. However, this can hinder business and increase the risk of companies operating in certain jurisdictions, such as MENA, sub-Saharan Africa and South Asia, where the risks of doing business are higher. For example, engaging an introducer, (which may be necessary in some jurisdictions in order for companies to participate in tenders), may now involve implementing sophisticated compliance procedures which hinder and delay the process.

8.4 For some of our clients, the stringency of the UKBA is a benefit as it allows companies to adopt a global policy which is of application to all entities within its group. It also assists companies with operations in emerging markets, which have shown appreciation for clear and strict anti-corruption policies. In markets where bribery is traditionally an issue, the credentials provided by complying with the UKBA operate to promote "clean" businesses.

9. *What impact has the Bribery Act 2010 had on UK businesses and individuals operating abroad?*

Our response to this question is covered in the responses to questions 6 and 8 above.

31 July 2018

Balfour Beatty plc – Written Evidence (BRI0045)

Overarching statement

Balfour Beatty is alive to the risks that exist in any industry where bidding for contracts takes place and where gaining a competitive advantage is important. As such, we have taken a proactive approach to ensuring that we comply with the Bribery Act. We have a Code of Conduct and a robust programme which includes training for all employees in behaving ethically and whistleblowing channels. We promote a culture of trust which instils confidence in those working for and with us to do the right thing and empowers them to challenge where others have not.

Balfour Beatty’s approach to bribery and corruption

The integrity of both our employees and our supply chain is something Balfour Beatty takes very seriously. We expect all those working for and with us to meet the highest standards of business conduct. Corruption and bribery are unethical and illegal. From false invoicing, bribery such as the giving of expensive gifts or payments or lavish entertainment, kick-back schemes, facilitation payments, opaque contracts, and the sale of sub-standard goods, bribery and corruption take multiple forms. These practices distort the market and undermine the law: they must be given no place in how the construction industry operates.

Balfour Beatty’s position is set out in its Code of Conduct¹⁵. The principle that guides us on this issue is that we will not offer, give or receive bribes, or make or accept improper payments to obtain new business, retain existing business, or secure any improper advantage, and we will not use or permit others to do such things for us.

Balfour Beatty’s Code of Conduct has been communicated to its employees, clients and supply chain and is posted on the company’s website. The company’s board and senior management actively lead the implementation of the Code. Our Code of Conduct training includes an annual assessment with a declaration of compliance. The training is tailored to different jurisdictions and risk groups (e.g. international Code, competition training). We also run workshops for a range of different groups across the business, including Project Managers, new starters, Joint Venture staff and graduates. In particular, our new starter programme includes access to the Code before starting and requires training to be completed within 30 days.

We continue awareness raising through a range of channels, including posters, newsletter articles, employee newspaper, blogs, Yammer, text messages and workshops. We also monitor this in number of ways. For example via staff surveys: in our most recent staff survey¹⁶, 95% of staff said they understand what is expected of them in the Code of Conduct; 84% agreed that they are

¹⁵ Balfour Beatty’s full Code of Conduct: <https://www.balfourbeattycodeofconduct.com>
Balfour Beatty’s Code of Conduct for our sub-contractors, suppliers and partners:
https://www.balfourbeatty.com/media/244806/balfour-beatty-code-of-conduct_2017.pdf

¹⁶ Balfour Beatty’s June 2018 staff survey: 69% of employees took part across the Group

encouraged to do the right thing at work; and 82% stated that they can challenge unethical, dishonest or unacceptable behavior.

We also have in place risk assessment and due diligence procedures which apply in relation to the appointment of agents, joint venture partners, sub-contractors and suppliers, and prior to tendering for projects in medium or high corruption risk markets. We procure materials, products and services only from suppliers and sub-contractors which agree to adhere to the same high standards as we operate to. Balfour Beatty aims to be transparent and accountable - and we expect the same of our suppliers. Our pre-qualification questionnaires and audits include questions about bribery to demonstrate to our supply chain what we expect of them. We ask questions as part of the procurement process and independently check publicly available information to verify what they have told us.

We believe it is better to miss out on business or lose money than act illegally or unethically, and we expect our suppliers to meet the same standards. We are committed to ensuring that those who provide goods and services to us do so with integrity and we make this clear in our contracts and dealings with them.

Balfour Beatty holds workshops with clients to share best practice and we make it clear that anyone in our supply chain who has a serious concern that something may not be consistent with the Code of Conduct should feel confident to raise it with Balfour Beatty senior management or using our whistleblowing channels. We will treat the issue seriously and follow it up conscientiously, discreetly and without bias.

We have a widely publicised confidential hotline: Speak Up¹⁷. This helpline is secure, confidential and independently operated. Employees, partners and suppliers can use this service to raise concerns about unethical conduct or possible breaches of the Balfour Beatty Code of Conduct and be assured that the issue will be investigated and dealt with appropriately. Investigations are carried out according to a standard investigations procedure. We will always support our suppliers for doing the right thing.

Responses to the Committee's areas of interest

1. Is the Bribery Act 2010 deterring bribery in the UK and abroad?

Although we are not able to comment beyond our own business as to whether the Act has changed behaviour, we do believe that it has raised awareness of the issues around bribery and corruption, especially amongst larger companies, many of which will have examined their own anti-bribery and corruption procedures in response to the legislation.

¹⁷ www.balfourbeattyspeakup.com

However, while we are clear that we expect those small and medium enterprises (SMEs) in our supply chain to act ethically and to comply with the Bribery Act, we are concerned that SMEs more broadly often remain unaware of the Act, or of its full extent. Where they are aware of it, they often do not have the resources to devise their own “adequate procedures” to mitigate against it happening either here or on their behalf anywhere in the world. To assist with this, we believe that SMEs would benefit from training. We go into more detail on this point in response to question 3.

One area where more could possibly be done is in the area of public procurement. The Government has huge buying power, which would enable it to make a significant difference in this area. At the moment, the Government asks for guarantees that bribery does not take place in either the company it is entering into a contract with, or in that company’s supply chain. We believe that there should be more checks to ensure compliance and Government should place more weight on scoring for those companies who can demonstrate a genuine compliance culture. Greater engagement from Government in this way would send a stronger signal to companies of all sizes that the issue is being taken seriously and is not merely a tick-box exercise.

2. Is the Bribery Act 2010 being adequately enforced? If not, how could enforcement be improved? Do the Serious Fraud Office and the Crown Prosecution Service have the right approach and the resources they need to investigate and prosecute bribery offences effectively?

As the Committee will be aware, the Serious Fraud Office (SFO) has a statutory obligation to investigate and prosecute cases involving serious or complex fraud which involves significant financial loss or economic harm. Although there is no longer a monetary threshold above which the SFO will investigate, in practice, the SFO focuses only on large-scale multinational bribery cases and has little appetite for smaller, domestic cases. The result is that there is a gap (which we believe has already been identified by the SFO and law enforcement) in that there is insufficient resource in policing generally to deal with economic crime which does not meet SFO criteria. Smaller domestic cases, which can nonetheless relate to bribery and fraud in the millions of pounds, can therefore go uninvestigated and therefore prosecuted. We therefore believe that there should be an increase in the resources being deployed to investigate/prosecute.

3. Is the statutory guidance on the Bribery Act 2010 sufficient, clear and well-understood by the companies and individuals who have to deal with it? Should alternative approaches be considered?

Balfour Beatty believes that the guidance on the Bribery Act is clear. However, as noted in response to question 1, many SMEs remain unaware of the legislation. It is our view that the Government should increase efforts to ensure that SMEs are aware of both the legislation and the available guidance, and that they understand what is required of them and how to devise appropriate procedures to ensure that they do not break the law.

Balfour Beatty has partnered with the Supply Chain School since 2013. The School is a collaboration between 75 clients, contractors and tier one

suppliers, operating largely in the construction industry, which have a mutual interest in building the skills of their supply chains. It is supported by the Construction Industry Training Board (CITB). The partners pay for the School via an annual fee, to ensure that its services are free for members. One of the values of the Supply Chain School is to share knowledge and resources. This takes place via a combination of e-learning and face-to-face sessions. We believe that the School could train the c.30,000 SMEs amongst its members in how to comply with the Bribery Act. Given that construction is among the industries where bribery and corruption are most likely to be an issue, this could have a significant positive impact. We are working with Government to overcome the barriers that currently exist to making this happen. These include budgetary issues. For example, while the partners fund the school and are happy to give their time and knowledge to develop content and materials for the training, further budget is required for additional costs, such as training the teachers and paying for invigilators.

4. How have businesses sought to implement compliance programmes which address the six principles set out in the Ministry of Justice’s guidance on the Bribery Act 2010? What challenges have businesses faced in seeking to implement their compliance programmes? Are there any areas which have been particularly difficult to address?

Balfour Beatty launched its own programme to ensure we were addressing these issues, in 2009. While we did not change our programme in response to the Bribery Act, we did closely examine the six principles to ensure we were addressing them, and we have kept that under regular review to ensure that our approach incorporates best practice.

The greatest challenge, in our view, lies in ensuring that our supply chain and partners are aware of and fully understand the legislation. We have robust procedures in place, are clear about the expectations we have of those we work with, and we undertake measurement and benchmarking to ensure they are working. For example, we have increased our whistleblowing cases from 7.1 to 11.6 cases per 1,000 employees¹⁸ (the global benchmark is 14) over a two-year period, showing that we can empower people to challenge, something which has been difficult in traditional industries. However, we do not think these is representative of the industry as a whole.

We also believe the protection of whistleblowers needs to be extended. Where a whistleblower is an employee and the issue complained of meets the statutory definition of a protected disclosure, the employee is protected from detrimental treatment as a result of raising the issue. This protection does not extend to protecting the identity of a whistleblower who is not an employee (for example, someone in our supply chain) nor to protecting them from victimisation. Offering greater protection to whistleblowers more generally may encourage more external parties to raise concerns.

5. What impact has the Bribery Act 2010 had on small and medium enterprises (SMEs) in particular?

¹⁸ <https://www.balfourbeatty.com/how-we-work/our-code-of-conduct/speak-up-helpline>

We are not able to comment specifically on the direct impact the Act as has on SMEs. However, as outlined above in response to questions 1 and 3, Balfour Beatty believes that this is an area where more awareness-raising and direct training would be helpful.

6. Is the Act having unintended consequences?

Balfour Beatty is not aware of any unintended consequences.

7. Has the introduction of Deferred Prosecution Agreements (DPAs) been a positive development in relation to offences under the Bribery Act 2010? Have DPAs been used appropriately and consistently? Has their use reduced the likelihood that culpable individuals will be prosecuted for offences under the Act?

Balfour Beatty believes that Deferred Prosecution Agreements (DPA) are a positive development and a useful tool in the fight against bribery and corruption. It is important to give companies the opportunity to acknowledge their failings and to be punished for them less severely than if they do not demonstrate full acceptance of their wrongdoing and a desire to make good on it. However, it is also important that DPAs are in no way an easy option for companies which have broken the law.

8. What impact has the Bribery Act 2010 had on UK businesses and individuals operating abroad?

Although the Bribery Act is likely to have had an impact on other companies, it did not make a significant difference to Balfour Beatty, as we already had a programme in place, as outlined above.

About Balfour Beatty

Balfour Beatty is a leading international infrastructure group. With 15,000 employees across the UK, Balfour Beatty finances, develops, delivers and maintains the increasingly complex infrastructure that underpins the UK's daily life: from Crossrail and Heathrow T2b to the M25, M60, M3 and M4/M5; Sellafeld and soon Hinkley C nuclear facilities; to the Olympics Aquatic Centre and Olympic Stadium Transformation.

Balfour Beatty is a member of the UK Anti-Corruption Forum (the Forum), which was established in 2004. The Forum is an alliance of UK business associations, professional institutions and companies with interests in UK and international construction. Its purpose is to promote effective and coordinated industry-led actions in order to reduce corruption, on both a domestic and international basis, and on both the supply and demand sides.

31 August 2018

British Exporters Association – Written evidence (BRI0034)

Overview of BExA

The British Exporters Association (BExA) is an independent national trade association representing the interests of the UK's exporters. Our membership is drawn from across the exporting community, including capital goods manufacturers and international traders (large corporates, MSBs, SMEs and Micro exporters), and their bank, credit insurance and other service providers. BExA seeks to promote the interests of its members and all UK exporters, with a particular focus on trade finance and export credit insurance.

BExA response to the above:

Whilst the focus of the review is understood, it is important to point out that BExA is keen to confirm its overall support for the Act. The desire to prevent and eradicate bribery and corruption is clearly of importance both here in the UK and across the globe.

Save for our overarching support for the Act, BExA would wish to highlight the support that HM Govt. needs to provide to companies of all size and industry sectors, such that they are able to adequately understand and deal with the requirements of the Act, and ensure that they are therefore able to mitigate bribery and corruption risk.

As a general rule, larger organisations have dedicated resources and experience, which enable them to interpret and apply the requirements of the Act. The majority of SMEs have limited resource and are therefore less able to give full focus to the requirements of the Act and may, as a result, be more prone to acting in line with "common business practices". These common business practices may, in some global jurisdictions, see some potential for bribery and corruption as a more accepted facet of doing business.

It is our belief that our members are very much supportive of the eradication of bribery and corruption, but thought needs to be given to highlight how businesses can compete effectively in jurisdictions where there is a greater degree of acceptance of B&C as a business practice. Furthermore, that support needs to be provided to the UK business community as a whole, and particularly SMEs who have limited resources and therefore have to contend with multiple competing priorities.

Providing good quality guidance and support to businesses to ensure they have procedures in place to prevent bribery and corruption, is vital and should be considered as key take away from this review.

There is also the opportunity for UK businesses to utilise the Act, and indeed the accompanying strong processes, protocols and good corporate governance which organisations create, to become a differentiating factor when doing businesses overseas. Using the strength of the UK legislation when overlaid with appropriate individual business due diligence and due process, can provide reassurance and

differentiation to overseas suppliers or customers, thereby enabling contracts to be secured which may not otherwise have been the case. Focus needs to be given to support businesses to use “best in class” standards, legislation, regulation, etc. as a means of leverage business opportunity rather than restricting and constraining business.

We hope the above is input of value and would be happy to further expand if requested to do so.

Marcus Dolman
Co-Chairman – Large Exporters

Geoffrey de Mowbray
Co-Chairman - SME & Micro Exporters

31 July 2018

City of London Police - Written evidence (BRI0022)

Memorandum from the City of London Police

Submitted by the Office of the City Remembrancer

1. City of London Police is responding to this inquiry as the National Police Chiefs' Council Lead for Economic Crime.
2. City of London Police's Economic Crime Academy has provided anti-bribery training to over 400 investigators from 39 law enforcement, public sector and corporate organisations since 2013. City of London Police was part of the working group that developed the BS10500 Anti-Bribery Management System and promoted its drive towards an international (ISO) standard.
3. City of London Police is supporting the Cabinet Office project to develop a Counter Fraud Profession in government. This included publication of Counter Bribery and Corruption Standards which detail both the organisational and individual standards to be met to combat corruption.

Training and knowledge

4. Following the implementation of the Bribery Act very few police forces were given training and advice so knowledge of legislation was low. This resulted in a slow start for prosecutions and continued use of Fraud by Abuse of Position, where a bribery charge might have been more appropriate.
5. Police currently receive anti-bribery training developed by the College of Policing as part of professional standards training which aims to prevent police corruption.
6. A 5 day training course in bribery and corruption investigation has been developed by City of London Police. This does not form part of mainstream police investigation training and is therefore subject to policing priorities and budgets of individual forces. Since 2013, City of London Police has provided training to over 130 delegates across 12 police forces.
7. An online training module for police investigators would raise awareness of the provisions of the Bribery Act resulting in increased use of the Act to investigate and prosecute bribery offences (including bribery linked to other forms of criminality).

Reporting

8. Handling of corruption reporting by law enforcement is fragmented and no single law enforcement or intelligence body within England & Wales leads on routinely receiving information relating to bribery and corruption activity. The nature of bribery means it is most often identified through audit or whistleblowing. It is not clear to the public who corruption and bribery should be reported to. Under Home Office Counting Rules it is

considered a state-based crime. This means existing channels for reporting crime to policing, which are victim-led, are often not effective for capturing bribery offences.

9. A central reporting mechanism for policing would ensure effective mechanisms for auditable crime recording as well as intelligence collection. This reporting mechanism would require an analytical capability as the preparatory stages of corruption are often subtle and sit outside definable criminality, making it difficult for law enforcement to act immediately. This mechanism would make it easier to report corruption, establish a clearer threat picture, and ensure decisions can be made to target limited police resources most effectively.

Enforcement

10. National law enforcement agencies' priorities involve dealing with corruption on a national and international scale. Domestic corruption involving public officials or corruption in business is mostly dealt with by police forces. A recent study showed that 55% of corruption cases in England and Wales are investigated by the police.
11. City of London Police has investigated and charged corruption cases under the Bribery Act 2010. Many cases involve areas such as the construction industry, defence sector and insurance sector. City of London Police has also successfully used the Bribery Act to charge offences linked to insurance fraud, in particular insurance brokers who sell confidential client information to third party claims companies, a growing threat in this sector.
12. The Crown Prosecution Service has made a concerted effort to support charges under the Bribery Act and put systems in place to actively monitor these types of case which supports prosecution.
13. The investigation and prosecution of bribery is seen as specialist within policing and this is reinforced by the requirement for either the Director of the Serious Fraud Office or Director of Public Prosecutions (DPP) to authorise prosecutions. There is therefore a tendency to use the Fraud Act or other offences not requiring DPP consent, particularly where knowledge of the Bribery Act is limited. Removing the requirement for consent to prosecute would help mainstream and increase use of the Bribery Act across policing and the Crown Prosecution Service.
14. The areas of acting in good faith and improper performance are often challenged, as is the area concerning positions of trust. At a recent sentencing of a bribery case a judge stated that being a director of a company does not necessarily mean they are in a position of trust and further evidence has to be provided as to how their role attracts this. The judge also questioned whether suspects had been pressurised to commit the offence or taken a lead in the offending, all of which were considered at sentencing.
15. A recent trend seems to be businesses dissolving companies before a s7 offence can be started/concluded, or prior to self reporting. In the recent

case of R v Skansen Interiors, a new company director discovered bribes paid by one of his sales team to obtain a contract to renovate offices. Prior to reporting this offence to the police, the company transferred all assets to the parent company and dissolved the company, sacking those responsible for the bribery. This meant that when considering corporate bribery offences the company no longer existed and would face no penalties. This puts at risk the ability to enforce adequate procedures and s7 prosecutions¹⁹.

SMEs

16. Many small to medium sized businesses grow rapidly within the first few years and investigations involving these types of businesses have identified a lack of knowledge of the Bribery Act, tendering processes and adequate procedures. More education is required on how these entities could be at risk and what reasonable adequate procedures are.

31 July 2018

¹⁹ In subsequent oral evidence Commander Karen Baxter, the National Coordinator for Economic Crime of the City of London Police, said: "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." (23 October 2018, Q 110)

Clifford Chance LLP – Written evidence (BRI0036)

INTRODUCTION

Clifford Chance is pleased to have the opportunity to respond to the Call for Evidence published by the House of Lords Select Committee on the Bribery Act 2010.

Clifford Chance has extensive experience in providing cross-border anti-corruption advice to multinational corporations in the UK and many other jurisdictions. We advise and represent companies in relation to all aspects of their anti-corruption efforts, including developing and implementing compliance management systems, conducting due diligence reviews, conducting internal investigations, and defending companies and individuals in government investigations. Our submission reflects our broad experience of advising a range of clients across different industries on the Bribery Act 2010 and similar legislation in other jurisdictions.

DETERRENCE

1. Is the Bribery Act 2010 deterring bribery in the UK and abroad?

- 1.1 In our experience, based upon advising companies on anti-corruption matters in multiple jurisdictions, the Bribery Act 2010 ("**the Act**") (together with the US Foreign Corrupt Practices Act) is generally perceived to represent the gold standard for compliance with anti-bribery and corruption and the benchmark against which other legislation globally should be compared.
- 1.2 Our perception is the introduction of the Act has precipitated greater awareness of what bribery is and how and where it may feature in a business' day-to-day operations. In particular, the corporate offence in section 7, has prompted organisations to design and implement bespoke and often sophisticated policies, procedures and changes to working practices. Where policies and procedures directed towards preventing bribery existed prior to the introduction of the Act, it has typically led to intensive review and in many cases a significant widening in their scope.
- 1.3 We have also seen a significantly increased focus on bribery and corruption issues in due diligence in M&A deals and private equity investments, as well as considerable resources being expended on instituting anti-bribery and corruption controls in the target entity, particularly outside the UK in high risk jurisdictions.
- 1.4 That said, we expect it may still be too early to tell definitively whether the Act is deterring bribery by otherwise would-be corrupt actors. The Act is in our experience having the effect of ensuring many companies adopt policies and procedures to prevent bribery, but whether it actually deters would-be criminals is difficult to assess. There is certainly a heightened degree of awareness of the risks amongst many companies in some areas

where bribery was not previously often considered, for example related to issues such as hiring practices.

ENFORCEMENT

2. **Is the Bribery Act 2010 being adequately enforced? If not, how could enforcement be improved? Do the Serious Fraud Office and the Crown Prosecution Service have the right approach and the resources they need to investigate and prosecute bribery offences effectively?**

2.1 The number of convictions in respect of offences under the Act is lower than was widely expected when the Act came into force. We think that this may be a consequence of a combination of factors. Firstly, although numerous investigations have been commenced by the Serious Fraud Office ("**SFO**") in particular, a large proportion of these concern conduct occurring prior to the date on which the Act came into force. Secondly, there have been a number of cases where it appears that prosecutions of corporate organisations and/or individuals could have taken place in which the SFO has taken apparently pragmatic decisions about how best to dispose of investigations. Thirdly, we consider that the lower than expected number of cases may be attributable to the fact that (as identified above), corporate organisations and individuals within them are now much more attuned to the need to proactively take steps to avoid becoming embroiled in bribery in the course of business.

2.2 In our experience, SFO investigations are typically extremely lengthy and seem to feature extended periods of apparent inactivity. Some cases will take five or six years to conclude. The approach taken by individual case officers may vary, and it is unclear whether a consistent policy is taken in relation to matters such as requests for extension. It is likely that the SFO personnel assigned to a particular case will turn over at least once over the course of an investigation. This, combined with the fact that periods may pass where there is seemingly little activity on a case, can be difficult for organisations to manage. The financial and operational burden on companies exposed to protracted investigations is significant. Even more acute is the personal impact on individuals of investigations concerning their historic conduct which can take many years. These extended timescales may also increase the chance of injustice resulting as individual and organisational memories fade.

GUIDANCE

3. **Is the statutory guidance on the Bribery Act 2010 sufficient, clear and well understood by the companies and individuals who have to deal with it? Should alternative approaches be considered?**

- 3.1 We understand that when it was drafted, the guidance was deliberately not prescriptive so as to apply to a broader category of circumstances, and to encourage businesses to become actively involved in making judgements about particular conduct. We understand it was anticipated that over time, judicial commentary would add to the body of available guidance to assist companies in making decisions.
- 3.2 However, there is a prevailing view that seven years on, and particularly given that there is a smaller than expected body of case law relating to the Act, it would be desirable for the guidance to be updated. One idea may be to include additional case studies dealing with how different types of companies should respond in particular situations.

CHALLENGES

4. **How have businesses sought to implement compliance programmes which address the six principles set out in the Ministry of Justice’s guidance on the Bribery Act 2010? What challenges have businesses faced in seeking to implement their compliance programmes? Are there any areas which have been particularly difficult to address?**
 - 4.1 Institutions within the regulated sectors (including financial services) have mostly implemented compliance programmes which address the six principles set out in the guidance. The Financial Conduct Authority (and its predecessor the Financial Services Authority) has made clear, including through enforcement action, that it expects institutions to have in place appropriate arrangements to ensure that they do not become involved in and are not used for the purposes of financial crime (including bribery as defined by the Act).
 - 4.2 This firm's direct experience and that of its larger financial institution clients is that while many small and medium enterprises ("SMEs") initially took steps to implement appropriate compliance programmes, in some cases such procedures may not have been subject to such rigorous review and updating as those implemented by larger organisations. This is particularly so given the enactment of substantial amounts of other legislation such as (most recently) the General Data Protection Regulation and the significant demands these place on such organisations.
 - 4.3 A remaining area of difficulty in our experience is in assessing whether an institution's programme is "adequate". Ultimately, this is a matter to be determined by a jury although, as demonstrated in the only instance of a contested prosecution in relation to the corporate offence under section 7 of the Act (*R v Skansen Interiors Limited*), where underlying bribery is established and in the absence of more detailed guidance, it is probably difficult for a jury to reach any conclusion other than that

an organisation's compliance programme to prevent such bribery was inadequate. In that case we understand that the jury was not provided with any specific direction in relation to the meaning of "adequate procedures" and instructed that the words should simply take their ordinary meaning.

4.4 We do not consider that this was the intention of the Act and think that there is scope for more detailed guidance to be issued in relation to what are to be regarded as "adequate procedures". We note in particular that Parliament decided not to replicate the "adequate procedures" wording in relation to the corresponding offences of failing to prevent the facilitation of tax evasion within the Criminal Finances Act 2017 and instead opted to provide for a "reasonable procedures" defence capable of reflecting efforts made to comply.

5. **What impact has the Bribery Act 2010 had on small and medium enterprises (SMEs) in particular?**

5.1 There is a widespread view that the Act may impose an excessively high burden on SMEs because compliance takes so much management time and resource, which may be easier for a larger company to absorb. Additionally, the demands of more recent legislation coming into effect, for example the GDPR, may divert attention and resources away from a previous focus on bribery.

6. **Is the Act having unintended consequences?**

6.1 One unintended consequence of the Act may be that some companies do not take a truly risk-based approach and instead take or impose burdensome measures in relation to managing potential bribery exposure which are not commensurate with the risk that is in fact presented. For example, it can often be the case that representations and warranties are sought when a contract is entered into which may well go beyond the needs of an adequate compliance programme. In fact, in some cases it can be impossible for the counterparty to reliably give them (for example, because they seek representations that every single employee in a multi-jurisdictional, 1000+ employee, organisation has never paid or received a bribe). This is an example of a box-ticking exercise reflecting a broad concern that such measures are needed in all cases in order to establish adequate procedures, when in fact this is not likely to be the case. It has been noted by several institutions that the inclusion of such representations and warranties in contracts has grown up as a cultural practice since the introduction of the Act, driven largely by individuals' desire to demonstrate compliance with its provisions.

DEFERRED PROSECUTION AGREEMENTS

7. **Has the introduction of Deferred Prosecution Agreements (DPAs) been a positive development in relation to offences under the Bribery Act 2010? Have DPAs been used appropriately and consistently? Has their use reduced the likelihood that culpable individuals will be prosecuted for offences under the Act?**

- 7.1 The use of DPAs is broadly seen as a positive development. They are seen as providing a fair mechanism for corporate misconduct to be dealt with and punished without catastrophic consequences to the organisation in question. DPAs to date are seen to have illustrated a readiness of the SFO to behave pragmatically and to exhibit a certain degree of commercial thinking in the way in which it has approached negotiations.
- 7.2 However, there remain some concerns about inconsistency of approach by the SFO and about a lack of transparency about what is expected of a corporate organisation in order to secure a DPA.
- 7.3 There is a developing body of case law in relation to DPAs. It is, however, difficult to grasp the totality of the picture given they present fewer opportunities to clarify particular points under the Act, such as the meaning of "adequate procedures" to mitigate corporate criminal liability.

INTERNATIONAL ASPECTS

8. **How does the Bribery Act 2010 compare with anti-corruption legislation in other countries? Are there lessons which could be learned from other countries?**

- 8.1 Our clients generally perceive that the Act imposes more compliance obligations than other comparable legislation in other jurisdictions. That said, there is a feeling that the Act is translatable, understandable, and easily applied to other jurisdictions.

9. **What impact has the Bribery Act 2010 had on UK businesses and individuals operating abroad?**

- 9.1 There is a notion within some organisations that even if working with or in jurisdictions where different anti-bribery standards apply, an organisation may take the view that maintaining the highest level of compliance is the "right thing to do", even if it is not strictly necessary to or if the legislation does not strictly apply to them. Additionally, some clients report that the Act, together with other factors, does cause them to weigh up the benefits of operating in high-risk countries against the disadvantages of not doing so, and that they may well opt to improve the bribery controls in place in a higher-risk jurisdiction rather than abandoning a beneficial opportunity.

Clifford Chance LLP – Written evidence (BRI0036)

Clifford Chance LLP

03 August 2018

Control Risks – Written evidence (BRI0014)

1. About Control Risks

1.1. Control Risks is a specialist risk consultancy that helps create secure, compliant and resilient organisations. We work with a wide range of companies on all aspects of business integrity from the board room to the frontline, and from policy formulation to problem-solving. Our headquarters is in London, and we have a network of international offices in every region and every time zone. We have extensive first-hand experience of helping companies operate ethically in complex emerging economies.

1.2. We follow international legal developments on business integrity and ethical issues very closely and contribute to 'thought leadership' through our research, briefing papers, and participation at specialist conferences. The UK government cites Control Risks' report on International Business Attitudes to Corruption in the United Kingdom Anti-Corruption Strategy for 2017-2022.

1.3. In this submission we draw on our combined international experience with a particular focus on the Call for Evidence questions concerning deterrence, guidance, challenges and the international aspects of anti-bribery enforcement. The main author of the submission is John Bray, a UK national who is based in our Singapore office and has specialised in anti-corruption policy and risk management for many years. Many of the examples cited in the submission come from the Asia Pacific region. However, the submission represents a collective Control Risks view of the impact and importance of the Bribery Act.

2. Summary

2.1. The Bribery Act is a vital part of the anti-corruption framework both within the UK and internationally. We recommend that the UK government continue to promote and enforce the Act fairly and consistently.

2.2. At the same time, we note that enforcement of the Bribery Act is only one part of the *UK Anti-Corruption Strategy* which also includes an emphasis on – for instance – the need to raise procurement standards within the UK, as well as helping improve governance standards internationally. This holistic approach is an appropriate response to a complex problem. The task of tackling corruption requires the combined participation of a range of government, private sector and civil society actors, both within the UK and internationally.

2.3. While highlighting the need for a combined approach, we also emphasise the distinctive governance role that only governments can play. If the UK government dilutes the act, or sends a message that it does not intend to enforce the law, it will undermine the wider anti-corruption framework. Specifically, it will make it harder for responsible UK and international companies to play their own part in resisting corruption.

3. Enforcement

3.1. Active enforcement of the Bribery Act is important because it demonstrates both to companies and to the UK's international partners that the intention behind the law is real. Serious Fraud Office (SFO) enforcement actions to date already demonstrate the agency's willingness to take on complex international cases involving larger, as well as smaller companies. In that respect, the SFO's performance already sends a clear message.

3.2. We judge that Deferred Prosecution Agreements (DPAs) can be a useful instrument to resolve bribery cases efficiently and relatively quickly. At the same time, we note that the UK's experience in applying DPAs is relatively limited. From a company's perspective, it is important there should be a degree of predictability at the outset of a DPA process, even if the details of the final outcome have yet to be decided. In the 17 July Select Committee hearings, Transparency International-UK (TI-UK) and Corruption Watch emphasised the need to build public trust in the fairness of DPA settlements and, for that reason, it is important that the key facts and reasoning behind any settlement should be published. We support this view.

4. Deterrence and prevention

4.1. Enforcement is essential but we do not regard the absolute number of Bribery Act cases as the single most important indicator of the law's success. Section 7 of the Act requires companies to implement 'adequate procedures' to prevent bribery. The emphasis on prevention is even more important.

4.2. In our experience, companies take the Section 7 requirement seriously, and our *International Business Attitudes to Corruption* survey reports provide supporting evidence. For example, according to our [2006 survey](#) (p.15) only 48% of UK companies operating internationally had anti-corruption training programmes. The [2015/2016 edition](#) of the survey (p.19) showed that the figure for UK companies had risen to 78%.

4.3. We believe that this increase is one among many indicators showing that the Bribery Act has had a constructive impact in promoting preventative measures. There is of course a need for continuous improvement. In our own advice to companies, we highlight the need for training that goes beyond dry legal briefings and includes an emphasis on practical problem-solving in the light of the challenges faced by specific companies and industries. We also emphasise the point that anti-bribery training needs to be integrated into other aspects of business planning. To cite an obvious example, sales people need challenging but realistic targets. If their targets are unrealistic, they will be more tempted to take illegal 'short cuts'.

4.4. The Bribery Act has helped set standards beyond the UK. This is firstly because it is widely understood to apply to international companies that have a connection with the UK, even if they would not normally be classified as British companies. In our experience, many leading non-UK Western European and Australian companies have for this reason placed higher importance on the Bribery Act than on their own countries' laws when framing their compliance policies. Perhaps more surprisingly, a similar observation applies to leading Japanese companies. At the time of writing, we are advising a Japanese company operating in Southeast Asia on aspects of its company policy: our client

intends to have the draft policy reviewed by a UK law firm specifically with regard to the Bribery Act because it regards the act as the 'gold standard'.

4.5. On a similar note, the ISO 37001 standard on *Anti-Bribery Management Systems*, which was released in 2016, is intended to be applicable across a range of jurisdictions. It goes beyond – for instance – the US Foreign Corrupt Practices Act (FCPA) in that it covers private-to-private bribery. It is widely understood that the Bribery Act has been an important influence on the drafting of ISO 37001. Levels of anti-bribery compliance maturity remain highly uneven even within the UK. However, at least among the leading international companies in the OECD countries, there is a gradual, incremental convergence towards common standards (see also *International Co-operation* below). This is by no means a uniquely British phenomenon.

4.6. In short, the UK can claim credit for supporting and reinforcing a wider international movement towards higher standards. However, UK companies who comply with the Bribery Act are not acting in isolation. We do not agree with the argument that the Act makes UK companies uncompetitive.

5. Guidance on 'adequate procedures'

5.1. We believe that the UK Ministry of Justice's *Guidance* on the Act is helpful, and we frequently cite it in our recommendations to our clients. The *Guidance* is constructive in that it offers a broad approach to the implementation of corporate anti-corruption programmes. It could no doubt be improved on points of detail. However, we do not believe that revising the *Guidance* should be a major focus of government energy. Rather, the emphasis should be on making existing guidance better known.

5.2. This is first because of the specific purpose – and also the limitations – of the *Guidance*. Both the Act itself and the *Guidance* are principle-based: they cannot provide a definitive legal guide to every situation in every industry. In our advice to clients, we are careful to point out that the final test as to whether an anti-corruption procedure is 'adequate' would come in a court of law. This is a source of irritation to some business people. However, in our view, principle-based – and risk-based – guidance is the only viable approach at the government level to the complexities and diversities of international business.

5.3. In our view, the next step beyond generalised high-level guidance is to focus more closely on specific industries. However, while governments should encourage this process, they do not necessarily need to lead it. As mentioned briefly in the Select Committee hearing on 17 July, TI-UK has a highly competent *Defence and Security* programme which works with – and challenges – industry associations as well as individual companies. The government can support such industry initiatives in a number of ways, including by improving their own industry-specific regulatory and procurement procedures, and by encouraging their international partners to do the same.

5.4. On a similar note, the UK government may be able to do more to publicise the existing *Guidance* to a broader section of UK industry, including small and medium enterprises (SMEs). We understand that this is already happening through – among other measures – enhancements to the *Great.gov.uk* website.

TI-UK's guidance for SMEs includes a special edition of its *Business Principles for Countering Bribery*.

5.5. In referring to SMEs, we emphasise that the same principles apply to companies of all size. In this respect, a key word in the UK *Guidance* is 'proportionate'. SMEs' anti-corruption strategies should be proportionate first in the sense that they cannot afford large compliance departments. They do not need them because lines of communication are much shorter than in larger companies. Secondly, SMEs' procedures should be proportionate in the sense that they should be commensurate with the corruption-related risks that they actually face, especially in complex emerging markets. For companies of all sizes, but perhaps especially for 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.

5.6. Finally on the subject of guidance, we note that the UK *Guidance* is one among several such documents that are available internationally. Many of our own clients fall within US jurisdiction, and we often refer them to *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, which was published by the US Department of Justice and the Securities and Exchange Commission in 2012. Other similar texts include the *Anti-Corruption Ethics and Compliance Handbook for Business*, which was published jointly by the OECD, the UN Office on Drugs and Crime (UNODC) and the World Bank in 2013. We hold Transparency International UK's guidance on the *2010 UK Bribery Act Adequate Procedures* in high regard. TI-UK has also published a helpful report on bribery risk assessment, which is perhaps one of the weaker areas in the UK *Guidance*. As noted above, the ISO 37001 standard likewise serves as a helpful guide to 'adequate procedures'. While these texts differ on minor points of detail, they agree on the most important principles.

5.7. In short, there are no mysteries on the principles of anti-corruption compliance: the challenge is to put them into practice. This is a task for companies.

6. International co-operation

6.1. The UK Anti-Corruption Strategy commits the government to continued support for the OECD in its promotion of the 1997 *Anti-Bribery Convention*, and we welcome this.

6.2. The OECD Working Group on Bribery operates through a form of 'peer pressure' with a view to ensuring that all 43 signatories to the Convention enforce it effectively, thus ultimately achieving the proverbial 'level playing field' whereby international companies from the major industrialised countries compete for contracts on equal terms. This is inevitably a long-term task, but we believe that the Convention is having a significant incremental – but not yet universal – impact on the conduct of international business. The UK is leading by example in that it ranks as one of the three leading enforcers of the Convention, albeit ranking well behind the US and Germany in the number of enforcement cases.

6.3. The UK is also leading by example in that the *Bribery Act* is seen as a model for other countries to follow. Australia is a particularly notable example. The *Combating Corporate Crime Bill*, which is currently going through the Australian parliament, amends the Criminal Code to include ‘adequate procedures’ provisions based on the UK Bribery Act. It also proposes to introduce DPAs, drawing on a combination of UK and US experience.

6.4. We note that the UK is currently lending valuable diplomatic support to the OECD’s anti-bribery agenda. In March 2018, Control Risks participated in the OECD’s *Global Anti-Corruption & Integrity Forum*. It was encouraging to learn that the UK had been a major financial supporter of the Forum, and to witness the prominent role played by the UK Anti-corruption Champion John Penrose in the Forum proceedings.

6.5. However, UK diplomatic support for the OECD will be meaningless if the government slackens in its commitment to the enforcement of the Bribery Act, still more if it is seen to ‘water down’ the letter of the law. Any such action would be seen as evidence of British hypocrisy. More than that, we do not believe that it would help British companies win business. Rather, as will be discussed in greater detail below, the reverse is the case because they will find it harder to resist demands.

7. Doing business in complex emerging economies

7.1. A major part of our business consists of helping international companies operate in complex emerging economies, including many jurisdictions with poor governance standards. We by no means underestimate the challenges of corruption. Illustratively, our *International Business Attitudes to Corruption Survey 2015-2016*, which was based on responses from more than 800 companies, showed that as many as 30% of the companies surveyed believed that they had lost business in circumstances where there was strong circumstantial evidence that their competitors had paid bribes (p.9).

7.2. However, the same survey showed that a clear majority of the respondents (81%) agreed with the general proposition that “international anti-corruption laws improve the business environment for everyone” (p.12). The answers to a related question on whether tough international anti-corruption laws make it easier for good companies to operate in high risk markets were more nuanced: 51% of US respondents to the survey said that laws did make the conduct of business easier, while 42% said the opposite. For UK companies, the balance of opinions was reversed: 41% said tough laws made it easier to operate, and 49% disagreed.

7.3. In interpreting these findings, we ourselves take a nuanced view. First, it may well be difficult to win business honestly in countries where bribery is widespread. However, we believe this to be the only sustainable approach, and not only for reasons of legal compliance. Companies who pay bribes will face repeat demands, as well as running a risk of reputational damage. They are also more exposed to political risks, especially if there is a change of government, as in contemporary Malaysia where a large number of contracts agreed under the previous administration are now coming under scrutiny.

7.4. In the 17 July Select Committee hearing, there was a brief reference to companies simply avoiding jurisdictions where there is a high risk of bribery. That is certainly one option: doing business in such countries may simply be too much trouble. Indeed, some 30% of respondents in our 2015/2016 survey (p.9) said that they had decided not to do business in a country because of the risk of corruption. These included a particularly high proportion (43%) of the UK companies who operated in international markets, as well as 29% of the US companies.

7.5. However, as we note on page 13 of the same report, a comparison of our survey findings from 2006 and 2015 suggests that companies from the countries with the highest levels of enforcement are becoming more – not less – willing to take risks. In 2006, 52% of UK and 38% of US companies said they had been deterred from entering a market because of the risk of corruption. This does not suggest – in the case of the UK companies – that the Bribery Act is a deterrent to responsible risk taking. On the contrary we believe that a company that complies with the Act is better able to enter a high-risk market with confidence because its defences will be stronger.

7.6. On both policy and commercial grounds, we think it is desirable for well-run international companies to engage with markets that might be considered high risk, as long as there is a genuine business opportunity. They should of course do so with 'eyes wide open', selecting their opportunities – and above all their commercial partners – with care. Initially, the market for compliant companies may be smaller than it would otherwise be (we have recently been having conversations to this effect with a beverages company in South Asia). However, we believe that a commitment to avoiding bribery is the only sustainable approach in markets that are themselves changing rapidly for political and social as well as economic reasons.

7.7. In this respect, we do not believe that the Bribery Act is fundamentally an obstacle. On the contrary, the law serves as an enabler for well-run companies – regardless of size – because it makes it easier to resist demands for bribes. They can credibly say that they cannot afford to relax their standards because this would amount to a criminal offence in the UK, as well as – a point that needs emphasising – in the host country. Softening the UK law or the spirit of enforcement would have the perverse result of leaving companies more exposed to demands.

7.8. The law is not – and should not be – the only weapon against corruption. To return to a point made at the beginning of this submission, we believe that complex problem of corruption demands a holistic approach, including initiatives to strengthen governance. One example comes from Myanmar, where the Department of International Development (DFID) is a major funder of the [Myanmar Centre for Responsible Business](#) (MCRB). As its name suggests, the MCRB itself takes a holistic approach, working on human rights and other aspects of corporate responsibility, as well as human rights. It also engages with the Myanmar government on policy matters, as well as local and international business and civil society. The MCRB is itself one of a number of private sector initiatives that fall under DFID's [DaNa](#) programme in Myanmar.

8. Facilitation payments

8.1. The same overall argument applies to so-called 'facilitation payments' (small bribes to speed up routine government transactions). We do not think that it is appropriate to amend the Bribery Act to allow for facilitation payments. However, government initiatives – working together with business and civil society – that address the governance problems that contribute to demands for such payments are very welcome.

8.2. To put this point in perspective, we agree with the consistent OECD view that such payments are "corrosive" (the word used in paragraph 9 of the original commentary on the Convention). In our experience, the prevalence of demands for such payments rarely amounts to a dealbreaker or a decisive obstacle to investment. However, as we discuss in a recent article in the FCPA Blog, they are certainly an obstacle to the smooth running of business in parts of Southeast Asia, and no doubt in other regions.

8.3. The arguments for and against introducing a facilitation payments exception to the UK law were well rehearsed, for example in a session of the House of Commons Public Bill Committee shortly before the Bribery Act was passed into law in 2010. On that occasion the UK government took a considered view that introducing a facilitation payment exception into the Bribery Act (which applies domestically, as well as internationally) would be a mistake. The Act sets an unambiguous standard on small as well as large bribes. It will be for prosecutors to decide whether to pursue an enforcement action on small bribes in accordance with the Crown Prosecution Service Guidelines. We support that view and see no reason to revisit it.

8.4. Already in its 2009 Recommendation, the OECD called on Convention signatories to review their legislation on facilitation payments, and to discourage companies from paying them. Since then, Canada has removed its own facilitation payments exception. Australia's Senate Economics References Committee recommended that Australia abolish its own facilitation payments exception in a report issued in March. However, the Australian government has not addressed this point in the draft anti-bribery amendments to the Criminal Code that it has presented to parliament. As discussed in another FCPA Blog article, we believe this to be a missed opportunity. Again, the reasons are well-rehearsed. Company policies that prohibit large bribes but not small ones set a double standard that confuses both employees and bribe-demanders. For that reason, more and more US companies prohibit facilitation payments even though the FCPA excludes such payments from its definition of the criminal offence of foreign bribery (though not from its accounting requirements).

8.5. We of course fully acknowledge that demands for facilitation payments often amount to a form of extortion: "If you do not pay, your business will suffer". In cases where demands for facilitation payments are a problem, we recommend that our clients undertake a carefully-planned risk analysis, mapping out their vulnerabilities in some detail, as well as identifying potential allies. They should then work out a considered strategy for dealing with the problem on the basis of that analysis. In many cases, the most common form of 'suffering' is a delay in the processing of a government procedure, and it is possible to plan for this.

8.6. Companies that do resist facilitation payment requests are often surprised at how easily this can be achieved without damage to their business. For the bribe-demanders, it is often simpler to move on to easier targets.

8.7. Our own business – on occasion – has suffered short-term setbacks because of our refusal to pay bribes to government officials. On this, we have no regrets. We are confident that such refusals ultimately make our business stronger, not weaker.

31 July 2018

Control Risks – Supplementary written evidence (BRI0059)

I write to offer further details to the oral evidence that I presented at the Bribery Act 2010 Committee hearing on 16 October. These relate to:

- Bribery as a potential deterrent to international investment
- “Adequate Procedures” in Australian, Indian and Malaysian anti-bribery legislation
- Charitable donations
- Competition from companies operating according to different standards
- Third parties and anti-bribery compliance guidance
- Singapore’s enforcement experience
- Should bribery prosecutions be tried without a jury?
- Deferred Prosecution Agreements and the “Recommendation 6” working group as a benchmark for non-trial resolutions

Bribery as a potential deterrent to international investment

In response to a question on the impact of Section 7 of the Act, I referred to our *International Business Attitudes to Corruption Survey 2015-2016*. This included a question “Have you decided not to conduct business in a particular country because of the perceived/actual risk of corruption?” Some 43% of UK respondents said that they had indeed decided to avoid certain countries for this reason. However, when we asked a similar question in a 2006 survey, the UK figure was even higher – 52%.

On the evidence of these surveys, UK companies take corruption risks seriously. However, the figures do not suggest that they have become more risk-averse since the Bribery Act. Our own view is that companies with strong anti-corruption procedures – as required by Section 7 are better placed to operate in high-risk regions and are therefore less likely to be deterred by bribery risks.

“Adequate Procedures” in Australian, Indian and Malaysian anti-bribery legislation

Australia

Australia’s *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017*, which makes reference to “adequate procedures” is available on:

<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22legislation/billhome/s1108%22>

https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1718a/18bd105

The relevant wording is:

70.5A. Failing to prevent bribery of a foreign public official

Offence

- (1) A person (the **first person**) commits an offence if:
 - (a) the first person is a body corporate:
 - (i) that is a constitutional corporation; or
 - (ii) that is incorporated in a Territory; or
 - (iii) that is taken to be registered in a Territory under section 119A of the *Corporations Act 2001*; and
 - (b) an associate of the first person:
 - (i) commits an offence against section 70.2 [The offence of bribing a foreign official]; or
 - (ii) engages in conduct outside Australia that, if engaged in in Australia, would constitute an offence (the **notional offence**) against section 70.2; and
 - (c) the associate does so for the profit or gain of the first person.

...

- (5) Subsection (1) does not apply if the first person proves that the first person had in place adequate procedures designed to prevent:
 - (a) the commission of an offence against section 70.2 by any associate of the first person; and
 - (b) any associate of the first person engaging in conduct outside Australia that, if engaged in in Australia, would constitute an offence against section 70.2.

The bill is still under parliamentary review.

The Australian Senate Economic References Committee published its report on Foreign Bribery in March 2018, and this is available on:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economic_s/Foreignbribery45th/Report

The Committee's recommendations include:

Recommendation 7

4.102 The committee recommends that the Criminal Code Act 1995 be amended to include a new corporate offence of failing to prevent foreign bribery, and that principles-based guidance be published as to the steps companies need to take in order to establish and implement adequate procedures in relation to the new failing to prevent foreign bribery offence.

Recommendation 8

4.103 The committee recommends that as part of the public consultation on the minister's guidance on adequate procedures in relation to the new failing to prevent foreign bribery offence, the government publish an exposure draft of the guidance and allow a period of no less than four weeks for stakeholders to provide comment.

Recommendation 9

4.104 The committee recommends that the minister finalise and publish the guidance on adequate procedures with sufficient time before the commencement of the new failing to prevent foreign bribery to allow companies to implement the necessary compliance measures.

The Committee’s analysis of “adequate procedures” comes in Chapter 4 of its report.

India

India’s *Prevention of Corruption (Amendment) Bill, 2018*, which was passed into law in July 2018, is available on:

<http://www.prsindia.org/uploads/media/Corruption/PCAs%20passed%20by%20RS.pdf>

The relevant wording is:

9. (1) Where an offence under this Act has been committed by a commercial organisation, such organisation shall be punishable with fine, if any person associated with such commercial organisations gives or promises to give any undue advantage to a public servant intending—

- (a) to obtain or retain business for such commercial organisation; or
- (b) to obtain or retain an advantage in the conduct of business for such commercial organisation:

Provided that it shall be a defence for the commercial organisation to prove that it had in place adequate procedures in compliance of such guidelines as may be prescribed to prevent persons associated with it from undertaking such conduct.

India’s Prevention of Corruption Act is narrower in scope than the UK Bribery Act in that it applies specifically to bribes paid to public officials.

Malaysia

Malaysia is a third country that has incorporated “adequate procedures” into its anti-bribery legislation, in this case the *Malaysian Anti-Corruption Commission (Amendment) Act 2018*. It was passed into law in May 2018. The text of the act is available at:

www.federalgazette.agc.gov.my/outputaktap/20180504_A1567_BI_Act%20A1567.pdf

The relevant wording is:

Offence by commercial organization

17A. (1) A commercial organization commits an offence if a person associated with the commercial organization corruptly gives, agrees to give, promises or offers to any person any gratification whether for the benefit of that person or another person with intent—

- (a) to obtain or retain business for the commercial organization; or

(b) to obtain or retain an advantage in the conduct of business for the commercial organization.

The Act continues in a subsequent subsection:

(4) If a commercial organization is charged for the offence referred to in subsection (1), it is a defence for the commercial organization to prove that the commercial organization had in place adequate procedures to prevent persons associated with the commercial organization from undertaking such conduct.

(5) The Minister shall issue guidelines relating to the procedures mentioned in subsection (4).

This section of the Act is not yet in force.

Charitable donations

In response to a question from Baroness Fookes about philanthropic donations as a possible form of bribery, I mentioned a US Securities and Exchange Commission (SEC) case. This involved a pharmaceutical company that had made donations to a castle restoration foundation, apparently with a view to influencing the director of a health fund. The details of the case are summarised on the SEC's website at:

<https://www.sec.gov/litigation/litreleases/lr18740.htm>

Competition from companies operating according to different standards

In response to a question from Lord Grabiner I mentioned that our *International Business Attitudes to Corruption Survey 2015-2016* had asked respondents whether they believed that they had lost business opportunities to corrupt competitors. Some 30% of the global sample said that they had failed to win contracts where there was "strong circumstantial evidence of bribery by the successful competitor". Interestingly, the UK figure was lower than average – only 18%.

Third parties and anti-bribery compliance guidance

In response to a question from Lord Thomas, and following on from Mark Anderson's observations, I referred to the US guidance: this says that the Department of Justice (DOJ) and SEC will give credit for a company that concentrates on the main risk of a large contract and might overlook minor risk, such as one to do with customs payments. This was a reference to the Resource Guide to the U.S. Foreign Corrupt Practices Act, published by the DOJ and the SEC in 2012. The precise wording (on page 59) is:

DOJ and SEC will give meaningful credit to a company that implements in good faith a comprehensive, risk-based compliance program, even if that program does not prevent an infraction in a low risk area because greater attention and resources had been devoted to a higher risk area.

This sentence follows an earlier paragraph that states:

Assessment of risk is fundamental to developing a strong compliance program, and is another factor DOJ and SEC evaluate when assessing a company's compliance program. One-size-fits-all compliance programs are generally ill-conceived and ineffective because resources inevitably are spread too thin, with too much focus on low-risk markets and transactions to the detriment of high-risk areas. Devoting a disproportionate amount of time policing modest entertainment and gift-giving instead of focusing on large government bids, questionable payments to third-party consultants, or excessive discounts to resellers and distributors may indicate that a company's compliance program is ineffective. A \$50 million contract with a government agency in a high-risk country warrants greater scrutiny than modest and routine gifts and entertainment.

The *Resource Guide* is available at:

<https://www.justice.gov/criminal-fraud/fcpa-guidance>

Transparency International UK's guidance on "adequate procedures" is available at:

<https://www.transparency.org.uk/publications/adequate-procedures-guidance-to-the-uk-bribery-act-2010/>

The OECD has also published an *Anti-Corruption Ethics and Compliance Handbook for Business* in collaboration with the United Nations Office on Drugs and Crime (UNODC). This is available on:

<http://www.oecd.org/corruption/anti-corruption-ethics-and-compliance-handbook-for-business.htm>

All these authorities agree on the main ingredients that are required for an anti-bribery compliance programme.

Singapore's enforcement experience

In response to a question from Lord Thomas, I briefly reviewed Singapore's experience in international anti-corruption enforcement. I mentioned that Singapore had just recently had its first major international case, enforced jointly with the US and Brazil. The US DOJ summary of the case is available at:

<https://www.justice.gov/usao-edny/pr/keppel-offshore-marine-ltd-and-us-based-subsidiary-agree-pay-422-million-global>

In Singapore, the national newspaper *Straits Times* published a summary of the subsequent parliamentary debate in early January 2018 on the case and the possibilities for future legislative reform:

<https://www.straitstimes.com/politics/parliament-keppel-bribery-scandal-dominates-question-time>

Since then, Singapore has introduced a procedure for Deferred Prosecution Agreements (DPAs) as part of a wider package of reforms in the Criminal Justice Reform Act. The text of the law is available here:

<https://sso.agc.gov.sg/Act/CJRA2018>

As I mentioned, I reported on the introduction of Singapore's DPA procedures in an article for the *FCPA Blog* and this is available here:

<http://www.fcpablog.com/blog/2018/4/30/john-bray-singapore-adopts-new-law-on-dpas.html>

Should bribery prosecutions be tried without a jury?

Lord Savile raised the question whether bribery prosecutions should be tried without a jury and suggested that Mark Anderson and I should express our views in our written responses.

In brief, I see the case for non-jury trials in complex fraud cases. However, I do not think that this approach would be necessary or appropriate for bribery cases.

As discussed earlier in the session, bribery cases frequently involve payments made by third parties, such as commercial agents. This would be one common example of the complexities that would need to be presented to a jury. However, I do not think that these issues are so complex that they would be beyond a jury's understanding.

Deferred Prosecution Agreements and the Recommendation 6 working group as a benchmark for non-trial resolutions

I mentioned that I was associated with "Recommendation 6", an informal working group that has prepared a set of recommendations on good practice for "non-trial resolutions" (including DPAs) for the OECD Working Group on Bribery. The recommendations were finalised on 31 October, and I am enclosing them as a separate PDF attachment.

The background is that in March 2017 the High-Level Advisory Group issued a report on combatting bribery and fostering integrity to the OECD Secretary-General. Two members of the Advisory Group, Peter Solmssen and Tina Søreide, subsequently convened an informal working group consisting of academics, lawyers, corporate officers and NGO representatives to advise on ways to implement Recommendation 6 of the report (hence the name of the group). This recommended that the OECD should:

Create and publish model guidelines for criminal and civil settlements and voluntary disclosure consistent with the requirement for effective, proportionate and dissuasive sanctions under the OECD Anti-Bribery Convention.

The working group's own recommendations address "non-trial resolutions or negotiated settlements of cases involving foreign bribery", a term that includes DPAs.

The premise is that negotiated settlements are becoming one of the primary vehicles for the resolution of bribery cases involving corporations: the UK's DPAs are a prominent example. However, many countries use settlements without

clear rules or principles to secure deterrent sanctions, transparency and legitimate process. In the worst case, this leads to low predictability and low public confidence in law enforcement systems, as well as significant variations in law enforcement responses across countries. There is therefore a need for consensus around the overall principles.

The attached draft contains a draft set of Principles for Non-trial Resolutions. These are addressed to a broad international audience, working within a variety of different legal systems. Paragraph 2 notes that:

Non-trial Resolutions are a privilege of government to offer, not a fundamental right of an accused, but Non-trial Resolutions that offer predictable sanctions and leniency for self-disclosure and cooperation are effective in deterring bribery and are compatible with the criminal, administrative and civil law traditions and practices of all Member countries.

However, the text also highlights the need for appropriate checks and balances including, for example, judicial review.

The Principles and the accompanying Explanatory Notes are necessarily high-level but they offer a useful benchmark against which to assess the UK's own experience with DPAs, and I therefore commend them to your attention. My own overall assessment is that the UK is broadly on the right track but that – perhaps understandably in view of the limited number of cases to date – it is too early to say that we have achieved “predictability” in DPA negotiations.

The Principles and Explanatory Notes are available online at:

www.nhh.no/en/research-centres/corporate-compliance-and-enforcement/guidelines-for-non-trial-resolutions/

John Bray
Director, Control Risks

8 November 2018

Corruption Watch – Written evidence (BRI0039)

Corruption Watch is a UK based anti-corruption non-governmental organisation which monitors how the UK enforces and implements its anti-corruption laws. This has included monitoring all of the foreign bribery cases that have resulted in enforcement actions since 2014, and regularly attending court to monitor trials.

Executive summary:

1. Corruption Watch believes that the Bribery Act has done a lot to improve the UK's international standing and is an important and widely respected piece of legislation.
2. Low enforcement rates for the Bribery Act can be offset against various factors, but there is no doubt that enforcement must be improved to maintain the deterrent effect of the Act. Several factors have been hindering greater enforcement which Corruption Watch believes need to be addressed including:
 - the institutional insecurity of the Serious Fraud Office (SFO);
 - the reorganisation of the police forces dealing with corruption and lack of clear lead on domestic corruption;
 - ongoing lack of resources; and
 - the absence of an economic crime crown court.
3. There are still outstanding recommendations from the OECD Working Group on Bribery about uncertainties in the Guidance which potentially undermine the Bribery Act, which the UK needs to resolve. Corruption Watch does not otherwise believe that the Guidance needs revisiting, until such time as significant case law emerging on adequate procedures suggests otherwise.
4. The informal consultation with trade associations and business carried out by the government in 2015 revealed few concerns from the business sector about the Bribery Act or the Guidance with the exception of a trade association for Small and Medium Sized Enterprises (SMEs). The government has recognised that it must do more to raise awareness of the Guidance among SMEs and has committed to disseminate information to them. Corruption Watch recommends that the government conduct another survey of SME awareness once it has fulfilled this commitment.
5. Corruption Watch believes however that SMEs do and will continue to shoulder the burden of prosecution while the outdated 'identification principle' remains the basis for attributing liability under Sections 1 and 6 of the Bribery Act. While prosecutors can easily choose between whether to charge SMEs with 'substantive' offending such as Section 1 or 6, in practice they would only be able to charge a large corporation with Section 7, a failure to prevent offence which is considered less grave in the courts. The effect of this is that:
 - it is less likely to be in the public interest to offer SMEs a Deferred Prosecution Agreement if substantive offending can be easily proved, given that this increases the gravity of the offending; and
 - SMEs are more likely to face consequences of exclusion from public procurement as substantive offending incurs mandatory exclusion while a

conviction for Section 7 does not need even to be declared to contracting authorities.

Corruption Watch strongly advocates that the Law Commission be tasked to review the 'identification principle' as a way of attributing liability on a priority basis.

6. Corruption Watch believes that the absence of an exception for facilitation payments is one of the strengths of the Bribery Act. It is helping to drive up standards globally, helps support the Department for International Development's efforts to tackle petty corruption, and must be maintained.

7. Deferred Prosecution Agreements are an important tool for prosecutors. Corruption Watch strongly supports the current approach of prosecutors in maintaining a high bar for offering a DPA and believes this is essential in order to incentivise companies to self-report and cooperate. However, consideration needs to be given to ensuring that the consequences that companies which do not self-report and cooperate face are significantly worse than for those which do. This should include greater court transparency when companies are convicted to ensure negative publicity is on a par with DPAs, the introduction of corporate probation orders, and addressing the issues which make trials so slow and cumbersome.

8. Corruption Watch believes that there are some emerging policy issues from DPAs so far that need to be addressed. These include:

- incentivising self-reporting in order to increase detection of economic crime by ensuring that companies that self-report and cooperate receive a greater discount to their fine than companies that simply cooperate;
- ensuring compensation is given more consistently in DPAs including in complex cases.

We are concerned that the discount to fines for companies being offered DPAs was lowered below that intended by Parliament as set out in the Crime and Courts Act with no formal consultation or policy discussion.

9. Corruption Watch believes that there is an ongoing issue around whether there is an appropriate level of senior level individual accountability, whether criminal or regulatory, where a DPA is issued. In principle, we believe that DPAs must always be accompanied by individual prosecutions, or significant regulatory action such as disqualification. We note however that individual prosecutions were also not pursued in the one guilty plea for a Section 7 offence and believe that the issue of individual accountability must also be addressed in Section 7 convictions.

1. Deterrence

1.1. Corruption Watch believes that the Bribery Act 2010 is a crucial and widely respected piece of legislation, which has helped significantly improve the UK's reputation both at home and abroad. In 2008, the OECD's Working Group on

Bribery issued an unprecedented warning that increased due diligence of UK companies may be needed by commercial partners and multilateral development banks due to the UK's antiquated anti-corruption laws.²⁰ The Bribery Act has ensured that the UK meets its international obligations in this regard.

1.2. Corruption Watch also believes that the legislation has given clarity to the commercial sector and provided responsible businesses with the policy and legislative framework to enable them resist bribe demands, thereby helping drive standards up globally.

1.3. There is no doubt that deterrence is ultimately only achieved by active enforcement and the genuine risk of detection and sanction.

2. Enforcement

2.1. The number of enforcement actions in relation to the Bribery Act is low (two convictions and three DPAs for corporates; and 14 individuals between 2011-2017). However, this should be offset against various factors:

- the Serious Fraud Office (SFO) since 2012 has increased enforcement under the previous Prevention of Corruption Act 1906 with three convictions of corporates under this act for corruption related activity pre-2011;
- the SFO has rightly, in our view, focused on prosecuting those companies that don't cooperate, and prosecutions take significantly longer to investigate to the required standard than the previous civil recovery approach taken by the SFO under its previous director;
- the SFO concentrates on higher-end cases, and it is not fully clear who is responsible for investigating the middle to lower tier cases of bribery and corruption particularly at a domestic level;
- the lack of case law that the SFO inherited in relation to overseas corruption in 2012 means that it is having to resolve a considerable number of 'satellite' issues in the course of investigations and trials which incurs delays;²¹
- the fact that bribery may be prosecuted as different criminality such as fraud by abuse of position.

2.2. There is no doubt in our view that enforcement, and particularly concluded enforcement actions, need to be increased to improve the deterrent effect of the Bribery Act. While corruption cases, and specifically those with an international cross-jurisdictional nature, inevitably take a long time to come to light, investigate and conclude, the following issues in Corruption Watch's view are hindering enforcement:

²⁰ <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/oecdgroupdemandsrapidukactiontoenactadequateanti-briberylaws.htm>

²¹ This has included resolving the following issues through the courts: the extra-territorial application of the SFO's Section 2 powers, with two judicial reviews in relation to this issue, one still ongoing; the application of privilege to internal investigations, for which a Court of Appeal judgement is pending; the legality of foreign bribery prior to 2002; and the presence of company lawyers in compulsion interviews.

A. The lack of institutional security of the SFO.

2.3. Corruption Watch notes that the former Director of the SFO, David Green, inherited serious institutional challenges including low morale and high staff turnover which took at least two years to rectify. In its 2012 assessment of the SFO, HMCPsi concluded that the organisation needed to “*improve its performance.*”²² In May 2016, HMCPsi noted the “*positive transformation change to the direction and purpose of the SFO led by the Director and SFO board.*”²³ Additionally, the SFO has faced several challenges to its existence, once in 2011, in 2014 and again in 2017 when a Conservative Party manifesto committed to incorporating the body into the National Crime Agency. Given the uncertainty over its future, and the considerable media criticism that the SFO faces every time it loses a case, the SFO has done well to improve its reputation both domestically and internationally over the past six years. However, in our view it needs greater political and institutional support to ensure that its existence is not called into question every time it loses a court case. This could include a strong executive statement from the government about its future, and a more proactive effort on the part of the Attorney General to communicate the SFO’s successes and explain to the public the reasons behind why cases do not always go the SFO’s way.

B. Institutional reorganisation of the police forces investigating overseas corruption.

2.4. In May 2015, there was a reorganisation of the police forces responsible for investigating overseas corruption, as a result of a commitment in the National Anti-Corruption Action Plan for the National Crime Agency to establish a national multi-agency intelligence team focusing on serious domestic and international bribery & corruption.²⁴ While this looked rational on paper, in practice none of the officers from the City of London Police’s Overseas Anti-Corruption Unit (which was responsible specifically for investigating middle to lower tier bribery and corruption) were prepared to move to the National Crime Agency. This meant that considerable expertise was lost and the National Crime Agency was required to effectively start from scratch with staffing for overseas bribery in 2015. It has, we understand, experienced difficulty in recruiting staff to this team. This will have had some impact on the overall number of overseas bribery cases feeding through to the Crown Prosecution Service and ultimately the courts.

C. Ongoing lack of resources.

2.5. The increase in core funding for the Serious Fraud Office in April 2018, to £52.7 million, was very welcome. It was not however, a net increase in resources, but rather a change in the funding formula, so that the ‘blockbuster’ funds that the SFO was receiving would be received as core funding. While it is a

²² https://www.justiceinspectorates.gov.uk/crown-prosecution-service/wp-content/uploads/sites/3/2014/04/SFO_Nov12_rpt.pdf

²³ <https://www.justiceinspectorates.gov.uk/hmcp/inspections/sfo-governance-arrangements/>

²⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/388894/UKantiCorruptionPlan.pdf

positive move in that it allows the SFO to achieve much better value for the money it receives, it is not clear that this is a sufficient sum to ensure that the SFO can tackle the full scale of both domestic and international fraud and corruption. Concurrently, the Crown Prosecution Service has faced budget cuts of 25% since 2010 and a significant reduction in staff.²⁵

2.6. The fact that pay scales at the Serious Fraud Office are significantly below those of the Financial Conduct Authority and the private sector is also a serious consideration and raises the issue of equality of arms between the SFO and the companies it investigates.

D. Absence of a dedicated economic crime court.

2.7. Corruption Watch believes that successful and timely prosecutions of the Bribery Act and the Prevention of Corruption Act have been hindered by the lack of a dedicated economic crime court. In trials that we have observed, the SFO has often had to wait over a year to get a court slot for its cases to be heard. Economic crime trials frequently lose out in priority to cases where individuals are being kept in jail on bail.

2.8. The announcement of a new flagship court dealing with cybercrime, fraud and economic crime in the City of London²⁶ is welcome. However, it does not appear that a crown court is being considered for inclusion in the new court complex which would be able to hear Serious Fraud Office and CPS overseas corruption and domestic corruption cases. Corruption Watch believes that having a dedicated economic crown court which can hear criminal and civil cases and which is led by judges who are specialised in dealing with economic crime could be an important way to improve the speed with which trials can be completed and to ensure greater consistency in judgements.

3. Guidance

3.1. We note that the OECD Working Group on Bribery (WGB) has some outstanding concerns about the statutory guidance on the Bribery Act, and that it considers some of its recommendations with regard to the guidance as unimplemented.²⁷ These recommendations include, in relation to the bits of the Guidance concerning hospitality and promotional expenditures, that the UK:

- *“(i) clarify the significance of “reasonable and proportionate” in the GCO, including the reference to industry norms; and*
- *(ii) amend the GCO to note that certain examples represent a high risk of bribery (Convention Articles 1, 5; 2009 Recommendation, X.C.i).”*

In particular, the OECD WGB was concerned that some of the examples provided in relation to acceptable hospitality constituted *“high risk activity under almost all circumstances.”*

²⁵ <https://www.pcs.org.uk/news/cuts-to-blame-for-criminal-trial-disclosure-crisis>

²⁶ <https://www.gov.uk/government/news/worldclass-fraud-and-cybercrime-court-approved-for-londons-fleetbank-house-site>

²⁷ <http://www.oecd.org/corruption/anti-bribery/UK-Phase-4-Report-ENG.pdf>

3.2. Additionally, the OECD WGB recommended that the UK:

- *"clarify the significance of indirect benefits for the purpose of determining whether persons may be an "associated person" under section 7 of the Bribery Act."*

The WGB was concerned that the Guidance and the Bribery Act were inconsistent on this, and that whereas the Bribery Act did not give more weight to a direct rather than indirect benefit, the Guidance suggested that the fact that an organisation indirectly benefited from a bribe *"is very unlikely, in itself, to amount to proof of the specific intention required by the offence."* By doing so, the Guidance risked limiting the scope of 'associated person', according to the WGB, which was concerned about whether a restrictive interpretation of the term would exclude foreign bribery by subsidiaries and joint ventures.²⁸

3.3. We note that when the guidance was drafted, following full consultation, the original draft was amended significantly to reflect business concerns. Civil society organisations were concerned at the time that this reflected an unacceptable weakening of the guidance.²⁹

3.4. During July 2015, the UK government engaged in an informal, unpublicised and one-sided consultation with businesses, primarily trade associations, under a mandate given by the National Security Council and the Export Implementation Committee as to whether the Bribery Act was a 'problem' for them and whether the guidance needed amending.³⁰ The note prepared for that consultation stated that:

- civil servants interacting with business had only picked up 'low level concerns' about the Bribery Act;
- UK Trade and Investment (UKTI) had sought views from posts and international trade advisors who had reported that the Bribery Act *"was not a significant problem and in some cases, it has had a positive impact;"*
- UKTI staff had picked up some "noise" in the system, particularly around some companies foregoing deals in certain countries (primarily China, and on oil and gas projects in the Middle East and North Africa), however UKTI thought this was likely to be due to wider factors than the Bribery Act, such as reputational risk;
- UKTI said that some concerns had been raised by first time exporters, companies worried about losing out to competitors, and companies worried about adequate procedures, using intermediaries and entering into partnerships.³¹

²⁸ <http://www.oecd.org/daf/anti-bribery/UnitedKingdomphase3reportEN.pdf>

²⁹ https://www.transparency.org/news/pressrelease/20110330_guidance_weakens_bribery_act;
<https://www.globalwitness.org/en-gb/archive/government-bows-pressure-business-allow-bribery-through-back-door/>

³⁰ <https://www.cw-uk.org/single-post/2015/11/06/The-UK-Government's-Bribery-Act-Wobbles-Received-Slap-Down-From-Business>;
https://docs.wixstatic.com/ugd/54261c_b05f26ab71344aa89faf09a73e0a8b57.pdf

³¹ Ibid.

3.5. In those responses to the consultation that were released to Corruption Watch under the Freedom of Information Act (some responses were withheld), a significant majority was content with the level of guidance provided, and supportive of the intent and scope of the Bribery Act.³² A minority of responses called for more detailed guidance around adequate procedures. The one submission which suggested that the trade association's members' attitudes had not moved on with regard to the use of bribery in exports, was an SME association which stated: *"it is an uncomfortable reality from a UK perspective, but [bribes] are an integral and accepted part of doing business in many ... [Arab and Asian] markets and therefore a necessity if you are going to export to those regions."*

3.6. It is not, we believe, a coincidence that the discordant voice was presented by the SME trade association. The OECD WGB has expressed concerns that SMEs are being "left behind" in the general shift towards improved corporate compliance in the UK. It specifically recommends in its latest report that:

"the UK facilitate the publishing and dissemination of more targeted information for SMEs on setting up anti-bribery compliance measures to effectively prevent and detect foreign bribery."

3.7. The government has committed in the National Anti-Corruption Strategy (5.16) to fulfil this recommendation by working with industry bodies to facilitate dissemination of information to SMEs.³³ Corruption Watch welcomes this commitment and hopes that the government will make public its efforts to do this.

3.8. Corruption Watch believes that the government must at some stage address the concerns and recommendations made by the OECD WGB about aspects of the guidance, to underline its commitment to complying with WGB recommendations. Ultimately, however, case law is needed about what adequate procedures do and do not consist of, and this can only be achieved through greater enforcement action through the courts. We also do not believe that it would be appropriate for the private sector to effectively outsource its risk management to government and law enforcement by seeking safe harbours from prosecution.

4. Challenges

The Bribery Act and SMEs

I. Impact and awareness

4.1. Corruption Watch believes that the government research on the impact of the Bribery Act on SMEs published in July 2015 was encouraging in that it found that:

- 90% of the 500 SMEs surveyed had no concerns with the Bribery Act, and

³² https://docs.wixstatic.com/ugd/54261c_b05f26ab71344aa89faf09a73e0a8b57.pdf

³³ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/667221/6_3323_Anti-Corruption_Strategy_WEB.pdf

- 89% said that it had had no impact on their ability to export.³⁴

As noted above, the key issue with the SMEs is dissemination of information, particularly about the Guidance. A third of SMEs surveyed by the government had still not heard of the Bribery Act. Meanwhile, only 42% of SMEs in the government survey had put bribery prevention procedures in place. It is encouraging that the government has recognised the problem of dissemination of information and committed to doing something about it. We would strongly encourage the government to repeat the survey it conducted in 2015 in 2019 to see if there has been improvement, following the outreach it committed to in the National Anti-Corruption Strategy.

II. Shouldering the burden of prosecution

4.2. Corruption Watch believes that the Bribery Act 2010 does unfairly penalise SMEs in an important respect which is rarely highlighted: namely, that Sections 1 and 6 of the Bribery Act are still subject to the current arcane and inadequate corporate liability laws in the UK. These laws are based on the 'identification principle' which the Law Commission has described as "*an inappropriate and ineffective method of establishing criminal liability of corporations.*"³⁵ The government has on various occasions acknowledged that the identification principle makes it difficult if not almost impossible to prosecute large, global companies.³⁶ The identification principle is widely acknowledged to be unfair to SMEs as it is far easier for a prosecutor to prove board level involvement in wrongdoing in an SME than in a large company. Additionally, it is recognised that the principle leads to poor corporate governance in larger corporations who can more easily insulate their board from knowledge of wrongdoing.

4.3. With regards to the Bribery Act, the fact that the identification principle still applies to the substantive offences of the Act, particularly Sections 1 and 6, means that while prosecutors can easily choose between whether to prosecute an SME for Section 1/6 or Section 7, in practice it is only able to contemplate seriously a Section 7 charge for large companies.

4.4. This is significant as the case law emerging on Section 7 of the Bribery Act is that because Section 7 is not a substantive offence, it incurs a lower level of culpability and therefore a potentially lower financial penalty.³⁷ It is notable that the one Deferred Prosecution Agreement involving an SME (XYZ) included suspended charges of both Section 1 and 7 of the Bribery Act, and that Sir Brian Leveson commented that the fact that XYZ faced charges for substantive offending made such offending more grave.³⁸ If substantive offending is more grave than failure to prevent offending, in theory it is therefore harder (though

³⁴ <https://www.gov.uk/government/publications/impact-of-the-bribery-act-2010-on-smes>

³⁵ http://www.lawcom.gov.uk/app/uploads/2015/06/cp195_Criminal_Liability_consultation.pdf

³⁶ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/517020/Tackling_tax_evasion-legislation_guidance_corporate_offence_of_failure_to_prevent_criminal_facilitation_tax_evasion.pdf; https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements/supporting_documents/deferredprosecutionagreementsconsultation.pdf

³⁷ https://www.judiciary.uk/wp-content/uploads/2015/11/sfo-v-standard-bank_Preliminary_1.pdf (para 46)

³⁸ <https://www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/>, preliminary judgement, para 21.

obviously not impossible as the XYZ case shows) to establish that it is in the public interest not to prosecute a company rather than offer it a DPA.

4.5. Furthermore, collateral consequences of a conviction under Sections 1 and 6, and those under Section 7 are significantly different. While a conviction under Section 1 and 6 of the Bribery Act will incur mandatory exclusion from public procurement subject to the principles of proportionality and considerations as to whether the company has self-cleaned, a conviction under Section 7 offence does not. Research by Corruption Watch has shown that Section 7 convictions do not even need to be declared to procurement authorities when bidding for public contracts, despite a statement from the government that such convictions would be subject to discretionary exclusion from public procurement.³⁹

4.6. The effect of this is that:

- in theory, it is harder to prove that it is in the public interest to offer SMEs a DPA if substantive offending can be easily proved, given that this increases the gravity of the offending;
- SMEs are more likely to face consequences of exclusion from public procurement as they are more easily prosecuted for substantive offending; and
- prosecutors have a much stronger hand in negotiating charges when dealing with SMEs.

4.7. Corruption Watch has long advocated that the Law Commission should be tasked on an urgent basis to review the identification principle and how it could be reformed or abolished. The Law Commission has repeatedly put reform of the corporate liability regime as a potential agenda item in its draft programme of law reform for over a decade, but it has consistently been removed by government. As a result, there has been no meaningful review of the options for reforming the identification principle in the UK.

Facilitation payments

4.8. There has been some complaint by parts of business that because the US Foreign Corrupt Practices Act does not specifically criminalise facilitation payments, where the Bribery Act does, this puts UK business at a competitive disadvantage. However, this must be offset against the following factors:

- the UN Convention Against Corruption makes no exception for facilitation payments and facilitation payments are illegal in most countries;
- the OECD's 2009 Recommendation for Further Combating Bribery of Foreign Public Officials calls on all parties to prohibit or discourage facilitation payments due to their corrosive effect;⁴⁰

³⁹ <https://globalanticorruptionblog.com/2017/05/11/quest-post-an-exercise-in-underachievement-the-uks-half-hearted-half-measures-to-exclude-corrupt-bidders-from-public-procurement/>

⁴⁰ <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/oecdantibriberyrecommendation2009.htm>

- the Council of Europe’s Criminal Law Convention on Corruption makes no exception for facilitation payments, and the Group of States Against Corruption (GRECO) evaluations have criticised those countries that have not made such payments illegal;
- groups such as business risk consultancy, Control Risks, and the International Bar Association’s Anti-Corruption Committee have argued strongly for a ban on facilitation payments on the grounds that they are ultimately bad for business, cumulatively undermine governance and entrench bad practice;⁴¹
- the International Chambers of Commerce rules on fighting corruption state that a company should not make facilitation payments except where the health or safety of an employee is at risk,⁴² and public statements by ICC chairs have been supportive of the UK Bribery Act’s lack of an exemption for providing clarity, while noting that those businesses with leading anti-corruption compliance programs already ban such payments;⁴³
- the UK’s lead in not making an exception for facilitation payments has helped drive up standards, including in Canada where the UK’s example led to the law being amended and the facilitation exception being phased out since October 2017, and in Australia where a Senate report into foreign bribery has called for the Australian exception to be abolished.⁴⁴

4.9. Corruption Watch believes that any introduction of an exception for facilitation payments would be seriously detrimental to the UK’s reputation, undermine the trend towards such payments being phased out, and undermine efforts by the Department for International Development and other aid donors to help eradicate petty corruption.

5. Deferred Prosecution Agreements

5.1. Deferred Prosecution Agreements (DPAs) are a useful and important tool for prosecutors, and there is no doubt that their introduction has benefited prosecutors in being able to:

- bring speedier resolutions to cases, thereby freeing up resources which could be used for more investigations; and

⁴¹ <http://www.fcpablog.com/blog/2018/4/11/pulvirenti-and-bray-time-to-remove-australias-facilitation-p.html>; <https://mlexmarketinsight.com/insights-center/editors-picks/anti-bribery-and-corruption/cross-jurisdiction/ethics-of-facilitation-payments-pit-business-principles-against-practicalities-in-the-developing-world>

⁴² <https://cdn.iccwbo.org/content/uploads/sites/3/2012/10/ICC-Anti-corruption-Clause.pdf>

⁴³ <https://www.ethic-intelligence.com/en/experts-corner/international-experts/291-icc-on-combating-corruption-2011-what-s-new.html?highlight=WyJmYWNPbGI0YXRpb24iLCInZmFjaWxpdGF0aW9uIiwicGF5bWVudHMiLCJwYXltZW50cyiLCJmYWNPbGI0YXRpb24qcGF5bWVudHMlXQ==>

⁴⁴ <http://www.fcpablog.com/blog/2018/4/11/pulvirenti-and-bray-time-to-remove-australias-facilitation-p.html>; <https://mlexmarketinsight.com/insights-center/editors-picks/anti-bribery-and-corruption/cross-jurisdiction/ethics-of-facilitation-payments-pit-business-principles-against-practicalities-in-the-developing-world>

- incentivise corporate self-reporting thereby increasing the detection of economic crime.

5.2. However, it is clear to us that these two policy objectives behind the introduction of DPAs sometimes sit uneasily with each other. In order to truly incentivise self-reporting, it must be clear to corporates and employees that there is a real risk of detection and prosecution if they fail to self-report and cooperate with law enforcement authorities. The prospect of a prosecution and conviction must be real and its consequences significantly worse than those incurred by those who self-report and cooperate with law enforcement.

5.3. We support the SFO's current stance of having a high bar for offering a DPA, high standards for what constitute self-reporting and cooperation, and a real commitment to prosecute those who do not meet those standards. We believe that this is an approach which has integrity and which in theory should maximise incentivisation of self-reporting. However, the SFO is let down by various factors outside of its control. These include:

- the 'identification doctrine' which continues to make it exceptionally difficult to prosecute large global companies, particularly for substantive offending with regards the Bribery Act;
- the lack of court transparency in prosecutions which means that significantly more information may come into the public domain about a company that receives a DPA than one which contests charges against it;
- the lack of a court mechanism, such as a corporate probation order (which would not require a separate hearing and impose an additional evidential burden in the way that Serious Crime Prevention Orders do), for imposing an equivalent requirement to implement a compliance program as that found in DPAs; and
- the slowness of the court system.

5.4. While an increase in the use of DPAs with a lower bar for qualifying would improve enforcement outcomes and bring speedier resolutions, it could undermine the incentives for self-reporting. Corruption Watch therefore believes that it is essential that a high bar for DPAs be maintained and that equal policy attention and resources are devoted to improving prosecution outcomes, ensuring that penalties in convictions are sufficiently high, transparent and accompanied by corporate remediation in order to maintain the incentive effect of DPAs.

Consistent and appropriate use

5.5. As DPAs are entirely new to the UK justice system, some inconsistency in their initial application, as prosecutors and the judge responsible for overseeing them work out how they could apply on a case by case basis, is inevitable. However, some of the inconsistencies that have manifested so far raise significant policy issues. These include the following:

Self-reporting and cooperation

5.6. As many commentators have noted, the Rolls Royce DPA was the first and, so far, only DPA to be given to a company that had not self-reported. This is despite the fact that the Code of Practice on DPAs specifically highlights the considerable weight that will be given to cooperation that includes self-reporting

conduct previously unknown to the prosecutor. The negotiation of a DPA with a company which did not self-report therefore raises the legitimate concern that this could undermine the incentive for companies to self-report.⁴⁵

5.7. The SFO's argument has been that Rolls Royce rendered such extraordinary cooperation that the company effectively provided it with information about wrongdoing which the SFO would otherwise not have known about – an argument that was accepted by the judge. What was particularly extraordinary in the Rolls Royce case was that despite the lack of a self-report, the company was given a full 50% discount in fine.

5.8. Corruption Watch believes that a self-report on its own should not be adequate grounds for granting a DPA unless accompanied by genuine cooperation and genuine commitment to a change of corporate culture. In order to encourage such cooperation and commitment to corporate change, it may be suitable to offer a DPA to a company which manifests this behaviour even where they did not self-report. However, if the ultimate policy aim of DPAs is to increase the detection of economic crime, it would be strongly advisable to offer higher discount rates in fine levels to companies that self-report, cooperate and implement corporate change, and significant but lesser discount rates to fine levels of companies that do not self-report but otherwise behave in an exemplary fashion.

5.9. This policy should however be developed formally and through consultation. Corruption Watch is concerned that the decision by Sir Brian Leveson, the sole judge currently presiding over DPA hearings so far, to allow a 50% discount in fine level for companies being given DPAs, despite the fact that the Crime and Courts Act specifies only a 30% discount, raises serious questions about how DPA policy is being developed beyond the original scope intended by Parliament.
Compensation

5.10. While compensation of victims of corruption forms an essential part of the DPA regime, no compensation was ordered in either the XYZ or Rolls Royce DPAs. The judgements in this regard suggest that no compensation was given because the bribery was too complex, too widespread, and conducted through agents. However, this sets a bad precedent that the more egregious and global a bribery scheme is, the less likely a company will have to pay compensation for it. Corruption Watch strongly believes that compensation based on a full analysis of loss caused to an affected body or state should form part of all DPAs that involve foreign bribery, and that complexity should not be a bar to giving compensation.

Individual culpability

5.11. Corruption Watch does have real concerns about whether individuals are being effectively held to account in enforcement actions against corporates for Section 7 offences. Individual accountability in cases of corporate wrongdoing is essential for the public confidence in the justice system and particularly in the use of DPAs. DPAs have received considerable criticism in the US, where they

⁴⁵ <http://www.transparency.org.uk/a-failure-of-nerve-the-sfos-settlement-with-rolls-royce/#.W0ZL8y3Myt8>

have been in use for longer than most other jurisdictions, due to lack of individual prosecutions at a senior executive level for the corporate conduct that forms the basis of the DPA.⁴⁶

5.12. It is noticeable that the two DPAs involving Bribery Act wrongdoing and which relate to large companies (Standard Bank and Rolls Royce) have not resulted in any action against individuals in the UK as yet, whether prosecution or any regulatory action such as disqualification of implicated individuals. Investigations into individuals in the Rolls Royce case are still ongoing, though no charges have yet been laid 18 months after the DPA. In comparison, charges were laid against individuals in the US in November 2017.⁴⁷

5.13. It is also however the case that no individuals have been charged or faced regulatory action in relation to the one guilty plea for a Section 7 offence. It is not clear whether this is because it was too difficult to prove guilt of individuals in these cases, or whether given resource constraints, prosecutors felt they needed to move onto the next case. This suggests that the issue of lack of individual accountability may be relevant not just in DPAs but to the offence of Section 7 itself, which has no corollary individual failure to prevent offence attached to it.

5.14. The lack of individual accountability is concerning and Corruption Watch believes it will rarely be appropriate to enter into a DPA without some form of enforcement or regulatory action being taken against senior level individuals. Corruption Watch also believes that individuals at a senior level must also be held to account when prosecuting Section 7 offending.

18 July 2018

⁴⁶ <https://www.cw-uk.org/single-post/2016/03/10/Out-of-Court-Out-of-Mind---do-Deferred-Prosecution-Agreements-and-Corporate-Settlements-deter-overseas-corruption>

⁴⁷ <https://www.justice.gov/opa/pr/five-individuals-charged-foreign-bribery-scheme-involving-rolls-royce-plc-and-its-us>

Corruption Watch – Supplementary written evidence (BRI0044)

Following oral evidence given by Corruption Watch on 17th July 2018, Corruption Watch is submitting further written evidence on the following issues:

- Corporate probation orders;
- Reform of the 'identification' principle; and
- Lack of prosecutions under Section 6 of the Bribery Act

Corporate Probation Orders

1. As mentioned briefly in our original written evidence, Corruption Watch strongly advocates the introduction of corporate probation orders as a sentencing option in courts for companies that are convicted of economic crime. The introduction of such orders would help ensure that companies that do not cooperate with law enforcement and therefore face prosecution and conviction are not treated more leniently, and do not receive less scrutiny of their corporate governance than those companies that do cooperate and are eligible for a Deferred Prosecution Agreement. Corruption Watch believes that the introduction of such orders would help enhance the effectiveness of the Deferred Prosecution Agreement regime and improve corporate governance in those companies most in need of such improvement.

The Issue

2. Currently there are only two contexts in which companies that have been convicted of wrongdoing are required to prove that they have remedied their corporate compliance and governance processes to prevent further wrongdoing. These are:

- *Following a conviction under the Corporate Manslaughter Act 2007*: the Act enables courts to impose 'remedial orders' for companies convicted under the Act, requiring a company to take steps to remedy any management failures that led to a death. The court can also make a 'publicity order' requiring a company to publicise that it has been convicted of an offence under the Act, the amount of the fine imposed and the terms of the remedial order imposed.
- *Deferred Prosecution Agreements*: companies that have committed economic crimes and which self-report their wrongdoing and cooperate with law enforcement bodies may be offered a Deferred Prosecution Agreement (DPA). These agreements allow prosecutors to impose requirements additional to a financial penalty, compensation and disgorgement of profits, which include modification of the company's compliance programme. Typically, an external monitor may be required, at the company's expense, so that the prosecutor can be assured that the company's compliance programme has genuinely improved.

3. There are no powers available to a court at sentencing stage to require companies convicted of non-manslaughter offences, such as the Bribery Act, to prove that they have changed their corporate culture sufficiently to prevent further wrongdoing. The result is that companies that do not self-report and cooperate with law enforcement face less external scrutiny of their compliance

programmes than companies that do. This is a missed opportunity to improve corporate governance among convicted companies, who are more likely to need greater scrutiny, having shown less commitment to change or corporate remorse.⁴⁸

4. Crucially, the lack of such powers for courts also undermines the incentives for companies to cooperate with law enforcement in order to receive a DPA, by making DPAs potentially more onerous than a conviction. The costs of external monitoring to prove that systems have changed sufficiently to prevent further wrongdoing can be high and represents an additional cost on companies. It is therefore unfair that companies that cooperate may face this additional cost while uncooperative companies do not.

5. To remedy this Corruption Watch recommends that corporate probation orders be introduced in the UK whether specifically in the Bribery Act or preferably as a wider tool for economic crime. These would effectively be a supervision or remedial order imposed by a court on a company convicted of an offence as part of the sentencing process, based on evidence already heard at trial, much like in corporate manslaughter convictions. The court would be able to appoint a third party such as an expert or body to supervise the probation period.

6. The government has argued, during an amendment to the Criminal Finances Act which would have introduced corporate probation orders for economic crime, that they are not necessary because of already existing powers under the Serious Crime Act 2007,⁴⁹ in particular, the power to impose Serious Crime Prevention Orders (SCPOs). SCPOs are orders imposed by a court⁵⁰ through a civil court process upon application by the Director of the SFO or of Public Prosecutions. The court must have reasonable grounds to believe that such an order would protect the public by preventing, disrupting or restricting involvement by a person in serious crime, and must be satisfied that there is a real risk that serious crime will be committed. These orders are very broad in what they can require and therefore could be used in theory to require compliance monitoring.

7. However, there is little evidence that Serious Crime Prevention Orders are being used in practice to require monitoring of corporate compliance programs post-conviction. The Serious Fraud Office, which conducts the majority of corporate crime prosecutions for economic crime, has never sought one for a company. The fact that they require a separate application to the court and for the prosecutor to prove that reoffending is a risk means they are an additional burden on prosecutors that are likely to be used only in exceptional circumstances. A corporate probation order in contrast would be a penalty imposed by the court upon sentencing, without need of a further hearing or

⁴⁸ <https://www.cw-uk.org/single-post/2016/02/16/SFO-Plays-Hardball-Sweett-Case-Sets-New-Standards-for-Cooperation-in-Corruption-Cases>

⁴⁹ [https://hansard.parliament.uk/commons/2016-11-22/debates/bb28ffa6-8a64-4c38-9653-67e0648e5881/CriminalFinancesBill\(FifthSitting\)](https://hansard.parliament.uk/commons/2016-11-22/debates/bb28ffa6-8a64-4c38-9653-67e0648e5881/CriminalFinancesBill(FifthSitting))

⁵⁰ <https://www.cps.gov.uk/legal-guidance/serious-crime-prevention-orders-serious-crime-act-2007-sections-1-41-and-schedules-1>

further evidence gathering. It is likely that this would necessitate minor legislative change and amendments to the Sentencing Guidelines.

Other jurisdictions

8. Corporate Probation Orders are used in other jurisdictions. The US Sentencing Council Guidelines for instance allow for 'organizational probation' to be imposed by the courts upon conviction.⁵¹ This can include a requirement for the organisation to "*develop and submit to the court an effective compliance and ethics program*", including a schedule for implementation (§8D.1.4 (b) 1).

9. In Canada, under the Corruption of Foreign Public Officials Act (CFPA) and the Criminal Code, courts may impose a probation order on a company, which can include:

- a requirement to make restitution; and
- establish policies and procedures to reduce the likelihood of reoffending, communicate these policies and report to the court on implementation of these policies and procedures.⁵²

Although underused, corporate probation orders have been used by courts in corruption cases in Canada.⁵³

10. The Sapin II anti-corruption law introduced in France in 2017 introduces a '*mandatory compliance*' penalty for companies convicted under the law. A convicted company must implement at its own expense, within five years, effective anti-corruption procedures under the supervision of the Agence Française Anticorruption (AFA).⁵⁴ Non-compliance with this penalty is itself a criminal offence. This is separate to the introduction in Sapin II of a new procedure under French law that enables companies to enter into negotiated settlements for criminal wrongdoing, known as Convention Judiciaire d'Intérêt Public (CJIP).

Reform of the Identification Principle

11. As we made clear in our written submission, Corruption Watch strongly recommends that the government should task the Law Commission to undertake on a priority basis a review of the overall corporate liability regime in the UK, and in particular the options for abolishing and replacing the 'identification principle' which currently governs prosecution of corporate criminality. The principle requires prosecutors to prove that someone at board level knew and intended for wrongdoing to occur. The Serious Fraud Office and Crown Prosecution Service have long indicated that the principle impedes their ability to prosecute larger and more global, companies.

12. As Corruption Watch made clear in its evidence to the Committee, we believe that the fact that the 'identification principle' continues to apply to

⁵¹ <https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/GLMFull.pdf>, §8D1.1 (part D), p 365

⁵² <https://globalcompliancenews.com/white-collar-crime/corporate-liability-canada/>

⁵³ https://dspace.library.uvic.ca/bitstream/handle/1828/9253/Ch.%2007_April2018_web.pdf?sequence=8&isAllowed=y

⁵⁴ https://www.eversheds-sutherland.com/documents/global/france/the-new-french-anti-corruption-law-sapin%20II_March_2017.pdf

substantive offending in the Bribery Act, particularly Section 1, 2 and 6 of the Act, unfairly penalises SMEs. SMEs are significantly more likely to face prosecution for such substantive offending under these Sections and as a result liable to face greater penalties and risk of far greater collateral consequences such as debarment from public contracting.

13. Indeed, there is evidence that this is already happening. In particular, while no large company subject to a Deferred Prosecution Agreement has faced a suspended Section 1 charge, the only SME to be offered one did face such a charge. Additionally, Corruption Watch understands that in several cases involving SMEs, Section 7 charges may have been preferred by prosecutors as a more lenient form of charging in return for some cooperation from the company, rather than Section 1 charges which incur far greater risk of exclusion from public contracting. A conviction under Section 1, 2 and 6 of the Bribery Act incurs mandatory exclusion from public contracting where Section 7 only incurs discretionary exclusion. With large companies, however, Section 7 will be the only charge that a prosecutor will be able to prove, thus reducing the charging options open to prosecutors and making it unlikely that larger companies involved in wrongdoing will face exclusion from public contracting.

14. Case law from Deferred Prosecution Agreement reveals that Section 7 is viewed by the courts as 'lesser offending.' Lord Justice Leveson stated clearly in his judgement in the first DPA when assessing the seriousness of the offending and culpability of the organisation, that the fact that Section 7 involved no knowledge or intention on the part of the organisation or its employees necessarily meant that the offending was by implication less serious and involved less culpability.⁵⁵ The implication of this is that large companies will only ever be found guilty of the lesser offending characterised by Section 7, and it is less likely that they will face the highest penalties that could be imposed upon them if they were liable for substantive offending.

15. Corruption Watch recognises the important role that Section 7 has played in helping incentivise companies of all sizes to put in place strong anti-corruption compliance systems and thereby improve corporate governance for anti-corruption in the UK. Section 7 is also an extremely useful tool for prosecutors making it easier for them to prosecute corporate bribery, and Corruption Watch strongly believes that a Section 7 style offence should be extended further to all economic crime.

16. However, Corruption Watch also believes that in order to ensure that SMEs are not unfairly penalised by the UK's economic crime laws, and in order to ensure that larger companies can face the maximum penalties possible where wrongdoing is egregious and merits such penalties, it is essential that the 'identification principle' is replaced with a fairer and more modern corporate liability standard that ensures that large companies can also be prosecuted for substantive offending.

17. In order to ensure that such reform is conducted in a comprehensive way, it would be appropriate for the Law Commission to be tasked by a government

⁵⁵ https://www.judiciary.uk/wp-content/uploads/2015/11/sfo-v-standard-bank_Preliminary_1.pdf (paras 26 and 46)

department at the earliest opportunity and on a priority basis to undertake a review of the options for replacing and abolishing the 'identification doctrine'. Our current corporate liability laws are unfair in principle and practice, and are leading to an uneven application of the Bribery Act. The UK needs modern laws that help foster its reputation as a global trading nation that operates with integrity and fairness. Tasking the Law Commission to review the options for reform of the identification principle would be a crucial step towards achieving that.

Lack of prosecutions under Section 6

18. The absence of prosecutions or other enforcement actions under Section 6 was noted by the Committee. Corruption Watch believes that the primary reason for the absence of such prosecutions is because Section 1 and Section 7 provide sufficient grounds for prosecutors to bring prosecutions where bribery of foreign public officials has taken place, therefore reducing the need to use Section 6 to prosecute such offending. Corruption Watch is of the view that the absence of prosecutions under Section 6 up to now does not necessarily reflect an absence of prosecutorial action being taken for this type of offending but rather the fact that other sections of the Bribery Act are already sufficient to criminalise the offending.

5 September 2018

Michelle Crotty and Nicola Hewer - Supplementary written evidence (BRI0049)

DPAs (Q3)

We unfortunately are not able to provide the further detail asked for. While we would assume the number of Bribery Act cases dealt with summarily are low in number, the CPS would only be able to obtain details on those cases by manually searching through all files (in the 1000s), which would incur a disproportionate cost to the Government.

Impact on Sports Sponsorship (Q16)

Evidence from the sport sector remains largely anecdotal in this area.

Stakeholders have reported that it is relatively rare for a customer to cite the Bribery Act as an explicit reason to not renew or partake in hospitality or sponsorship of a sport event, certainly in writing.

Stakeholders have reported a decline in acceptance to hospitality invites in the UK since the introduction of the Act, which in many cases has necessitated combining the sponsorship of sporting events with the introduction of business conferences/seminars in order to facilitate attendance from both the public and private sectors, particularly where strict rules have been introduced to ensure compliance with the Act.

Several firms have cited 'legislation' as a reason for not renewing sponsorship or hospitality packages at events. The issue is mingled with the PR challenges for some sectors that arose out of the financial crash, and therefore the perceptions of attending events.

Sport stakeholders have attempted to tender investigations in to the precise impact of anti-bribery legislation on events sponsorship and hospitality. One stakeholder shared that some major consultancies have declined to look in to the issue, with one of the firms describing corporate hospitality as 'a toxic issue for a Big Four firm to get involved in'.

Looking more holistically at the issue, some stakeholders feel that the Bribery Act, which has been in place for some time, is less of an issue than the Markets in Financial Instruments

Directive (MiFID) II.

Outside the EU, stakeholders have reported that organising events in less developed countries with an absence of corresponding legislation has also proven problematic; rightly or wrongly the way that business is conducted in some of these countries is not compatible with some of the provisions of the Act. This has allegedly led to some lost opportunities for UK business.

International Corruption Unit (Q20)

Provided by Home Office:

"A range of agencies in addition to the NCA are involved in the law enforcement response to bribery including the SFO, FCA, Ministry of Defence Police (MDP), CPS and Scotland's Crown Office and Procurator Fiscal Service (COPFS).

The SFO's purpose is to investigate and, where appropriate, prosecute cases of serious or complex fraud, bribery and corruption and associated money laundering. In addition, the SFO recovers the proceeds of those crimes it investigates and assists overseas jurisdictions in their investigations into serious or complex fraud, bribery and corruption. The SFO is also the UK's lead agency

for assessing the credibility of corporate self-reports of bribery and corruption and taking these forward for investigation and, where appropriate, prosecution. The SFO will investigate those cases which call for the legal powers and multi-disciplinary approach available to the SFO. In considering whether to take on an investigation, the Director applies a Statement of Principle, which includes consideration of:

- whether the apparent criminality undermines UK PLC's commercial or financial interests in general and the City of London in particular;
- whether the actual or potential financial loss involved is high;
- whether actual or potential economic harm is significant;
- whether there is a significant public interest element, and;
- whether there is a new type of fraud.

The International Corruption Unit (ICU) investigates international bribery and corruption and related money laundering offences.

The main functions of the ICU are to investigate:

- money laundering in the UK resulting from corruption of high-ranking officials overseas;
- bribery involving UK-based companies or nationals which has an international element;
- cross-border bribery where there is a link to the UK

The ICU also traces and recovers the proceeds of international corruption

The type of case that the SFO takes forward are those for which the application of the SFO's dual investigatory and prosecutorial role (known as the Roskill model) is most appropriate. The type of case taken forward by the NCA are those for which the NCA's police powers and use of covert tactics are most appropriate.

In 2017, a MOU entitled 'Tackling Foreign Bribery' was signed between various law enforcement bodies. Parties to the MOU are the SFO, COLP, COPFS, CPS, FCA, MDP, NCA, and HMRC. The MOU outlined the refreshed collaborative law enforcement effort to investigating and prosecuting foreign bribery, confirmed the remit of each agency within this objective and established new rules for assigning foreign bribery cases.

Operational deconfliction under a 'Bribery and Corruption Clearing House' mechanism takes place between these partner agencies on a monthly basis to ensure there is no duplication of activity between agencies. The National Economic Crime centre will build on this mechanism, going further to ensure the most effective response."

Whistleblowing (Q21)

The Government has no day-to-day role in the enforcement of rights under Part IVA of the Employment Rights Act 1996, originally inserted by the Public Interest Disclosure Act 1998, nor generally in the handling of disclosures, so has no specific information on its effectiveness in cases where bribery is reported. The Government believes that the legislative framework in general is proportionate and effective in enabling workers to make public interest disclosures without fear

of recrimination by their employer, but will of course keep the legislation under review.

In 2013 the Government published a call for evidence on the whistleblowing framework, seeking views on ways that it could be made more effective.

Responses highlighted that when whistleblowers made disclosures to prescribed persons, they did not have confidence that their disclosures were properly investigated or that action was taken as a result. In response, the Government legislated in the Small Business, Enterprise and Employment Act 2015 to require most prescribed persons to produce an annual report on whistleblowing disclosures made to them by workers. The regulations to implement this reporting duty are now in place, and prescribed persons' first annual reports are due to be published in the next few months, covering the period 2017-18. Each prescribed person must report annually on the number of concerns that can be reasonably identified as public interest disclosures; and the number of disclosures where a decision to take further action was taken, including a summary of the types of action taken. This reporting duty aims to increase confidence that prescribed persons are taking whistleblowing disclosures seriously through greater transparency about how disclosures are handled: in particular that they investigate where appropriate and take action where necessary. The reporting duty will also provide a source of data in future about the number of disclosures made to prescribed persons.

All allegations reported to the SFO from whistleblowers that may fall within the SFO's remit are assessed on their merits. This involves seeking corroboration of any allegations, as well as gaining an understanding of a whistleblower's motives.

The SFO receives a range of information and intelligence about alleged criminal actions from diverse sources. Decisions to investigate are made on the basis of all relevant material.

The SFO does not require a formal report to be received by the SFO before considering allegations of criminality. Nor does it require a named or identified individual to make a report; anonymous reports which may fall within the SFO's remit are also considered. The SFO proactively reviews the media and open source material for intelligence relating to offending.

The SFO receives a relatively small number of whistleblowing reports. The SFO does not publish those numbers since to do so could prejudice the prevention or detection of crime.

Prosecutions dealt with summarily (Q18)

From 2016 onwards, we have identified only one prosecution under the Bribery Act has been dealt with summarily. We have not been able to identify any other matters between 2011-2015; unless sentences are sufficiently high they may fall off internal recording systems. We would assume the number is low but further information would require a manual trawl of physical files which at this stage, due to the high volume of magistrates courts file generally, would not be possible.

Treasury and SFO Interactions (Q19)

Following agreement by the CST in March 2018 to increase to the SFO's vote funding from April 2019, the SFO and HMT changed their practices when dealing with expensive cases. As part of the revisions to funding for the SFO, the SFO will at the next Supplementary Estimate round submit a reserve claim for the

collective costs of any cases above 5% of turnover (£2.5m in 2018-19). To support any reserve claim they will be expected to provide HMT officials with background information and a justification of why the costs of each case have gone above this. Like all reserve claims, this would need to be signed off by the Chief Secretary. HMT ministers do not receive specific details of the case e.g. the names of the defendants etc. only the broad outlines and justifications for the reserve claim.

Clarification on statistics from Attorney General's Office:

CPS prosecution numbers

CPS has charged 26 defendants over the last two financial years.

- 2016-17: 13 defendants charged, including 1 corporate under the Bribery Act.
- 2017-18: 13 defendants charged, including 1 corporate under the Bribery Act.

Cases under old legislation:

Since the Bribery Act came into force on 1st July 2011, the Law Officers have granted consent to prosecute around 107 individuals (including companies) for offences of corruption under the Prevention of Corruption Act 1906 (including conspiracy to commit offences under that Act). The applications were made by CPS and SFO and involved 28 separate cases.

25 July 2018

Crown Prosecution Service– Supplementary written evidence (BRI0057)

I am writing following the evidence that was provided by Iskander Fernandez, Partner, BLM on Tuesday 11 December in order to set out the CPS position in relation to Deferred Prosecution Agreements (DPA) and SMEs.

The Directors of the Serious Fraud Office (SFO) and the CPS have made it clear that where there is sufficient evidence to prosecute and it is in the public interest to do so, a deferred prosecution agreement will only be considered where the corporate meets the criteria set out in the Directors' DPA Code.

In practice, we have found that not all corporates are aware of DPAs, so representations may not be made prior to charge. The current Code and Criminal Procedure Rules anticipate that all discussions with the corporate will be pre-charge. Therefore, if the corporate wishes the prosecution to consider issuing an invitation to commence formal negotiations in relation to a DPA, there will have to be preliminary discussions between the two to explore whether it would be a possibility. If, following these discussions, it appears a DPA may be an option then a letter of invitation will be issued as required by paragraphs 3.1-3.5 and 3.11 of the DPA Code. If, during these formal discussions, it appears the corporate has not brought itself within the eligible criteria then the prosecution will proceed.

In relation to dormant companies, businesses may use corporate structures to limit liability and transfer risk and assets between different legal entities. Company officers determine whether any one company in a group may be active or dormant. A dormant company may be revived and start trading again at any point.

The CPS did not issue a letter of invitation under paragraphs 3.1-3.5 and 3.11 of the DPA Code to Skansen, therefore that case did not reach the stage of formal negotiations.

MAX HILL QC

DIRECTOR OF PUBLIC PROSECUTIONS

21 December 2018

Sean Curran – Written evidence (BRI0048)

These submissions relate to ongoing investigations and court proceedings; they have been generalised so as not to reveal the identity of the parties involved.

Deterrence

1. *Is the Bribery Act 2010 deterring bribery in the UK and abroad?*
 - a) The Bribery Act 2010 is generally perceived to implement a zero-tolerance approach to bribery and corruption.
 - b) However, its application and enforcement are inconsistent. It is especially apparent that a significant amount of resources have been spent on investigating and prosecuting the “low-hanging fruit” such as SMEs and individuals, and less so on large scale matters.
 - c) It is considered that it would be most helpful and informative to the general public and businesses general at large in deterring future potential acts of bribery and corruption if, when instigating all investigations and proceedings, there was greater transparency, openness and justification by the SFO as to Director’s reasoning against each of the SFO’s Statement of Principles, that being the five key considerations of:
 - a. whether the apparent criminality undermines UK PLC’s commercial or financial interests in general and the City of London in particular;
 - b. whether the actual or potential financial loss involved is high;
 - c. whether actual or potential economic harm is significant;
 - d. whether there is a significant public interest element; and
 - e. whether there is a new type of fraud.

Additionally this would also provide much greater accountability of the Director and the rest of the SFO Board as to the commitment of public of funds.

Enforcement

2. *Is the Bribery Act 2010 being adequately enforced? If not, how could enforcement be improved? Do the Serious Fraud Office and the Crown Prosecution Service have the right approach and the resources they need to investigate and prosecute bribery offences effectively?*
 - a) The SFO’s powers of arrest are contained in s.24 PACE, but it still has a duty to comply with PACE Code G. This should be rigorously upheld for all arrests connected to the investigation of bribery.
 - b) The SFO’s approach to the seizure of property is, more often than not, disorganised and inefficient. Appropriate procedures must be put in place such that an inventory of each item seized is provided to subject of a search and seizure in a thorough and timely manner. This would alleviate the copious time and resources spent subsequent to a search attempting to

establish exactly what has been seized. If for some reason this proves to be a challenging task, the SFO should consider allowing the subject to inspect seized material in order to assist with identifying each item.

- c) If the SFO's seeks the cooperation from other law enforcement bodies for the seizure of property outside of their own enacted powers under the Criminal Justice Act 1987 (hereafter the "CJA'87") Section 2(4) and 2(5) then the reasoning for such decision should be logged and be transparent to the property owner. This would help uphold the statutory protection afforded under the CJA'87 and provide much needed accountability.
- d) Once the seized material has been itemised, a consistent timetable should be adopted throughout investigations for the items to be processed and returned. The onus should not be on the subject to ascertain what property of his own has been seized. In addition, it would expedite the process of isolating privileged material from non-privileged material in order for the SFO to begin their review as quickly as possible.
- e) There are numerous examples of written communication where the SFO "hopes" to provide updates and / or the return of materials by a certain date. Subsequently, no further updates are provided until chased repeatedly. This is an ongoing theme which indicates either inefficient internal processes, and/or a substantial lack of resources to cope with simple update requests. Having a systematic procedure to respond to such queries would also prevent the need to escalate requests to senior members of the SFO and the Attorney General.
- f) The SFO, by its own admission, refers to their respective investigations as being one of many large and complex investigations, and that the office is subject to competing demands.
- g) In some instances, and obviously this cannot always be the case, it may expedite matters if the SFO were to engage effectively with the subject of an investigation, rather than spending many months after arrest resisting communication. This is especially so if the subject indicates that they are willing to cooperate and assist with an investigation into bribery as these are often the most complex and lengthy types of investigation.
- h) In some cases, property has been seized and detained for well over a year and the SFO is unable to commit to a date for the processing and return of the majority of the seized items. This once again is indicative of the competing interests on the SFO's resources and / or a distinct lack of (known) processes in place to assist with timely returns.
- i) As demonstrated in the case against the *Tchengviz* brothers, an absence of proper procedures can lead to serious failings and significant damage to the subject of a search.
- j) The SFO should be required under statute (as they appear almost singularly not to be currently under Schedule 2 of the Parliamentary Commissioners Act 1967) to be subject to the Parliamentary and Health Service Ombudsman's suite of good practice principles being a publically accountable body.

Guidance

3. *Is the statutory guidance on the Bribery Act 2010 sufficient, clear and well-understood by the companies and individuals who have to deal with it? Should alternative approaches be considered?*

- a) The existing guidance is not sufficiently clear, particularly for SMEs. As a result, SMEs are reluctant to fund the initial outlay which goes toward deciphering the guidance, and then implementing practical procedures to ensure its compliance with the Bribery Act 2010.
- b) A better approach would be to enable SMEs to account to and address concerns to a specific, dedicated body. In particular, it would include a mechanism for the SME to obtain clearance for an action. This would have the effect of shifting the focus to preventative measures being taken to prevent bribery and corruption from taking place.
- c) This model would alleviate the excessive onus on SMEs to implement costly internal procedures which may not even tackle the risks that are pertinent to its business. Accordingly, the spirit of section 7 of the Bribery Act 2010 would be better upheld and SMEs would not be so reluctant to putting in place corporate procedures to prevent the facilitation of bribery.

Challenges

4. *How have businesses sought to implement compliance programmes which address the six principles set out in the Ministry of Justice’s guidance on the Bribery Act 2010? What challenges have businesses faced in seeking to implement their compliance programmes? Are there any areas which have been particularly difficult to address?*

- a) The guidance is largely theoretical and SMEs may not have the resources available to seek thorough, tailored advice (from lawyers or auditors) on how to comply with the Bribery Act 2010.
- b) An area which has been particularly problematic is the guidance related to hospitality, promotion and other business expenditure. The guidance on this area is particularly unclear and while larger corporate bodies may be able to implement “blanket” procedures to address the way in which hospitality, promotion and other business expenditure are dealt with, SMEs may require a more fact-specific policy relevant to their business. This would take into account the foreign element of the business and the cultural sensitivities within which it is required to operate.

5. *What impact has the Bribery Act 2010 had on small and medium enterprises (SMEs) in particular?*

- a) Aside from the initial outlay spent on striking a proportionate balance between the level of resources directed towards anti-bribery procedures and the risks faced by the business, there is an ongoing burden to ensure compliance across supply chains (especially in an international connect). This is challenging in itself for a SME and will have already placed significant financial burden on the SME.
- b) These challenges are compounded if the SME falls subject to a complex and lengthy investigation. In light of the lack of processes and efficiency alluded to above, such investigations can have a damning effect on the running of a business, as vital materials may be detained for undefined lengths of time.
- c) A further consequence of such delays can be extremely adverse to an individual or subject concurrently dealing with a different authority for other purposes, such as filing business documents at Companies House or returns to HMRC.

- d) There is a complete absence of accountability of the SFO to any independent adjudicative body. The SFO is able to act entirely of its own accord with total impunity when conducting investigations, and this has been particularly apparent in investigations conducted pursuant to the Bribery Act 2010.
- e) The SFO is currently only quasi - accountable to the Attorney General acting in a superintendent role. Having been assigned the mammoth task of investigating and prosecuting under the Bribery Act 2010, it is wholly inappropriate that the governing body of such complex and lengthy investigations is able to act without independent supervision. This is highly prejudicial for the subject of an investigation, and especially a SME, as there is limited recourse to challenge the SFO's actions. The SFO's lack of accountability is highlighted by the fact that other large government bodies, such as the Financial Conduct Authority and the National Crime Agency are both accountable to supervisory bodies.
- f) The only avenue currently open to a SME in these circumstances is judicial review of the SFO's actions, but as previous cases have proven, it would be a futile yet extortionately expensive and lengthy process to endure. As discussed above, a better approach would be for a SME to have access to an independent adjudicative body, to whom the SFO is accountable, in order to address any concerns regarding investigation and prosecution under the Bribery Act 2010.
- g) An investigation pursuant to the Bribery Act 2010 can have devastating financial consequences on SMEs. Even if the subject of the investigation demonstrates an overwhelming willingness to cooperate and assist, the investigation by its very nature can be extremely lengthy and complex and can drain the resources of a subject (with reference to the recent *Bilta* judgment).
- h) To this end, the Bribery Act 2010 is wide in its application, and strong consideration should be given to the adoption of a stringent "checklist" prior to commencing a lengthy investigation into a SME. A definitive balance should be struck between investigating the SME and dealing with individuals caught up in such investigations.

6. *Is the Act having unintended consequences?*

- a) Most significantly, investigations that are conducted under the Act can have a crippling impact on a subject's business and family affairs. This is compounded due to the lack of (known) processes for the majority of the investigative stage.

Deferred Prosecution Agreements

7. *Has the introduction of Deferred Prosecution Agreements (DPAs) been a positive development in relation to offences under the Bribery Act 2010? Have DPAs been used appropriately and consistently? Has their use reduced the likelihood that culpable individuals will be prosecuted for offences under the Act?*

No submissions.

International aspects

8. *How does the Bribery Act 2010 compare with anti-corruption legislation in other countries? Are there lessons which could be learned from other countries?*

- a) The Bribery Act 2010 has a much wider, extra-territorial reach compared with the anti-corruption legislation in most other countries. This impacts foreign trade as in most other (mainly EU countries), anti-corruption and bribery laws are predominantly aimed at attempts to bribe public officials rather than having a focus on business-to-business transactions.
- b) There is an obvious comparison to be made with the FCPA's treatment of facilitation payments made to officials for the routine processes of official actions that are expected by local customs. These are wholly illegal under the UK Bribery Act 2010 and this may discourage British companies from working abroad.

9. *What impact has the Bribery Act 2010 had on UK businesses and individuals operating abroad?*
No submissions.

10 August 2018

Deloitte LLP – Written evidence – (BRI0033)

About Deloitte

Deloitte welcomes the opportunity to contribute to the House of Lords Select Committee on the Bribery Act 2010 and to set out our thoughts on the impact of this legislation and where we see opportunities for improvements.

Deloitte is among the UK's leading professional services firms, provides audit, financial advisory, tax and consulting services across the corporate sector. We employ over 17,000 people in the UK, with a presence in each region and nation.

The comments reflected in our submission to the Select Committee are principally drawn from the interactions we have with large clients on the impact of the legislation.

Summary

We are generally supportive of the impact of the Bribery Act 2010 (the Act) in encouraging a stronger focus on integrity in winning and retaining business.

We hope that this evidence is helpful to the Committee in highlighting some of the challenges we have seen for large corporates. Most of our interactions in relation to the Act have been with large enterprises and therefore we have concentrated on the impact of the corporate offence under sections 7 and 8 (failure to prevent bribery) and its defence of having adequate systems and procedures in place to prevent bribery.

In overview:

- The Act, and the section 7 offence in particular, has generated positive action from many companies aimed at eliminating corruption through enhanced procedures and monitoring.
- This is an area of continued and ongoing focus for many organisations, as the statutory guidance applies a principles-based approach, which is very different from previous more prescriptive approaches to compliance, and can require a cultural shift.
- As bribery risk affects most business functions, implementation of an effective programme is complex, particularly at international level.
- Deferred Prosecution Agreements (DPAs) are, broadly, seen as a positive development in corporate enforcement, and it is inevitable that some decisions will be subject to discussion and criticism bearing in mind the delicate balances applied.
- The Act remains a lodestar for other countries in updating their own legislation, although developments elsewhere, such as compulsory compliance programmes in France, should be watched with interest for any potential translation into the UK.

Deterrence

1. Is the Bribery Act 2010 deterring bribery in the UK and abroad?

Since the Act introduced the corporate offence of failure to prevent bribery, anti-bribery policies, procedures and controls have become not just an essential component for most of our multinational clients' compliance and monitoring programmes but also a focus area when choosing and managing third party agents and suppliers. In particular, more controls and due diligence are often put in place in jurisdictions considered to be riskier. This represents a significant shift in awareness and positive action. The retrospective aspect of published judgements concerning DPAs assists in providing further clarification and insight that is relevant to the development of these business decisions

We believe this is likely to have had a deterrent effect - most commercial bribery involves employees or others acting for the company's benefit, not purely their own, so in this context, setting clear expectations on conduct is a good foundation for prevention. The deterrent effect is likely to be stronger in organisations with a more centralised structure, with UK nationals (who are personally liable under the Act) managing operations in other jurisdictions, as opposed to more decentralised models where local management has greater control and attitudes depend on local law and enforcement practices.

The Act does, of course, sit within a wider context of the international drive against corruption, supported by the OECD, high penalties under the US Foreign and Corrupt Practices Act, and more countries taking active enforcement steps themselves. The Act is also being complemented by the increased focus on strengthening the narrative disclosure made by corporates on areas such as ethical business conduct.

Enforcement

2. Is the Bribery Act 2010 being adequately enforced? If not, how could enforcement be improved? Do the Serious Fraud Office and the Crown Prosecution Service have the right approach and the resources they need to investigate and prosecute bribery offences effectively?

Enforcement can only be as strong as the underlying law and a case's factual complexity allow. Given the challenges of international investigations, and the legal uncertainty as to what can constitute 'adequate procedures' (see our further comments under Question 6 below), we consider that the high penalties and required compliance programmes under DPAs to date have had a meaningful impact on the large corporates involved, and acted as a driver for others to implement effective prevention measures.

We do not, of course, have any visibility of whether other cases could have been taken forward had the approach differed or additional resources been accessible.

Guidance

3. Is the statutory guidance on the Bribery Act 2010 sufficient, clear and well-understood by the companies and individuals who have to deal with it? Should alternative approaches be considered?

We consider that the statutory guidance is a good example of the principles-based approach and is clearly and simply written. However, businesses are still

learning how to implement this type of approach effectively, as it requires exercising risk-based judgment across multiple functions rather than applying prescriptive tick-box style requirements to one or two. We discuss this further under Question 4 below.

It is not, of course, for government guidance to meet this challenge, as it requires business decisions dependent on appropriate risk assessment and evaluation of proportionality. Adapting to this has been an adjustment for some businesses.

Challenges

4. How have businesses sought to implement compliance programmes which address the six principles set out in the Ministry of Justice’s guidance on the Bribery Act 2010? What challenges have businesses faced in seeking to implement their compliance programmes? Are there any areas which have been particularly difficult to address?

Complexity

Complexity is the main implementation challenge - bribery risk touches almost every part of a business and its processes, globally, from expenses to procurement to sales to logistics to remuneration. Further, relationships with agents, joint venture partners and other third parties are necessary to penetrate markets across the globe.

The key risk areas for each of the above can be different depending on circumstances and jurisdiction, the policies and procedures needed for a Section 7 defence must be tailored, and ethical behaviour must be embedded. Then, appropriate monitoring and analytics are needed to support the programme.

As we have also seen with recent implementations of the General Data Protection Regulation (GDPR), this type of wide-ranging ‘root and branch’ programme with international impacts requires significant time and resources in order to deliver and sustain an effective programme. Further, within corporate group structures, there are often multiple legal entities with varying levels of autonomy across many jurisdictions that need to be co-ordinated as part of the programme.

The need for a cultural shift

The complexity challenge is compounded by the facts that:

- a transition is underway – but by no means complete – between more traditional technical approaches to regulation and compliance and the trend towards outcomes-based approaches and ‘regulation by reputation’ delivered by driving ethical behaviour; and
- the compliance officer’s role and remit is still developing, particularly in terms of skills and experience, and may not yet hold sufficient influence at executive level to gain the necessary buy-in and resources in competition with other business activities.

As a result, building 'adequate procedures' based on the six principles can be problematic because it involves risk assessment, and exercising judgment as to proportionality, not just data-gathering on activities, controls and vulnerabilities.

The risk assessment is an essential foundation for proportionate and meaningful policies, but it can be unclear where responsibility for this should – or even does – sit in the business, especially within traditionally structured corporates. Some would place it with compliance, for example, others with strategic or operational functions.

Given the trend towards outcome-based regulation, and increasing enforcement emphasis across regulatory areas on companies having sufficient policies and procedures, we expect businesses will continue over time to adapt and learn how to implement this approach into 'business as usual' with appropriate delivery mechanisms.

The international challenge is even greater where a local subsidiary may operate with a degree of management autonomy and cultural norms could see bribery accepted as a way of doing business within the jurisdiction – the cultural shift is even greater, and the structures in place to drive change may be less effective.

In general, we see a need for:

- greater confidence and suitable procedures in businesses to make risk-based judgments on legal and regulatory matters such as anti-bribery, rather than seeking 'tick box' comfort;
- a better understanding of the need to balance quality of measures and ease of auditing. For example, for most businesses face-to-face training for staff in high risk positions will be an effective approach when delivered alongside an e-learning programme rolled out to all, but some businesses would tend to focus all their resources on delivering the e-learning programme given it provides a clear and simple audit trail rather than seeking a dual approach;
- further enhancement of the compliance officer's role and status within organisations; and
- an integrated approach to compliance and corporate culture as a whole – many regulations such as data protection, anti-money laundering and anti-bribery overlap, but many organisations do not look for the commonalities to develop a single, comprehensive view that pulls together all these jigsaw pieces and can be simply and easily communicated. Without this, cross-functional implementations and monitoring will remain complex, costly and potentially only partially ineffective.

6. Is the Act having unintended consequences?

In so far as we are aware, the Act's consequences for large corporates were largely foreseeable, such as investment in developing, maintaining and monitoring compliance structures across all relevant jurisdictions as corruption becomes seen as a key business risk.

That said, the complexity we refer to above does not seem to have been understood by policymakers at the time. In the absence of a Regulatory Impact

Assessment, there was less scrutiny as to the likely cost to business and its proportionality, and, in the light of this, further analysis of whether the policy outcome could have been achieved more cost-effectively.

The DPA judgments published to date have suggested that the term ‘adequate procedures’, which in the context of a Section 7 offence, should be read widely, potentially meaning ‘adequate to prevent that particular bribery’ rather than the broader sense of ‘adequate in the context of the business and its risks’. Put more simply, the question is whether the law looks ‘issue-out’ or ‘top-down’.

The judgments focus on whether policies and procedures are effective in influencing actions and behaviour, not simply on whether a policy or training exists or has been read/taken by the relevant people. In the first DPA case under the Act, for example, the bank had anti-corruption training and policies, but the judgment notes that ‘[t]he applicable policy was unclear’ and ‘In essence, an anti-corruption culture was not effectively demonstrated... as regards the transaction at issue’. In the agreed Statement of Facts, it says ‘Although [the bank] did have a relevant training system in place for its employees, the effectiveness of the training provided must be in doubt given that no ... deal team member raised any concern...’

This comment serves to illustrate the difficulties organisations face in implementing an effective organisation wide compliance system that deals with fact specific individual incidents in isolation. We understand of course that this is a natural consequence of the enforcement of a criminal statute. A number of organisations have expressed the view that a single failure would seem more than likely to have an entire programme deemed not adequate and may not reflect the overall quality of steps that organisation has taken.

Embedding culture and behaviour to this degree is much harder for a business both to achieve and to measure (see our comments under Question 4 above for more detail).

Deferred Prosecution Agreements

7. Has the introduction of Deferred Prosecution Agreements (DPAs) been a positive development in relation to offences under the Bribery Act 2010? Have DPAs been used appropriately and consistently? Has their use reduced the likelihood that culpable individuals will be prosecuted for offences under the Act?

We consider DPAs to be a broadly positive development in circumstances where the public interest can be served without the expense and uncertainty of a criminal trial, and the penalties secured are equivalent.

DPAs to date have also included terms not possible under criminal prosecution, such as compliance programmes and monitoring. Such terms are a significant ongoing investment by the company to avoid future misconduct by associated persons. Further, without the potential for a DPA through co-operation, corporates would have little incentive to investigate internally and share material that enables enforcement action.

The requirement of court approval for DPAs, combined with the transparency of having judgments published, appears to be a suitable mechanism for ensuring appropriate and consistent use. Although decisions have been criticised, the

balance of judgment can be fine in such cases and views will inevitably vary as to which side it should fall.

We have seen no evidence as to whether or not use of DPAs reduces the likelihood of individual prosecutions, but this would not be an inevitable result of DPA use. Individual prosecutions can be evidentially difficult, where witnesses are abroad and possibly implicated themselves so unwilling to co-operate, and culpable individuals are unlikely to have benefited personally from the bribery enough to make recompense possible. In these circumstances, the Code for Crown Prosecutors could well lead to a decision not to prosecute, leaving DPAs or corporate prosecutions as the main means of enforcement.

8. How does the Bribery Act 2010 compare with anti-corruption legislation in other countries? Are there lessons which could be learned from other countries?

When introduced, the Act was widely considered as the most stringent anti-bribery and corruption legislation in the world. It went further than other legislation at the time by:

- creating corporate liability for the acts of a wider range of third parties such as service suppliers, and not merely employees and agents
- introducing the corporate 'failure to prevent bribery offence'
- including private (or commercial) bribery, and not just that of public officials
- including facilitation payments as criminal bribes
- ensuring an extra-territorial reach for acts by UK citizens abroad

Many of these elements have now been replicated by other countries, such as Brazil, as they update their own legislation, but the combination of all of them remains uncommon. For example, extra-territorial reach and commercial bribery elements are less common.

Some countries have introduced other elements, such as making compliance programmes, including risk assessments, compulsory for larger businesses. In France, the Sapin II reforms have done this, and the Agence Française anticorruption (AFA) has conducted the first proactive inspections. The outcome of these inspections should provide insight into whether the practical impact assists or hampers development of an outcomes-based approach to compliance.

31 July 2018

Eversheds Sutherland Intl LLP - Written evidence (BRI0024)

We are pleased to present this submission on the impact of the Bribery Act 2010 (“**the Act**”) to the Select Committee on behalf of the international law firm Eversheds Sutherland. We summarise the key aspects of our submission as follows:

- the Act has had a significant impact in deterring and preventing bribery in the UK and abroad. UK businesses are generally aware of the Act and have adopted procedures to prevent bribery in response to the Act. However, much remains to be done: only 32% of businesses understand their organisation’s anti-bribery policy and only 12% believe they get enough training on anti-bribery;
- enforcement of the UK’s bribery laws has markedly increased since the introduction of the Act, especially in the area of high value and/or foreign bribery. However, we still believe more could be done e.g. around bribery in procurement, an issue that causes substantial loss to UK businesses;
- the Ministry of Justice should not invest scarce resources in amending or updating its Guidance on the Act. The Act is much better understood now than it was when the Guidance was published in 2011, and a huge volume of anti-bribery compliance advice is freely available online. Re-stating the Guidance in the absence of changes to the Act or prosecutorial priorities could create more confusion than it solves;
- we welcome the commitment by prosecutors to explore systematically how penalties arising from bribery enforcement actions can compensate overseas victims. Foreign bribery often victimises ordinary people in developing countries, but to date relatively little money recovered from bribe payers has been used for their benefit;
- while not perfect, Deferred Prosecution Agreements create incentives for commercial organisations to self-report misconduct and co-operate with law enforcement. We do not believe DPAs mean fewer individuals will be held accountable;
- the Act is generally clear and well-drafted. There is no compelling evidence that amendments to the Act are necessary. Changes could distract law enforcement from greater enforcement and companies from practical anti-bribery steps; and
- the Act has had a global impact on the way parliaments and law enforcement agencies around the world fight bribery. The UK should be proud of its leadership in this area, and should not water down its commitment to fighting bribery.

Post-legislative scrutiny inquiry into the Bribery Act 2010

Eversheds Sutherland is a global legal practice with 66 offices across 32 countries. It has a dedicated Corporate Crime & Investigations team that has

extensively advised clients on the Act. This submission was prepared by Eversheds Sutherland on the basis of:

- our experience of advising clients in the UK and overseas on how to introduce and maintain adequate procedures to prevent bribery and on how to respond to bribery-related concerns or allegations;
- the experience of our clients in identifying and responding to bribery issues. In preparing this submission, we discussed the Select Committee's call for evidence with a number of clients, and a number of them have provided us with feedback on the Select Committee's questions, which we have considered and (where noted below) incorporated into our submissions; and
- relevant academic and analytical research into bribery with which we are familiar, which (where appropriate) we have cited below.

We respond below to the Select Committee's questions in the order in which they were posed. Where appropriate, we have provided citations (and, in the electronic version of this document, links) to underlying sources.

1. Is the Bribery Act 2010 deterring bribery in the UK and abroad?

We suggest criminal laws will have a deterrent and preventative effect⁵⁶ when there is good awareness of them and when that awareness translates into practical action that reduces offending. In that light, we believe that in a business context, the Act has been effective in deterring and preventing bribery in the UK and abroad, but much remains to be done.

Awareness of Britain's bribery laws and the implications of bribery has undoubtedly risen since 2010. We believe that relevant functions of almost all large corporations and financial institutions in the UK are very familiar with the Act, and we note that 66% of SMEs are substantively aware of the Act.⁵⁷ We believe that high profile prosecutions of major UK corporations have raised boardroom awareness of the Act. Anecdotally, our firm has experienced an appreciable increase in client inquiries for advice on the nature and practical implications of the UK's anti-bribery laws since 2010 and especially in the last two years.

⁵⁶ There is a subtle difference between crime deterrence and crime prevention. According to classical deterrence theory, deterrence occurs when a rational actor decides not to offend in light of the severity, certainty and celerity of punishment ("An Examination of Deterrence Theory: Where Do We Stand?", Kelli D Thomson, *Federal Probation*, Volume 80 Number 3, December 2016, accessible [here](#)). Prevention is an intervention that prevents or reduces offending by another person that would have happened without that intervention (adapted from *Crime Prevention Strategy*, Police Scotland, March 2015, accessible [here](#)). This distinction is important in considering the effectiveness of section 7 of the Act, which punishes commercial organisations' failure to prevent bribery by others i.e. their Associated Persons.

⁵⁷ Page 4, *Insight into awareness and impact of the Bribery Act 2010: Among small and medium sized enterprises (SMEs)*, HM Government, eds. Rob Warren, Alice Large, Mark Tweddle, 2015, accessible [here](#).

Practical actions to prevent and reduce bribery have also undoubtedly increased since 2010:

- 1.1.1 around 80% of businesses now have a formal anti-bribery policy in place,⁵⁸ and Eversheds Sutherland's own research⁵⁹ identified that 50% of business people believed their organisation's anti-bribery policy had been upgraded in the preceding five years;⁶⁰
- 1.1.2 most large organisations now have anti-bribery training in place for relevant members of staff, and increasingly, large commercial organisations are requiring their Associated Persons to complete specified anti-bribery training. We believe our firm alone has trained over 100,000 of its clients' employees and other Associated Persons through its anti-bribery@work online learning product. This is radically different from the position prior to the introduction of the Act; and
- 1.1.3 most dramatically, our research indicated that 90% of companies would decline a business opportunity if there was an unacceptable bribery or corruption risk associated with it.⁶¹ We think this shows many UK companies are willing to "put their money where their mouth is" in rejecting bribery.

Notwithstanding the above progress, we also believe much remains to be done to give full effect to the deterrent and preventative potential of the Act because:

- 1.1.4 when asked by Eversheds Sutherland to consider what the impact of their business being tainted by bribery might be, only 9% of businesspeople identified the legal consequences as their greatest concern.⁶² In contrast, 61% were primarily concerned about the commercial impact on their business.⁶³ In other words, it may be that the business case for anti-bribery has been more readily accepted than the fear of prosecution;
- 1.1.5 only 41% of business people believe that their organisation's anti-bribery policies work well in practice, only 32% understand their organisation's anti-bribery policy, and only 12% believe they get enough training on their organisation's anti-bribery policy.⁶⁴ This suggests that most commercial organisations are

⁵⁸ Page 9, Global Anti-Bribery and Corruption Survey, KPMG International, 2015, accessible [here](#).

⁵⁹ Eversheds Sutherland conducted a survey of 500 businesspeople across multiple jurisdictions, including the UK, to identify their understanding of, and response to, bribery risks and anti-bribery laws. The research, results and key themes are summarised in *Beneath The Surface: the business response to bribery and corruption 2016*, ed. Viv Jones, Eversheds Sutherland, 2016, accessible [here](#).

⁶⁰ Page 15, *Beneath The Surface*, *ibid* above.

⁶¹ Page 8, *Beneath The Surface*, *ibid* above.

⁶² Page 14, *Beneath The Surface*, *ibid* above. There were no statistically significant differences between the responses of interviewees in different jurisdictions in respect of this question or the other responses cited in this submission.

⁶³ Page 14, *Beneath The Surface*, *ibid* above.

⁶⁴ Page 15, *Beneath The Surface*, *ibid* above.

failing to produce useful anti-bribery policies and to explain them clearly to their staff; and

- 1.1.6 relatively few prosecutions have been brought under the Act, an issue we discuss further in response to Question 2, below.

In addition to the above, we note that the Act has influenced how other jurisdictions have chosen to reform and implement their own anti-bribery laws. We discuss that further in response to Question 8, below.

Is the Bribery Act 2010 being adequately enforced? If not, how could enforcement be improved? Do the Serious Fraud Office and the Crown Prosecution Service have the right approach and the resources they need to investigate and prosecute bribery offences effectively?

Each year, a significant number of our corporate clients are victimised by bribery (e.g. by overpaying for goods or services as the result of bribery in procurement). Reliable statistics on the prevalence of this crime are inherently difficult to identify. However, our own research indicates that 80% of business have discovered bribery or corruption within their organisation,⁶⁵ and 95% of senior executives believe bribery is a serious risk to their business. A fraud management association estimates that firms lose around 5% of their revenue to fraud, the median value of fraudulent events is £152,000 per incident, and approximately 36% of fraudulent events are corruption events.⁶⁶

Despite the above, only 41% of businesses surveyed by Eversheds Sutherland (some of which were quite large) are aware of their organisation ever having self-reported corrupt conduct to law enforcement agencies, even when the business itself was also victimised by that bribery. In the UK context, we believe that this low level of reporting at least partly reflects a belief on the part of corporate victims that law enforcement will not be able to investigate and resolve bribery concerns swiftly and thoroughly in light of the resource constraints on those agencies. Consequently, we believe relatively few UK companies see their interests as victims of bribery vindicated through the courts.

The Serious Fraud Office ("SFO"), Crown Prosecution Service ("CPS") and Crown Offices and Procurator Fiscal Services ("COPFS") have markedly increased the level of bribery enforcement actions since the introduction of the Act. However, we do not believe that the relatively small volume of enforcement actions under the Act is reflective of the true prevalence of bribery in the community, particularly in respect of private sector bribery or the bribery of domestic public officials within the UK. While the UK is a

⁶⁵ Page 28, *Beneath the Surface*, ibid above.

⁶⁶ See pages 7, 8 and 13 of *Report to the Nations: 2018 Global Study on Occupational Fraud and Abuse*, Association of Certified Fraud Examiners, 2018, accessible [here](#). Figures cited are for Western Europe and converted to GBP at current rates of exchange.

comparatively low bribery risk environment,⁶⁷ it seems unlikely that the handful of such prosecutions is a significant proportion of total offending.

In that light, we encourage the government to consider what measures would increase the capacity of the SFO and CPS to review and resolve bribery complaints presented to them and would increase police forces' awareness of the Act, particularly in respect of bribery in procurement, an issue that causes substantial loss to UK businesses every year.

Is the statutory guidance on the Bribery Act 2010 sufficient, clear and well-understood by the companies and individuals who have to deal with it? Should alternative approaches be considered?

The Ministry of Justice published its Guidance⁶⁸ to business people on "adequate procedures" in March 2011. At the time, there was little visibility of how the "failure to prevent" offence under section 7 of the Act might work in practice and what the government's enforcement priorities were. Consequently, at the time it was published, the Guidance was widely consulted by UK businesses generally and compliance professionals in particular.

Despite that, we do not see a compelling argument for the Ministry of Justice to dedicate scarce resources to revising or updating its Guidance on the Bribery Act 2010 because:

- 1.1.7 the Guidance has no legal effect and does not determine the enforcement priorities of the SFO or the CPS;
- 1.1.8 the Guidance is necessarily broad and principles-based, and neither the legislation nor enforcement priorities have changed radically since 2011;
- 1.1.9 the market now understands better what "adequate procedures" means, and the SFO's enforcement actions under the Act have served as "case studies". There is a substantive body of best practice for anti-bribery and;
- 1.1.10 the Act itself has had the effect of stimulating research and investigation into bribery prevention. A large volume of practical anti-bribery guidance and analysis by non-governmental organisations, professional groups, law firms, consultancies and pressure groups is now freely available on the internet. Some of that advice is industry- or function-specific.

In the absence of any changes to the Act or a pronounced change in prosecutorial priorities, we believe that revising the existing Guidance might even create more confusion than it resolves. We would instead

⁶⁷ TRACE International identifies the UK as posing a "Very Low" bribery risk in its 2017 TRACE Matrix, accessible [here](#).

⁶⁸ *Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)*, Ministry of Justice, March 2011, accessible [here](#).

encourage the CPS to prepare and release more detailed case summaries upon conclusion of enforcement actions under the Act. This would be useful given the public interest in better understanding public sector corruption and lower level private sector corruption in the UK. We note that the SFO has a good track record of publishing case summaries and similar materials about foreign bribery and high value bribery.

How have businesses sought to implement compliance programmes which address the six principles set out in the Ministry of Justice's guidance on the Bribery Act 2010? What challenges have businesses faced in seeking to implement their compliance programmes? Are there any areas which have been particularly difficult to address?

Many large international companies already had anti-bribery compliance programmes in place prior to the Act (particularly if they were affected by the Foreign Corrupt Practices Act of 1977 (US)), and they have simply adapted and upgraded those systems in light of the requirements of the Act. A significant number of smaller and domestic companies have introduced anti-bribery systems and controls only in response to the Act.

We have observed that bribery issues are typically "owned" within a larger organisation by the legal or (if present) risk and compliance function. However, we have also seen responsibility for bribery compliance lie with internal audit, human resources, or operations functions. Consistent with the risk-based approach inherent with the concept of "adequate procedures", we do not think any of these approaches is necessarily wrong, so long as it is effective in practice.

As mentioned above at 1.1.5, our research indicates that only 41% of businesspeople believe that their organisation's anti-bribery policies work well in practice and only 32% understand their organisation's anti-bribery policy. In our experience, such situations commonly arise when:

- 1.1.11 organisations' anti-bribery policies are generic, too long, written in overly complicated language, or simply fail to explain in practical terms how bribery issues could impact the employee's everyday life; and/or
- 1.1.12 organisations fail to provide practical, engaging and useful training on the practicalities of their anti-bribery policies. Our research suggests there is a demand among employees for such training: as mentioned above, only 12% of employees in large organisations believe they get enough training on anti-bribery.

A key challenge for many businesses has been in deciding "how much diligence is enough" i.e. what is the point at which adequate procedures become unreasonably complex and costly. We suspect that this is an issue that neither law enforcement nor the government can resolve unilaterally: after all, the approach within both the Guidance and the Act itself is that commercial organisations should identify their own vulnerabilities and install their own anti-bribery procedures. Ultimately, it is courts that

must determine whether procedures are adequate in the context of contested prosecutions under section 7 of the Act. As there has only been one such prosecution to date,⁶⁹ there is little UK-specific jurisprudence to guide companies, and consequently commercial organisations must have regard to international best practice.

What impact has the Bribery Act 2010 had on small and medium enterprises (SMEs) in particular?

We believe that the research previously commissioned by the government into the impact of the Act on SMEs by the government contains useful data and analysis.⁷⁰

As the Committee is likely aware, there are many SMEs in the construction sector. While we believe most large companies are familiar with the Act and are willing to engage with anti-bribery issues, SMEs in that sector may find it difficult to identify industry-specific and practical anti-bribery assistance. If the government considers construction and the built environment to be particularly problematic sectors from a bribery perspective, then it should consider funding anti-bribery initiatives for SMEs as a crime prevention measure. Such initiatives could perhaps be funnelled through existing training entities in the sector e.g. the Supply Chain Sustainability School.

Is the Act having unintended consequences?

An unintended consequence has arisen in the context of enforcement of the Act in relation to foreign bribery. As a general proposition, the bribery of foreign public officials by UK persons victimises the people of the country in which the public official works,⁷¹ and is an offence under the Act and the analogous law of that foreign country. If an enforcement action under the Act is brought in the UK with the result that a fine or penalty is paid, and/or profits are disgorged, that money will typically be paid into the UK's Consolidated Fund.⁷²

⁶⁹ Skansen Interiors Limited was convicted of an offence under section 7 of the Act in February 2018. The company, which was dormant, was given an absolute discharge after the court ruled it had no assets from which any financial penalty could be paid. The individuals who gave and received the bribes were convicted, sentenced to a custodial term and disqualified from acting as the director of a company.

⁷⁰ *Insight into awareness and impact of the Bribery Act 2010: Among small and medium sized enterprises (SMEs)*, op cit above.

⁷¹ This is to say, the citizens are negatively impacted by the improper performance of foreign public official's duty or function. For example, in Guatemala, prosecutors alleged that a Mexican company bribed Guatemalan public officials to win a contract to provide dialysis services to patients in public hospitals, with the consequence that 13 patients died as a result of the company's substandard care. See for example "Corruption Network in Guatemalan Health System Exposed", Nic Wirtz, *Americas Quarterly*, 22 May 2015, accessible [here](#). It is possible that the citizens of multiple countries could be victimised by the same corrupt conduct – much depends on the factual matrix.

⁷² Page 2, "Consolidated Fund Account 2017-18", HM Treasury, 10 July 2018, accessible [here](#).

This dilemma is consistent with global practice. The World Bank has estimated that 97% of bribery penalties in relation to public officials were imposed by countries other than those whose public officials were bribed, and that only 3% of those penalties were “sent back” to the countries in which the bribery took place. More than USD 20 billion per annum is stolen from developing countries and laundered in industrialised countries every year, while only USD 197 million has ever been returned to those same countries as a result of foreign bribery.⁷³

We recognise the practical difficulties associated with transferring monies to foreign states for the benefit of their population, particularly when the states are characterised by a high degree of corruption. We believe the UK government has recognised this dilemma, and in that light we welcome:

- 1.1.13 case-specific efforts to ensure victimised populations are compensated e.g. the return of USD 7,000,000 to the Government of Tanzania following a deferred prosecution agreement concluded by the SFO;⁷⁴ and
- 1.1.14 a commitment to systematically exploring civil and criminal law mechanisms to compensate victims of foreign bribery recently agreed by the CPS, SFO and National Crime Agency.⁷⁵

More generally, we applaud the increasing co-operation between the UK government and foreign law enforcement to promote the return of the proceeds of bribery and economic crime to developing countries e.g. the National Crime Agency’s collaboration with the Economic & Financial Crimes Commission in Nigeria.

Has the introduction of Deferred Prosecution Agreements (DPAs) been a positive development in relation to offences under the Bribery Act 2010? Have DPAs been used appropriately and consistently? Has their use reduced the likelihood that culpable individuals will be prosecuted for offences under the Act?

We believe that DPAs are a positive development in relation to economic crime offences. They create incentives for commercial organisations to self-report misconduct and co-operate with law enforcement agencies. Successful self-reports and DPAs can lead to greater understanding of corrupt practices by law enforcement and greater certainty for

⁷³ Pages 73-78, *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, Anyango Odour et al, Stolen Asset Recovery Initiative, 2014, accessible [here](#).

⁷⁴ Page 3, “Deferred Prosecution Agreement”, in re: SFO v ICBC SB PLC, 2015, accessible [here](#).

⁷⁵ “General Principles to compensate overseas victims (including affected States) in bribery, corruption and economic crime cases”, SFO, CPS and National Crime Agency, 31 May 2018, accessible [here](#).

companies that discover misconduct and want to do the right thing in the future.

To state the obvious, however, DPAs are not a magic bullet. Among the companies that might consider self-reporting, there remain concerns that:

- 1.1.15 as DPAs (even when negotiated in parallel with similar arrangements in other jurisdictions) are unlikely to extinguish all legal liability in relation to complex or cross-border bribery, they will not be the “last word” and may involve admissions or the release of evidence that would be adverse in other jurisdictions; and
- 1.1.16 in some instances, the delay and cost of negotiating DPAs may be greater than the pain of conviction.

In that light, we think some companies may believe that once a bribery issue is discovered, it might be better to “fix, learn lessons and move on” than to self-report and seek a DPA.

We do not believe that DPAs reduce the likelihood that culpable persons will be prosecuted for offences under the Act because:

- 1.1.17 the conclusion of a DPA between a corporate defendant and an organisation does not preclude the subsequent or parallel prosecution of culpable individuals. Consistent with the Select Committee’s instructions, we do not comment on ongoing cases. However, we note that the SFO has signed DPAs with certain organisations, and prosecutions of individuals associated with those same organisations have been commenced in the UK and other jurisdictions. Further, we note that DPAs can include (and have in the past included) specific acknowledgement that conclusion of the DPA does not shield any individual from subsequent or parallel prosecution; and
- 1.1.18 DPAs may involve corporations to providing law enforcement agencies with evidence, information and analysis that it would otherwise be impossible or impractical for them to obtain. That evidence, information and analysis may be leveraged to inform or assist the prosecution of culpable individuals.

How does the Bribery Act 2010 compare with anti-corruption legislation in other countries? Are there lessons which could be learned from other countries?

Based on our firm’s experience of advising clients on their rights and obligations under the Act and similar foreign laws, we believe the Act compares favourably to anti-corruption legislation in other countries. We note that despite them being fundamentally the same conduct, in many other countries foreign bribery is treated differently from domestic bribery, and public sector bribery is treated differently from private sector bribery.

Even where there is a legitimate reason⁷⁶ for such divisions, in a British context the clarity of the Act's "unified" approach to bribery is important.⁷⁷

The maximum penalties for individual offenders under the Act (i.e. a fine unlimited by statute and ten years' imprisonment) are broadly comparable to penalties available for comparable offences in other jurisdictions e.g. Ireland (unlimited fine + 5-10 years' imprisonment), Singapore (SGD 100,000⁷⁸ fine + 5-7 years' imprisonment), Australia (AUD 1.8 million⁷⁹ + 10 years' imprisonment).⁸⁰ The picture for corporate offenders is similar. We do not believe that increasing or decreasing penalties will materially change the deterrent and preventative effects of the Act.

In some jurisdictions (e.g. Kenya, South Africa⁸¹), anti-bribery laws compel certain persons to report known or suspected instances of bribery. We think such measures would – in the context of the UK – infringe fundamental rights e.g. the privilege against self-incrimination and legal professional privilege. We do not recommend it be introduced in the UK.

In some jurisdictions (e.g. France, Russia⁸²), certain commercial organisations are under a legal duty to implement adequate anti-bribery procedures. We are not aware of any credible research showing that such obligations lead to greater long-term deterrence and prevention of bribery, and we believe such measures are inconsistent with a risk-based approach to preventing bribery.

Some jurisdictions (e.g. Australia, USA) exclude so-called "facilitation payment" bribes from the scope of bribery that is prosecutable when they occur outside the home jurisdiction and subject to certain conditions. There is no such exclusion under the Act and *ceteris paribus* such bribes are illegal under UK law. We do not believe the Act should be amended to create such an exemption because:

- 1.1.19 the conditions which enliven the exemption from prosecution under the laws of other jurisdictions (e.g. the obligation to create an accurate record of the facilitation payment under Australia's foreign bribery law)⁸³ are rarely complied with in

⁷⁶ For example, it is more appropriate for the federal legislatures of the United States and Australia to legislate on foreign bribery than their sub-national (state, territory) legislatures.

⁷⁷ There are of course particular aspects of the Act that treat foreign bribery differently to domestic bribery (for obvious jurisdictional reasons) and the bribery of public officials differently to the bribery of businesspeople (for example the section 6 offence of Bribery of Foreign Public Officials), but fundamentally the approach to these various kinds of bribery within the Act is consistent.

⁷⁸ SGD 100,000 is around £56,000 at current rates of exchange.

⁷⁹ AUD 1,800,000 is around £1 million at current rates of exchange.

⁸⁰ Sentencing is a complex area of law. These are necessarily broad summaries of the general position for the offences under foreign law that are most comparable to the Act's offences.

⁸¹ See section 34 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (South Africa) and the similar section 14 of the Bribery Act 2016 (Kenya).

⁸² See for example Article 13.3 of the Federal Law on Combating Corruption No.273-FZ (Russian Federation) as amended, an English translation of which is accessible [here](#).

⁸³ Section 70.4(1)(c) of Schedule to the Criminal Code Act 1995 (Cth).

practice, such that the exemption is of limited practical utility in those jurisdictions;

- 1.1.20 an exemption is somewhat confusing for a non-technical audience, and may undermine public understanding and confidence in the Act;
- 1.1.21 an exemption under UK law would not affect illegality of the payment under the applicable law of the foreign country in which it is paid; and
- 1.1.22 to the extent that there is a fear that "trifling" foreign bribes should not be prosecuted in UK courts, we note that the SFO, CPS and (in Scotland) the COPFS have not brought any publicly-disclosed enforcement actions solely in relation to facilitation payments. In any case, a decision to prosecute is still subject to a public interest test,⁸⁴ and courts have inherent jurisdiction to stay an indictment, stop a prosecution or (in Scotland) to sist proceedings that the court considers to be an abuse of process.

In light of the above, we do not see a compelling argument for substantive amendments of the Act. We believe that amendments would distract prosecutors from increasing enforcement of the Act (as discussed at Question 2) and distract commercial organisations from enhancing practical measures to prevent bribery (as discussed at Question 1).

We note that several jurisdictions outside the UK have passed legislation or intend to pass legislation that is modelled on or otherwise informed by elements of the Bribery Act e.g. the Bribery Act 2013 (Isle of Man), the Bribery Act 2016 in Kenya,⁸⁵ the Bribery Act 2016 in Bermuda, the Criminal Justice (Corruption Offences) Act 2018 in Ireland,⁸⁶ the Malaysian Anti-Corruption Commission (Amendment) Act 2018 in Malaysia, and the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 which is currently under consideration in Australia.⁸⁷ In this light, it is no exaggeration to say that the Act has had a global impact on the way parliaments and law enforcement agencies fight bribery.

⁸⁴ See Bribery Act 2010: Joint Prosecution Guidance of The Director of the Serious Fraud Office and The Director of Public Prosecutions, SFO and Crown Prosecution Service, undated, accessible [here](#).

⁸⁵ See the text of the legislation [here](#) and our commentary, "Kenyan bribery law underscores the new reality: Washington and London have no monopoly on talking tough", Viv Jones, *KYC 360*, 22 March 2017, accessible [here](#).

⁸⁶ See the text of the legislation [here](#) and our commentary, "Presumed Guilty: Dramatic Implications Of New Irish Bribery Law", Eoin Mac Aodha and Viv Jones, *KYC 360*, 19 July 2018, accessible [here](#).

⁸⁷ See the text of the bill [here](#), the Parliament of Australia's analysis [here](#), and our commentary, "Australia: How effective is the new foreign bribery law likely to be?", Viv Jones, Jamie Nettleton and Cate Sendall, *KYC 360*, 7 March 2018, accessible [here](#).

What impact has the Bribery Act 2010 had on UK businesses and individuals operating abroad?

We do not believe that the Act has impaired the ability of UK businesses and individuals to operate abroad in an ethical and lawful manner. We note that 89% of SMEs who were aware of the Act did not believe it impaired their ability or plans to export goods and services abroad.⁸⁸ UK engagement with foreign markets is extremely strong: the UK is the tenth largest exporter of goods in the world⁸⁹ and it has the sixth largest stock of direct investment overseas.⁹⁰ UK companies remain at the forefront of investment even into emerging markets that pose an elevated bribery risk.

There is no evidence that the Act puts UK businesses at a material disadvantage to competitors from countries which do not have effective bribery laws. We note that in the late 1970s, some American companies complained to President Carter about proposed foreign bribery laws because “they couldn’t sell in competition with the French and British and other overseas if they didn’t bribe officials”. Despite their protestations, the Foreign Corrupt Practices Act was enacted in 1977 – and of course American companies remain as strong as ever on international markets.

In fact, we believe that UK companies that have introduced adequate anti-bribery procedures as a result of the Act may be more resilient and better protected against the risks that arise in emerging economies. This is consistent with research that indicates “high compliance” companies experience a return on equity in developing markets that is no worse than “low compliance” companies, and that companies with adequate compliance systems are able to reduce the impact of fraudulent events when they arise.⁹¹

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⁸⁸ Page 5, *Insight into awareness and impact of the Bribery Act 2010: Among small and medium sized enterprises (SMEs)*, op.cit above.

⁸⁹ World Trade Organisation data as extracted and summarised by “Sources: See Which Countries Dominate the Export Market”, HowMuch, 18 June 2018, accessible [here](#).

⁹⁰ “Country Comparison: Stock Of Direct Foreign Investment – Abroad”, *The World Factbook*, CIA, 2018, accessible [here](#).

⁹¹ For example, companies that operate whistleblowing hotlines (a common part of adequate anti-bribery procedures in large companies) detect fraudulent events more often, and experience a median loss from fraud that is half the level experienced by companies that do not operate whistleblowing lines. See page 19, *Report to the Nations: 2018 Global Study on Occupational Fraud and Abuse*, op cit above.

**Iskander Fernandez – Supplementary written evidence
(BRI0062)**

In my evidence to the Committee on 11 December 2018, when asked about the connection between the Skansen Group and Skansen Interiors Limited, I said that I didn't recall any cross-sharing of board members between the Skansen Group and SIL, and that the parent company had very little to do with the subsidiary.

In answer to a follow up question about the sharing of board members and office premises, after the evidence session, I can confirm that there was a sharing of some board members, but I am unable to comment about the sharing of offices. That said, I note that the registered offices of the two entities are different.

7 January 2019

Fieldfisher LLP's – Written evidence (BRI0005)

Fieldfisher LLP regularly advises organisations in relation to the application of, and compliance with, the Bribery Act 2010. In particular in undertaking risk assessments and developing adequate procedures. The answers below are derived from our experience advising business in this arena.

Deterrence

1. *Is the Bribery Act 2010 deterring bribery in the UK and abroad?*

It is difficult to answer this question as there are no statistics for bribery before and after the Act. However, the Act has a wide reach with harsh penalties for non-compliance and therefore it has been taken seriously by business. It has certainly had the effect that businesses are more openly communicating their no tolerance approach to bribery which may have had a deterrent effect.

Enforcement

2. *Is the Bribery Act 2010 being adequately enforced? If not, how could enforcement be improved? Do the Serious Fraud Office and the Crown Prosecution Service have the right approach and the resources they need to investigate and prosecute bribery offences effectively?*

It is a matter of record that there have been few prosecutions under the Act. It is possible that is because it has had the effect of deterring bribery so that there are few cases to prosecute.

Guidance

3. *Is the statutory guidance on the Bribery Act 2010 sufficient, clear and well-understood by the companies and individuals who have to deal with it? Should alternative approaches be considered?*

No, the guidance is not clear and well understood.

The guidance fails to clarify some of the more complex concepts in the Act. For example, the question of whether commercial organisations are "conducting business" in the UK has caused uncertainty and confusion and the guidance provides no real indication of the extent of connectivity to the UK that will be required before corporate liability may apply.

Another example where the guidance is unclear is in relation to policies and procedures. The guidance suggests that commercial organisations must have in place policies and procedures which cover entities over which they have a degree of control. The concept of control did not feature in the Act but was welcomed by business when it appeared in the guidance. However, it remains unclear what level of control would be required to bring an associated entity within the net of a business's policies and procedures.

Additionally, there remains uncertainty as to who falls within (or who does not fall within) the definition of "associated person". This lack of clarity is particularly concerning as organisations are being forced to assume responsibility for the actions of an undefined set of third parties - a legal liability that they do not otherwise have and in circumstances where there is no obligation to exert control over these persons.

It has also been difficult for business to know where to pitch policies and procedures in relation to hospitality. The guidance states that it does not intend

to prohibit reasonable or proportionate hospitality or other bona fide business expenditure but that levels of expenditure are not the only factor to consider. It is left to business to develop their own appropriate standards for such expenditure which has resulted in real uncertainty and a fear that any form of gift or hospitality may be viewed as a bribe.

It is our view that rather than introducing a new approach, the guidance should be improved to provide more practical pointers and examples for business so that they can be sure they are taking the right approach. This should include ensuring the key concepts referred to above are clarified as far as possible.

Without a body of case law this is particularly important as it is the only source of guidance as to how the Act will be interpreted. In addition, we recommend that a de minimis level be set out in the guidance under which the provision of gifts and hospitality would not be considered a bribe. This would provide some level of certainty to business and avoid the unnecessary administrative burden that has been caused by reviewing and approving low level expenditure.

The guidance published by HMRC in relation to the Criminal Finances Act 2017 (which contains a "failure to prevent" offence and the requirement to implement policies to address the risks of the business in the same manner as the Act) sets out that in some circumstances it may be unreasonable to expect a business to put preventative procedures in place. This would be, for example, where the business' risks are assessed to be extremely low and the costs of implementing procedures disproportionate. There is no such statement in the guidance to the Act, which effectively says no matter how low an organisation's risk may be it still needs to put in place some form of procedures. We recommend that the guidance is amended to make it clear that having no procedures in place may be acceptable for some businesses.

Challenges

- 4. How have businesses sought to implement compliance programmes which address the six principles set out in the Ministry of Justice's guidance on the Bribery Act 2010? What challenges have businesses faced in seeking to implement their compliance programmes? Are there any areas which have been particularly difficult to address?*

It is our experience that business has taken steps to put in place robust compliance regimes to address bribery risk. Normally this has been by firstly undertaking a risk assessment and then developing policies and procedures which address the principles. Depending on the business, this has often been a lengthy and costly process requiring significant external legal spend and the utilisation of extensive internal resources.

An area which has caused particular difficulty has been created as a result of uncertainty regarding the extent to which these policies and procedures should be rolled out to "associated persons" and who they are. It remains unclear the extent to which an organisation should seek to impose its own anti-bribery policies and procedures on intermediaries not within its control.

Another area of difficulty has been in relation to due diligence on third parties. The guidance provides that each commercial entity has a responsibility to carry out due diligence on those with whom it is doing business. It is not entitled to rely solely on the due diligence carried out by its business partners (even if it is

extensive and/or they are in a regulated sector), leading to unnecessary cost and duplication. It is also unclear to what extent due diligence should be carried out on intermediaries and counterparties, again leading to unnecessary bureaucracy and cost as businesses feel they should err on the side of caution and undertake checks where they may not in fact be necessary. Similarly, in relation to aspects such as gifts and hospitality business has generally erred on the side of caution and set very low levels of expenditure that can be made without approval. This has also led to an additional administrative burden (and therefore cost).

5. *What impact has the Bribery Act 2010 had on small and medium enterprises (SMEs) in particular?*

The main impact on SMEs has been in terms of the burden on them in ensuring they have in place adequate procedures and that these are rolled out to associated persons (including providing training), and in the extra work involved in due diligence and review.

SMEs often do not have an internal compliance function and have therefore been forced to incur external legal spend and/ or divert internal resources to do this. This also results in them being less likely to be able to effectively monitor and review their adequate procedures, leaving them open to corporate liability for bribery of which they are unaware.

6. *Is the Act having unintended consequences?*

No.

Deferred Prosecution Agreements

7. *Has the introduction of Deferred Prosecution Agreements (DPAs) been a positive development in relation to offences under the Bribery Act 2010? Have DPAs been used appropriately and consistently? Has their use reduced the likelihood that culpable individuals will be prosecuted for offences under the Act?*

Yes, DPAs have been a positive development and represent a managed contractual outcome that provides certainty for a business within a reasonable time frame. They allow discussions to be entered into with the prosecuting authority at an early stage of an investigation.

Those DPAs which have been entered into to date have included a reduction in the penalty paid by one third or more (with Rolls-Royce obtaining a 50% reduction) and therefore they encourage co-operation with the prosecuting authorities. They also encourage self-reporting of bribery offences.

We consider that the likelihood of culpable individuals being prosecuted under the Act is in fact increased by the use of DPAs. For example, the Rolls Royce DPA contained a term that it fully cooperated in assisting the SFO as required with the prosecution of its former employees. The Standard Bank DPA contained details of the corrupt behaviour of the individuals involved.

International aspects

8. *How does the Bribery Act 2010 compare with anti-corruption legislation in other countries? Are there lessons which could be learned from other countries?*

The Act is one of the most wide reaching and stringent pieces of anti-corruption legislation in the world.

9. *What impact has the Bribery Act 2010 had on UK businesses and individuals operating abroad?*

UK businesses and individuals have to comply with the provisions of the Act wherever they operate. That can present challenges as business is done in very different ways in different countries. For example, what is considered normal hospitality in one country may be excessive in another, and the giving of gifts may be expected in one country but would be unusual in another. There is a constant balancing act between not being seen to do anything which could be considered to infringe the Act and not offending business norms. This is challenging for businesses and the guidance offers little practical help (hence our recommendation to at least set a de minimis level). This is particularly difficult because business may not exert any control or have any visibility over what is happening in other jurisdictions.

26 July 2018

The Fraud Advisory Panel – Written evidence (BRI0020)

This response of 31 July 2018 reflects consultation with the Fraud Advisory Panel's board of trustees and interested members. We are happy to discuss any aspect of our comments and to take part in all further consultations on the issues we've highlighted or to provide evidence to the committee.

INTRODUCTION

1. The Fraud Advisory Panel believes that the Bribery Act 2010 has the potential to make to a significant difference to the UK's ability to tackle bribery and corruption both domestically and abroad and is a huge improvement on the previous legislation.
2. However, fraud, bribery and corruption have traditionally been afforded a low priority by the criminal justice system and have consequently suffered from a lack of proper investment in resources (in terms of both money and people). Only recently have national crime statistics begun to include data on fraud and cybercrime⁹², and no similar data is routinely collected and published on bribery and corruption. In our view there is a need for greater transparency in, and monitoring of, criminal justice outcomes in relation to bribery and corruption including the number of cases being reported to, and investigated by, law enforcement and coming before the courts (and what the outcomes are). Only then will we be able to properly assess the impact that the Act has had on deterring bribery and corruption.

RESPONSES TO SPECIFIC QUESTIONS

A. DETERRENCE

Q1. Is the Bribery Act 2010 deterring bribery in the UK and abroad?

3. The Fraud Advisory Panel believes that the Bribery Act is an important piece of legislation that has improved the prospects of both stopping bribery and corruption before it happens and uncovering it when it has, whilst also leading to increased self-reporting of criminality to the authorities.
4. The Act seems to have had a positive effect in discouraging some UK companies – especially big business such as genuine trading companies, banks and household names which trade around the world – from engaging in bribery. These companies have invested significantly in anti-bribery and corruption compliance and introduced better systems and controls to prevent bribery in the UK and in other jurisdictions. As part of building up these compliance programmes, companies have analysed their businesses in a more holistic way to understand more clearly where the risks of bribery and corruption exist in their businesses.

⁹² Office for National Statistics (19 July 2018). *Crime in England and Wales: year ending March 2018*. See Chapter 9 'Little change in the volume of fraud offences in the last year'. <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingmarch2018#little-change-in-the-volume-of-fraud-offences-in-the-last-year>

5. However we caution that it is still too early to fully assess the effectiveness of the legislation and its impact as a deterrent. So far the Act has not led to a significant increase in the number of corporate or individual cases being prosecuted by the Serious Fraud Office (SFO)⁹³. Indeed, very few cases have been brought under the Act, and the majority brought against corporates have been settled with a Deferred Prosecution Agreement (DPA).
6. The Act will clearly not be a deterrent for those who will always be minded to commit a criminal offence or to run the risk of being caught (such as a rogue director or employee), especially if the rewards are great enough and the chances of detection low.

B. ENFORCEMENT

Q2. Is the Bribery Act 2010 being adequately enforced? If not, how could enforcement be improved? Do the Serious Fraud Office and Crown Prosecution Service have the right approach and the resources they need to investigate and prosecute bribery offences effectively?

7. It is still too early to tell whether the Bribery Act 2010 is being adequately enforced because most cases date back several, or even many, years. However, our general impression is that it is not. The number of enforcement actions taken under the Act are low and have likely been hindered by the ongoing uncertainty surrounding the SFO's future⁹⁴, a lack of adequate resources being made available to authorities, and the disruption caused by the transfer of law enforcement responsibilities for investigating overseas corruption to the National Crime Agency's International Corruption Unit, now part of the Economic Crime Command (ECC).⁹⁵ *We hope that the ECC will be more effective in combating bribery and corruption than its predecessor.*

⁹³ Between July 2011 and December 2017 16/59 bribery and corruption cases were completed in the UK under the Bribery Act 2010. Some of the 59 cases involved criminal conduct committed prior to 1 July 2011 and would have been assessed under the previous bribery regime. For more information see EY (March 2018). *UK Bribery Digest: table of cases* [https://www.ey.com/Publication/vwLUAssets/EY-UK-Bribery-Digest-edition-12-March-2018-_table-of-cases/\\$FILE/EY-UK-Bribery-Digest-edition-12-March-2018-table-of-cases.pdf](https://www.ey.com/Publication/vwLUAssets/EY-UK-Bribery-Digest-edition-12-March-2018-_table-of-cases/$FILE/EY-UK-Bribery-Digest-edition-12-March-2018-table-of-cases.pdf)

⁹⁴ Alexandra Rogers (2018). Uncertainty around SFO's future 'is over', says departing director David Green. *City A.M.* (13 April). <http://www.cityam.com/283919/uncertainty-around-sfos-future-over-says-departing-director>. Christopher Williams (2017). Theresa May abandons plans to scrap fraud office. *The Telegraph* (16 September). <https://www.telegraph.co.uk/business/2017/09/16/theresa-may-abandons-plans-scrap-fraud-office/> Natasha Bernal (2017). Future of SFO investigations in question amid Theresa May pledge. *The Lawyer* (18 May). <https://www.thelawyer.com/issues/online-may-2017/future-sfo-investigations-question-amid-theresa-may-pledge/>

⁹⁵ National Crime Agency (2018). International Corruption Unit (ICU). [Website] <http://nationalcrimeagency.gov.uk/about-us/what-we-do/economic-crime/international-corruption-unit-icu>

8. *More clarity is needed about the agencies responsible for investigating cases of low and mid-level bribery which fall outside the SFO's remit. These agencies also need to be provided with proper training and resources to fulfil their responsibilities. Currently it is clear that cases falling outside of the SFO's remit, such as those involving small-scale facilitation payments and/or low level bribery and corruption against domestic companies and local authorities, are a hidden problem, left largely uninvestigated and unpunished. Yet reducing public sector corruption (particularly in public procurement and grants) is a stated priority for Government under its anti-corruption strategy.*⁹⁶
9. It follows, therefore, that we believe there needs to be more investigation and more enforcement so that the public as well as global business know that the UK is serious about changing business behaviour, both nationally and internationally, within both the private and public sectors. More enforcement in other areas of financial crime including anti-money laundering and counter terrorist financing has meant that companies have focused more resources and budget on getting their compliance right in those areas. Greater resources need to be made available for intelligence, investigative and prosecutorial purposes to ensure that the SFO and CPS are able to bring and sustain cases beyond reasonable doubt.
10. There will always be competition for investigation and prosecution as well as resource from other criminal offences, many of which may seem as more of a priority for police forces and the public. However, it is vital that bribery is seen as a significant problem worthy of law enforcement.

C. GUIDANCE

Q3. Is the statutory guidance on the Bribery Act 2010 sufficient, clear and well-understood by the companies and individuals who have to deal with it? Should alternative approaches be considered?

11. We question whether you can ever have guidance that is comprehensive enough to cover every company, every risk and every circumstance. Attempting to do so would create a lengthy and unworkable set of guidance, so a balance must be struck.
12. Many SMEs (and their advisors) are still confused by the concept of 'adequate procedures' and how these can be practically achieved. This confusion may deter some companies from implementing and investing properly in anti-bribery measures and therefore have the opposite effect to the Act being a deterrent. Less than half of SMEs surveyed in 2014 said that they had put in place any bribery prevention procedures and the mean

⁹⁶ HM Government (2017). *UK anti-corruption strategy 2017-2022*.
<https://www.gov.uk/government/publications/uk-anti-corruption-strategy-2017-to-2022>

spend amongst those that had was only around £2,730.⁹⁷ Where SMEs have implemented a bribery policy, we are concerned that they do not have the time or resources to reinforce the purpose and scope of the policy year-on-year.

13. The official guidance is well-supplemented by other non-official guidance published by professional advisers working in this space, but the sheer volume of such material may be too burdensome for some SMEs to fully consider. Therefore there is potential scope for more to be done to educate smaller businesses about adequate procedures in a simple and more easily digestible format.
14. Improved outreach, dialogue and co-operation with the business community (by the SFO, NCA and others) would enable grey or potential problem areas to be identified and discussed before court proceedings are instigated. We believe that encouraging such dialogue and cooperation is likely to encourage companies to come forward when uncovering suspected bribery. We believe this process would be assisted by a consistent approach from investigation and prosecution agencies. There are concerns that the prosecution of Skansen was not in line with the approach taken by the SFO in Rolls Royce and other cases.

D. CHALLENGES

Q4. How have businesses sought to implement compliance programmes which address the six principles set out in the Ministry of Justice’s guidance on the Bribery Act 2010? What challenges have businesses faced in seeking to implement their compliance programmes? Are there any areas which have been particularly difficult to address?

15. Since the introduction of the Act there has been a marked increase in awareness of the criminal offence of bribery, especially amongst big business, professional advisers, and those working in compliance and risk-related roles. Initially, however, business may have focussed too much on hospitality-related risks rather than those risks associated with third parties (such as introducers and government officials) which are more significant.
16. The challenges to businesses in complying with the legislation and its impact on businesses operating abroad are great. On the one hand they must comply with the law and guidance⁹⁸ and on the other there are cultural differences as well as legal differences around the world in terms of

⁹⁷ HM Government (2015). Insight into awareness and impact of the Bribery Act 2010 among small and medium sized enterprises (SMEs). https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/440661/insight-into-awareness-and-impact-of-the-bribery-act-2010.pdf

⁹⁸ This includes HMG guidance such as DFID’s Global Britain Strategy, Business Integrity Initiative, and new anti-corruption and human rights wording developed by IBLF Global and GovRisk as uploaded last month to great.gov.uk – the UK Government’s platform for international trade and investment information and services.

what is considered a gift or a bribe and what is 'expected' in a particular country or network in order to conduct business.

17. Some companies have significantly improved and invested in their anti-bribery policies and procedures. However it has been seen that commercial interests may still override bribery concerns, particularly where competitors in the same market overseas are not from jurisdictions where corporate bribery is effectively enforced. Similarly, facilitation payments pose particular issues given the reality of businesses operating overseas in jurisdictions with lower standards. A business is often faced with the choice of either withdrawing from the jurisdiction in order to comply with the legislation or continuing to operate and succumbing to paying bribes. This can be particularly problematic for humanitarian and international aid charities. In comparison the USA's facilitation payment exemption provides a safe harbour for certain types of payments. Further guidance on facilitation payments, especially those made under duress or at risk of life and limb, would be welcome.
18. *It follows that we believe that Government should do more not only to support UK businesses who seek to trade overseas, but also, more importantly, to challenge countries which have not taken sufficient and appropriate action against bribery (particularly in relation to corrupt foreign officials). As part of its anti-corruption strategy to work with other countries to combat corruption, the Government (working with other governments, the World Bank, and other lending organisations) needs to start focusing on the 'demand' side of bribery and force other governments to tackle their own corrupt officials, in order to improve anti-bribery standards worldwide.*
19. Finally, we note that public interest has waned somewhat since the Act was introduced because of its lower public profile and lack of learning points to emerge from cases to date. The government, through supervisory authorities, should consider ways to ensure awareness is maintained.

Q5. What impact has the Bribery Act 2010 had on small and medium enterprises (SMEs) in particular?

20. It can be very difficult and expensive for smaller businesses to implement 'gold-plated' bribery procedures because of the challenges associated with determining what constitutes 'adequate'. In part due to the lack of continued education of SMEs in relation to bribery and corruption risks, many such companies do not appreciate that those risks also exist for companies trading within the UK alone, as evidenced in the Skansen Interiors Ltd case. Some SMEs also believe that they are unlikely to be prosecuted due to their size and the perceived limited prosecution resources.

Q6. Is the Act having unintended consequences?

21. As stated above, there are massive challenges for UK businesses that operate in high-risk countries, particularly where competition is from businesses whose countries of origin are not so law-abiding.
22. *Bribery is endemic in many parts of the world. There is a risk that UK and other western countries will cease trading in high-risk jurisdictions, leaving the field open to organised crime and bad practice. The Government could do more to encourage such jurisdictions to raise their standards to acceptable levels.*

E. DEFERRED PROSECUTION AGREEMENTS

Q7. Has the introduction of Deterred Prosecution Agreements (DPAs) been a positive development in relation to offences under the Bribery Act 2010? Have DPAs been used appropriately and consistently? Has their use reduced the likelihood that culpable individuals will be prosecuted for offences under the Act?

23. DPAs are an important mechanism to punish corporate wrongdoing and we, therefore, consider their introduction to be a positive development and a welcome tool in the prosecutors toolkit. They are a particularly good option for companies which come forward to self-report but should be used sparingly where this is not the case and wrongdoing has been covered up.
24. *Some of the advantages of DPAs are the cost savings to the public purse (achieved through shorter investigations and less lengthy court cases and enforcement actions), and that they provide a greater incentive for companies to self-report because the stigma of conviction has been removed. For these reasons there is merit in DPAs becoming the default mechanism for all but the most serious cases in future.*
25. *Case law in this area is still very much in its infancy. As it develops it should provide greater clarity to companies and their professional advisers on what constitutes adequate procedures and help them to make informed decisions about self-reporting.*
26. We note that some concerns have been raised about the transparency of justice and equality before the law (ie. they may be seen by some as 'cosy deals' or being politically-driven). They may also be seen as a cheap solution for the offending company and an easy option for the prosecutor. In reality they are not. Unlike the US Foreign Corrupt Practices Act (where parties can reach agreement without any significant intervention by the judge) the judge has to play an active and critical role in approving DPAs under the Crime and Courts Act 2013.
27. It is of course based on a small sample of four cases, but so far the DPAs reached have been consistent and subject to appropriate scrutiny by the judiciary. It should also be noted that in two cases, Sweett and Barclays,

DPA's were declined by the SFO due to a lack of apparent cooperation by the companies.

28. It is difficult to assess whether DPA's have reduced the likelihood of culpable individuals being prosecuted for offences, as it is not known whether cases against individuals were investigated or declined in every case. It is however clear that a DPA can be followed by action against individuals, as illustrated by the Rolls-Royce case.

F. INTERNATIONAL ASPECTS

Q8. How does the Bribery Act 2010 compare with anti-corruption legislation in other countries? Are there lessons which could be learned from other countries?

29. In our opinion the Bribery Act 2010 compares well with other anti-corruption legislation and is widely regarded as the strictest currently in existence. . However this means nothing without timely investigation and enforcement. In this regard the UK could learn and benefit from the US experience whereby sufficient resource is dedicated to investigative and prosecution agencies, working together with the SEC, to result in a more joined-up and effective approach. There are also greater incentives to self-report in the US because of their whistleblowing regime and the severity of financial penalties that can otherwise be imposed⁹⁹. It could be beneficial to assess the effectiveness of these measures and to consider whether it is desirable to revisit the debate about the incentivisation and protection of UK whistleblowers.

Q9. What impact has the Bribery Act 2010 had on UK businesses and individuals operating abroad?

30. Please see our above responses.

31 July 2018

⁹⁹ In 2017 11 companies paid just over US\$1.92bn to resolve FCPA enforcement cases. See Richard L Cassin (2010). 2017 FCPA enforcement index. *FCA Blog* [2 January]. <http://www.fcpablog.com/blog/2018/1/2/2017-fcpa-enforcement-index.html>

Lord Garnier QC – Written evidence (BRI0038)

1. I am a barrister in private practice at One Brick Court, Temple, London EC4Y 9BY (www.onebrickcourt.com) where I am currently head of chambers. I was called to the Bar in 1976 and took Silk in 1995. My practice includes defamation, privacy, confidence, malicious falsehood, contempt and related media law cases, as well as corporate crime and international human rights. I was the Conservative MP for Harborough in Leicestershire 1992-2017 and was HM Solicitor General 2010-2012. I was Shadow Attorney General 1999-2001 and 2009-10 and held a number of other Shadow Front Bench appointments whilst my party was in opposition. I knighted in 2012, became a member of the Privy Council in 2015 and was appointed a life peer in June 2018.

2. Prior to the general election in 2010, when I was Shadow Attorney General, it occurred to me, anticipating a Conservative Government that would need to decrease public expenditure, and following the banking crisis of 2008-09, that we needed to find a more effective way of dealing with corporate crime, particularly in the area of financial or economic crime, that satisfied the public that more of an effort was being made to deal with it, but without our losing sight of the need to do justice or lashing out in anger or frustration.

3. I concluded that we could (i) change the law relating to corporate criminal liability from the identification or directing mind model we have used since Victorian times to the American system which is broadly akin to the civil vicarious liability system; and (ii) bring in Deferred Prosecution Agreements (DPAs), a mechanism already much used in the United States for dealing with companies that admit financial and economic crimes. Politically doing both at once would, however, prove difficult because of parliamentary time constraints and the problem of obtaining Government, let alone cross party, agreement, especially as a Law Officer, whose remit was traditionally outside the policy field and largely reactive, and when there were plenty of other issues which were bound to take up Government time at both political and official levels.

4. DPAs

(a) I decided to concentrate on DPAs. Once in Government as Solicitor General, I developed DPAs for use in this jurisdiction adapting the practice in the United States. Having left office in September 2012 I returned to private practice and subsequently appeared for the Serious Fraud Office in two of the four DPAs so far approved by the Court pursuant to the Crime and Courts Act 2013, the first one, Standard Bank, in 2014, and the largest, Rolls-Royce, in 2017. I have also been appointed to the Prosecution Counsel Panel for the Serious Fraud Office 2017-2021.

(b) In order to develop DPAs in a way that would suit our criminal justice system I spent some time discussing the policy and practicalities with members of the senior judiciary, with barristers and solicitors who advise and act for the SFO and the CPS as well as corporations and individuals in commercial and criminal law matters, with senior staff at the SFO and CPS, members of the Coalition Government and Opposition front bench and with interested back benchers from all parties, policy civil servants from relevant Whitehall

departments (the AGO, MoJ, Treasury, Home Office, Cabinet Office), and with representatives of NGOs who take a particular interest in overseas bribery and corruption. I also held meetings with the Law Officers in Scotland, Wales and Northern Ireland (the SFO's remit covers England, Wales and Northern Ireland) and their civil servants and lawyers. In addition, I went to New York and Washington DC to learn from Federal Judges, lawyers in private practice, federal and state prosecutors, the SEC, the Department of Justice (investigators, prosecutors and the US Solicitor General) and journalists more about the practice (and criticisms) of the American DPA system.

(c) The result of this work is to be found in S.45 and Schedule 17 of the Crime and Courts Act 2013 and the four DPAs so far concluded in this jurisdiction and approved by the President of the Queen's Bench Division, the Rt Hon Sir Brian Leveson, namely, Standard Bank, XYZ, Rolls-Royce and Tesco. I had left Government by the time the provisions in the Act came before Parliament although, from memory, the policy work and most of the drafting had been completed before I left.

(d) I was subsequently instructed by the SFO (a) with Crispin Aylett QC and Allison Clare in Standard Bank (2015), the first DPA case, which concerned a factually straightforward failure by the London-based bank to prevent bribery in Tanzania (this case did not involve criminal charges against any individuals) and one count under S.7 of the Bribery Act 2010; and (b) with Richard Whittam QC, Allison Clare, Christopher Foulkes, Saul Herman and Jennifer Carter-Manning in Rolls-Royce (2016-17), the largest ever investigation carried out by the SFO covering criminal conduct in Nigeria, Indonesia, Russia, Thailand, India, China and Malaysia between 1989-2012 and 12 counts on the indictment dealing with conspiracy to corrupt, failing to prevent bribery, and false accounting. This case was conducted in cooperation with the American DoJ and the Brazilian prosecuting authorities who entered into separate but parallel settlements with Rolls-Royce that were concluded and announced at the same time as the DPA with the SFO. I understand the SFO is still investigating a number of individuals, but I am not involved in those matters.

(e) I will not set out either the facts of the 4 DPAs or the law and practice considered by the parties' lawyers or Sir Brian Leveson who approved the DPAs. The statute, the Code for Crown Prosecutors, the Joint Prosecution Guidance on the Bribery Act 2010, the DPA Code of Practice, the Sentencing Guidelines in respect of fraud, bribery and money laundering, the Criminal Procedure Rules, Sir Brian Leveson's judgments in the 4 DPAs, and the 4 DPA themselves, including the statements of facts, are public documents.

(f) That said, there are differences between the US and English systems, most obviously

- (i) American DPAs emerged through practice and are not, as here, underpinned by statute;
- (ii) English DPAs must be approved by the Court whereas in the USA the judiciary has very little, if any, say in their formulation or conclusion;
- (iii) In England DPAs are not available to human defendants;
- (iv) In the USA there are civil settlements, Non-Prosecution Agreements (NPAs) and DPAs whereas in England we do not have NPAs.

(g) There are roughly 50-60 DPAs and NPAs every year in the United States and whereas at the outset they were primarily concerned with banking offences, money laundering, overseas corruption under the Foreign Corrupt Practices Act and other financial crimes committed by corporates in New York and other large financial or economic centres on the east coast of the United States, their remit has been extended, for example, into price fixing in the pharmaceutical industry and health and safety cases and to corporates in other parts of the United States. I had intended that in this jurisdiction, scaling things down to our smaller economy, we would see about 8 to 10 DPAs each year but even though the number of DPAs approved so far is very low I am hopeful we will see the pace increase as we become more used to this novel way of doing justice. I believe there are several cases presently under consideration by the SFO and I recently advised the CPS in respect of one case which proved to be unsuitable for a DPA. In essence though, I remain confident that DPAs, though few in number, have demonstrated their utility and allowed the court to show that justice can be done this way in the right case according to the law and principles behind them with pragmatism and flexibility.

(h) It is fair to comment that when developing DPAs I did not pay sufficient attention to the disclosure and privilege issues discussed in *SFO v ENRC* [2107] EWHC 1017 (QB) (the decision of the Court of Appeal in this case is awaited) and related cases including the Divisional Court decision in *XYZ* [2018] EWHC 856 (Admin) nor to the questions relating to the need to alert the markets about DPAs before the court.

5. Corporate Criminal Liability

I am increasingly persuaded that we do need to examine very closely the suitability nowadays of the identification or directing mind system of corporate criminal liability which was apt for 19th century companies with a very small number of directors and which traded predominantly within this jurisdiction and often very locally indeed. Of course, companies can only commit crimes through the agency of a human being but nowadays we see companies with hundreds of thousands of employees, with operations, offices and local directors in many different countries, deploying vast amounts of capital and revenue electronically around the world. Finding the directing mind in such a way as to pin corporate liability is becoming difficult. I therefore ask your Committee to consider whether we should not change our criminal law in this regard to the United States system of vicarious liability. There, as I understand it, a company is liable for the criminal acts of its employees carried out in the course of its business for the benefit of the company. There may also be a personal benefit for the individual who is also criminally liable but where there is also a benefit for the company it becomes criminally liable for the individual's criminal conduct.

6. Failure to Prevent

There is perhaps another way of arriving at an answer to the problems caused by the directing mind principle. Under S.7 of the Bribery Act a company can be liable for failing to prevent bribery. This was deployed in the two DPA cases in which I was instructed. There are, though, approximately 45 offences listed in Schedule 17 of the Crime and Courts Act 2013 which can form the basis of a DPA and which could, I suggest, be included within a failure to prevent model. In addition to the S.7 offence, it is also now a criminal offence under the Criminal Finances Act 2017 for any entity that fails to prevent the criminal facilitation of tax evasion by associated persons so we have to that extent

Lord Garnier QC – Written evidence (BRI0038)

extended the failure to prevent model. Extending the failure to prevent model yet further is not, I accept, a complete answer to the directing mind problem but it does make it more possible for corporations to be brought to justice in circumstances where they presently may not be and, incidentally, was something the DoJ prosecutors told me they wished they had in their jurisdiction when I was there in 2012.

Lord Garnier QC

25 July 2018

GIACC – Written evidence (BRI0032)

Deterrence

1. The Bribery Act 2010 is definitely deterring bribery in the UK and abroad.

The fear of criminal prosecution is a significant motivator for individuals and organisations to take steps to prevent and avoid bribery.

The Section 7 offence with the adequate procedures defence is vital, and has proven particularly effective in encouraging organisations to implement anti-bribery controls (such as those consistent with the new international anti-bribery standard ISO 37001).

Enforcement

2. The agencies responsible for enforcement (e.g. SFO, NCA, CoLP) have the commitment, knowledge and enthusiasm to prosecute. However, bribery prosecutions are difficult and resource intensive, and there is inadequate resourcing overall for a truly effective deterrence and enforcement environment.

Guidance

3. Guidance is important. The current statutory guidance can definitely be expanded and improved. The six principles do not adequately encapsulate best practice anti-bribery controls.

Challenges

4. Well run businesses are implementing anti-bribery programmes. The publication, initially of BS 10500, and now ISO 37001, has provided effective international minimum standards against which organisations can measure their programmes, and get audited and certified.

The most difficult area to address is the steps that need to be taken to ensure compliance by your suppliers, sub-contractors, joint venture partners etc. However, this is vital, and international good practices exist which provide guidance.

5. SMEs can comply with good anti-bribery practice. Plenty of SMEs have implemented excellent anti-bribery programmes. It is often easier for them to comply as their management structures are smaller, so control is easier. On the other hand, they do not have the resources that large companies do, so implementation can have a greater impact on the time of management. However, it is vital for SMEs to implement anti-bribery controls. Involvement in a corrupt transaction, whether or not intended, can have catastrophic consequences for an SME from a criminal, financial and reputational perspective.
6. No. The Act is not having unintended consequences.

DPAs

7. It is difficult to tell at this early stage what impact DPAs will have.

International aspects

8. The Bribery Act compares favourably with other good international legislation. The Section 7 offence with adequate procedures defence is a positive differentiator, which is being increasingly copied by other countries.
9. The Bribery Act has had a very powerful deterrent effect on organisations and individuals who are aware of it.

It also provides an effective “excuse” if someone requests a bribe – you can cite the Bribery Act, and say that paying a bribe is impossible due to the consequences for you and the recipient. Frequently this results in the bribe request being withdrawn.

Neill Stansbury
Director: GIACC

31 July 2018

Greenberg Traurig – Written evidence (BRI0026)

Questions

Deterrence

1. *Is the Bribery Act 2010 deterring bribery in the UK and abroad?*

It is presumed so.

The Bribery Act increased publicity around bribery and focussed attention on the criminal penalties associated with it. In turn there was much public debate and many professional advisers actively marketed services to assist clients on anti-bribery compliance. Many businesses implemented anti-bribery policies and procedures.

Whether and to what extent the Bribery Act is deterring bribery in the UK and abroad is impossible (for me) to say given it would require knowledge of those who may have paid a bribe but did not as a result of the Bribery Act. It is presumed that in the same way criminal laws have a broadly deterrent effect in respect of the matters they outlaw, the Bribery Act would act in the same way.

Enforcement

2. *Is the Bribery Act 2010 being adequately enforced? If not, how could enforcement be improved? Do the Serious Fraud Office and the Crown Prosecution Service have the right approach and the resources they need to investigate and prosecute bribery offences effectively?*

Dealing with each in turn.

Is the Bribery Act 2010 being adequately enforced?

The position differs as between agencies.

SFO & the Police/CPS

The SFO appears to be adequately enforcing the Bribery Act.

It is a matter of public record that the SFO (for example see SFO's recent Annual Report and Accounts), and the Police (via the CPS) have been involved in enforcement of the Bribery Act.

NCA

The NCA does not appear to be adequately involved in the enforcement of the Bribery Act.

It is unknown and unclear what, if any, substantive activity the National Crime Agency has been involved with in connection with enforcement of the Bribery Act.

In view of the purported important role of the National Crime Agency in connection with the investigation and enforcement of the Bribery Act, for example it houses the International Corruption Unit, the apparent lack of activity/transparency of its work is an enforcement concern. We are not aware of a case prosecuted by the NCA under the Bribery Act. Unlike the SFO the NCA is exempt from Freedom of Information Act requests and does not respond to them.

The NCA's annual report and accounts published on 20 July has only this to say on bribery, corruption and sanctions evasion – we have highlighted the reference to bribery investigations – there is no further detail:

"Bribery, Corruption and Sanctions Evasion

*At year end, the value of assets restrained in the UK and overseas as a result of activity by the **International Corruption Unit (ICU)** exceeds £683m, while the cumulative amount of assets confiscated exceeds **£55m**. Considerable progress has been made on increasing the number of anti-bribery and money laundering cases under investigation, diversifying the countries to which the ICU cases relate, and building strong relationships with overseas law enforcement authorities.”*

Greater transparency of the NCA’s work would assist in enabling a proper relative comparison it would also assist the tax payer in understanding that the public funding received for this work is well spent.

Do the Serious Fraud Office and the Crown Prosecution Service have the right approach and the resources they need to investigate and prosecute bribery offences effectively?

The approach of various agencies and their enforcement of the Bribery Act and observations in relation to the same differ, depending upon the nature of the suspect/defendant/agency.

The position in respect of the SFO is evolving as it increases work in this area. It’s approach in relation to a variety of subjects has sparked, at a minimum, a legal debate and in the following examples legal challenges around issues ranging from legal professional privilege and its availability in SFO investigations, the process concerning the conduct and arrangements surrounding Section 2 interviews and the international reach of Section 2 powers etc. The fact of the challenges suggests that there is disagreement over the SFO’s approaches on certain matters from time to time.

In fairly prosaic examples, where the CPS has prosecuted individuals for Bribery the approach appears broadly correct. In more complex cases involving commercial organisations and s.7 offences the position is potentially more complex.

The CPS prosecution of Skansen Interiors, a dormant company, against a backdrop where Skansen had gone to great lengths to self report the issue but in respect of which no financial penalty could be levied because the company had no ability to pay a fine, is questionable. It is presumed that it was done to demonstrate that companies should put in place Adequate Procedures to trigger the applicable defence under the Bribery Act. However, presumably there must be better cases where a better example could have been made without the public money being spent on prosecuting a dormant company.

Guidance

- 3. Is the statutory guidance on the Bribery Act 2010 sufficient, clear and well-understood by the companies and individuals who have to deal with it? Should alternative approaches be considered?*

In our view the statutory guidance is sufficiently clear. It is helpful that it is principles based. As a result it is not overly prescriptive and enables companies to tailor their own anti-bribery policies and procedures in a way which is appropriate to their business.

We understand that there has been some concern from SME’s about the Bribery Act.

We would welcome the implementation of a UK procedure to mirror/similar to the US Opinion Procedure Release program. In broad terms under this procedure, anyone who is unclear about whether a proposed course of action might violate the US Foreign Corrupt Practices Act (FCPA) can submit a request to the Department of Justice (DOJ) setting out a fact pattern in advance of entering into a proposed transaction and seek confirmation (assuming that on those facts the DOJ would not consider a violation to occur) that based on those facts, the DOJ would not take action; in practical terms it is similar to a safe harbour albeit it is not a formal defence.

The DOJ give these advisory opinions where a person has doubts about a particular issue to help small and medium-sized businesses comply with the FCPA. A link to that procedure can be found [here](#) and we have extracted the wording and Appended it, in full, as an Appendix to this submission for consideration.

Challenges

- 4. How have businesses sought to implement compliance programmes which address the six principles set out in the Ministry of Justice's guidance on the Bribery Act 2010? What challenges have businesses faced in seeking to implement their compliance programmes? Are there any areas which have been particularly difficult to address?*

See answer to 1. Above. In broad terms many businesses have adopted policies, procedures and systems and controls to counter bribery. The issue of facilitation payments, broadly speaking small sums paid to expedite something to which a person is entitled to, reportedly remain a problem in many parts of the world. That said, while the US does contain an exemption many US companies outlaw their payment and so while many draw comparisons between the UK law which outlaws all bribery in contrast to the US law which permits facilitation payments (as defined) in practice the distinction is limited because many companies outlaw all bribery.

- 5. What impact has the Bribery Act 2010 had on small and medium enterprises (SMEs) in particular?*

We are not in a position to comment. Though at a minimum SME's should ensure compliance and would be well advised to implement proportionate and Adequate Procedures to prevent bribery.

- 6. Is the Act having unintended consequences?*

There may be many collateral consequences, for example, it is certainly the case that businesses may focus on regions for investment where bribery is less prevalent. However, this may have been an intended consequence of the legislature.

We are not aware of any unintended consequences.

Deferred Prosecution Agreements

7. *Has the introduction of Deferred Prosecution Agreements (DPAs) been a positive development in relation to offences under the Bribery Act 2010? Have DPAs been used appropriately and consistently? Has their use reduced the likelihood that culpable individuals will be prosecuted for offences under the Act?*

DPAs have been a welcome development and we consider that where used (ie where companies have entered into them) they have been used appropriately. Their use is evolving and so we do not consider that they have been used consistently to date. For example, the calculation of penalties under them has varied (although the discount is still not enough – see below).

We do not consider the penalty discount available for those entering into a DPA sufficient.

As a legal matter the applicable Sentencing Guidelines draw no distinction in calculating a penalty between those companies who enter into a DPA and those who plead guilty in court at the first available opportunity (where there is a 1/3 discount).

In the first DPA the company paid a penalty with a higher multiplier than the first company to plead guilty and be convicted of failing to prevent bribery.

Latterly the court has sought to address this but it remains the case that the marginal extra discount for going through a DPA process versus pleading guilty is 17%. We do not consider a 17% discount enough to encourage Self Reports to a material extent.

As to whether the DPA process results in fewer prosecutions it is too early to say.

International aspects

8. *How does the Bribery Act 2010 compare with anti-corruption legislation in other countries? Are there lessons which could be learned from other countries?*

The Bribery Act compares well with legislation in other countries.

Having enacted strong legislation the next important question concerns its enforcement in respect of which please see above answer to question 2.

9. *What impact has the Bribery Act 2010 had on UK businesses and individuals operating abroad?*

See answer to question 1.

Appendix

FOREIGN CORRUPT PRACTICES ACT OPINION PROCEDURE

28 C.F.R. part 80 (current as of July 1, 1999)

Sec. 80.1 Purpose.

These procedures enable issuers and domestic concerns to obtain an opinion of the Attorney General as to whether certain specified, prospective--not hypothetical--conduct conforms with the Department's present enforcement policy regarding the antibribery provisions of the Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. 78dd-1 and 78dd-2. An opinion issued pursuant to these procedures is a Foreign Corrupt Practices Act opinion (hereinafter FCPA Opinion).

Sec. 80.2 Submission requirements.

A request for an FCPA Opinion must be submitted in writing. An original and five copies of the request should be addressed to the Assistant Attorney General in charge of the Criminal Division, Attention: FCPA Opinion Group. The mailing address is 10th & Constitution Avenue, NW, Bond Building, Washington, DC 20530.

Sec. 80.3 Transaction.

The entire transaction which is the subject of the request must be an actual--not a hypothetical--transaction but need not involve only prospective conduct. However, a request will not be considered unless that portion of the transaction for which an opinion is sought involves only prospective conduct. An executed contract is not a prerequisite and, in most—if not all--instances, an opinion request should be made prior to the requestor's commitment to proceed with a transaction.

Sec. 80.4 Issuer or domestic concern.

The request must be submitted by an issuer or domestic concern within the meaning of 15 U.S.C. 78dd-1 and 78dd-2, respectively, that is also a party to the transaction which is the subject of the request.

Sec. 80.5 Affected parties.

An FCPA Opinion shall have no application to any party which does not join in the request for the opinion.

Sec. 80.6 General requirements.

Each request shall be specific and must be accompanied by all relevant and material information bearing on the conduct for which an FCPA Opinion is requested and on the circumstances of the prospective conduct, including background information, complete copies of all operative documents, and detailed statements of all collateral or oral understandings, if any. The requesting issuer or domestic concern is under an affirmative obligation to make full

and true disclosure with respect to the conduct for which an opinion is requested. Each request on behalf of a requesting issuer or corporate domestic concern must be signed by an appropriate senior officer with operational responsibility for the conduct that is the subject of the request and who has been designated by the requestor's chief executive officer to sign the opinion request. In appropriate cases, the Department of Justice may require the chief executive officer of each requesting issuer or corporate domestic concern to sign the request.

All requests of other domestic concerns must also be signed. The person signing the request must certify that it contains a true, correct and complete disclosure with respect to the proposed conduct and the circumstances of the conduct.

Sec. 80.7 Additional information.

If an issuer's or domestic concern's submission does not contain all of the information required by Sec. 80.6, the Department of Justice may request whatever additional information or documents it deems necessary to review the matter. The Department must do so within 30 days of receipt of the opinion request, or, in the case of an incomplete response to a previous request for additional information, within 30 days of receipt of such response. Each issuer or domestic concern requesting an FCPA Opinion must promptly provide the information requested. A request will not be deemed complete until the Department of Justice receives such additional information. Such additional information, if furnished orally, shall be promptly confirmed in writing, signed by the same person or officer who signed the initial request and certified by this person or officer to be a true, correct and complete disclosure of the requested information. In connection with any request for an FCPA Opinion, the Department of Justice may conduct whatever independent investigation it believes appropriate.

Sec. 80.8 Attorney General opinion.

The Attorney General or his designee shall, within 30 days after receiving a request that complies with the foregoing procedure, respond to the request by issuing an opinion that states whether the prospective conduct, would, for purposes of the Department of Justice's present enforcement policy, violate 15 U.S.C. 78dd-1 and 78dd-2. The Department of Justice may also take such other positions or action as it considers appropriate. Should the Department request additional information, the Department's response shall be made within 30 days after receipt of such additional information.

Sec. 80.9 No oral opinion.

No oral clearance, release or other statement purporting to limit the enforcement discretion of the Department of Justice may be given. The requesting issuer or domestic concern may rely only upon a written FCPA Opinion letter signed by the Attorney General or his designee.

Sec. 80.10 Rebuttable presumption.

In any action brought under the applicable provisions of 15 U.S.C. 78dd-1 and 78dd-2, there shall be a rebuttable presumption that a requestor's conduct, which is specified in a request, and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department's present enforcement policy, is in compliance with those provisions of the FCPA. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption, a court, in accordance with the statute, shall weigh all relevant factors, including but not limited to whether information submitted to the Attorney General was accurate and complete and whether the activity was within the scope of the conduct specified in any request received by the Attorney General.

Sec. 80.11 Effect of FCPA Opinion.

Except as specified in Sec. 80.10, an FCPA Opinion will not bind or obligate any agency other than the Department of Justice. It will not affect the requesting issuer's or domestic concern's obligations to any other agency, or under any statutory or regulatory provision other than those specifically cited in the particular FCPA Opinion.

Sec. 80.12 Accounting requirements.

Neither the submission of a request for an FCPA Opinion, its pendency, nor the issuance of an FCPA Opinion, shall in any way alter the responsibility of an issuer to comply with the accounting requirements of 15 U.S.C. 78m(b)(2) and (3).

Sec. 80.13 Scope of FCPA Opinion.

An FCPA Opinion will state only the Attorney General's opinion as to whether the prospective conduct would violate the Department's present enforcement policy under 15 U.S.C. 78dd-1 and 78dd-2. If the conduct for which an FCPA Opinion is requested is subject to approval by any other agency, such FCPA Opinion shall in no way be taken to indicate the Department of Justice's views on the legal or factual issues that may be raised before that agency, or in an appeal from the agency's decision.

Sec. 80.14 Disclosure.

(a) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by an issuer or domestic concern under the foregoing procedure shall be exempt from disclosure under 5 U.S.C. 552 and shall not, except with the consent of the issuer or domestic concern, be made publicly available, regardless of whether the Attorney General responds to such a request or the issuer or domestic concern withdraws such request before receiving a response.

(b) Nothing contained in paragraph (a) of this section shall limit the Department of Justice's right to issue, at its discretion, a release describing the identity of the requesting issuer or domestic concern, the identity of the foreign country in which the proposed conduct is to take place, the general nature and circumstances of the proposed conduct, and the action taken by the Department of Justice in response to the FCPA Opinion request. Such release shall not disclose either the identity of any foreign sales agents or other types of identifying information. The Department of Justice shall index such releases and place them in a file available to the public upon request. (c) A requestor may request that the release not disclose proprietary information.

Sec. 80.15 Withdrawal.

A request submitted under the foregoing procedure may be withdrawn prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect. The Department of Justice reserves the right to retain any FCPA Opinion request, documents and information submitted to it under this procedure or otherwise and to use them for any governmental purposes, subject to the restrictions on disclosures in Sec. 80.14.

Sec. 80.16 Additional requests.

Additional requests for FCPA Opinions may be filed with the Attorney General under the foregoing procedure regarding other prospective conduct that is beyond the scope of conduct specified in previous requests.

31 July 2018

Keely Hibbitt - Supplementary written evidence (BRI0063)

At the recent evidence session on the Bribery Act, I agreed to send the Committee further information about Balfour Beatty's idea that the Supply Chain School be supported to train small businesses in the legislation surrounding bribery and corruption.

As I mentioned during our discussion, bribery and corruption remain an issue in the construction industry. For companies such as Balfour Beatty, ensuring that our supply chain and partners are aware of and fully understand the legislation is important and yet challenging. While we are clear that we expect those small and medium enterprises (SMEs) in our supply chain to act ethically and to comply with the Bribery Act, we are concerned that SMEs more broadly often remain unaware of the Act, or of its full extent. Where they are aware of it, they often do not have the resources to devise their own "adequate procedures" to mitigate against it happening either here or on their behalf anywhere in the world, as they are required to do. To assist with this, we believe that SMEs would benefit from training and support from a third party. In our view, the Supply Chain School would be the best vehicle for this as it provides high-quality training, has a large number of registered users, measures its success, and is already established.

Balfour Beatty has partnered with the Supply Chain School since 2013. The School is a collaboration between 75 clients, contractors and tier one suppliers, operating largely in the construction industry, which have a mutual interest in building the skills of their supply chains. The School is funded by these organisations, so it is free at the point of use for SMEs.

There are over 26,000 registered users at the School (in April 2018). It offers a wide range of training (including CPD accredited), from technical subjects such as carbon omissions, to management skills, and fairness, inclusion and respect. It undertakes this via eLearning, face-to-face workshops, supplier days and policies, procedures and checklists.

The School uses the best practice logic model approach to measure its impact. Its latest assessment shows that there has been an overall increase in knowledge of 17% above base levels of knowledge. In specialist areas, the number is greater. A good example is modern slavery where 62% of respondents had improved knowledge of which 82% agreed the School helped to achieve this.

The School, which supports the idea to add bribery and corruption to the areas within its training remit, currently provides no specific training on bribery and corruption. While the partners fund the school itself and are happy to give their time and knowledge to develop content and materials for the training, further budget is required for additional costs, such as training the teachers and paying for invigilators. The initial funding required is £250k. This would cover the cost of developing and rolling out a full programme of events, workshops, online resources, supporting material such as videos and so on. It would also pay for the marketing of the new course to encourage members to take the training,

Keely Hibbitt - Supplementary written evidence (BRI0063)

and of monitoring of the outcomes and behavior change driven by the training. There would also be an annual cost, which is likely to be less.

Sean McCarthy OBE, who chairs the School, has presented the idea and funding request to the National Crime Agency and the Anti-Corruption Forum, where a DfID representative was present, to attempt to win their support. There are some outstanding issues, for example, that the School covers only one sector. However, we believe, that, given the small amount of funding required, and the significant potential benefits of the new training in terms of raising awareness of the Bribery Act amongst a large number of SMEs, we should continue to work together to overcome these issues.

The Supply Chain School's website, which has full details about its work, is here: <https://www.supplychainschool.co.uk>

I trust that this provides the Committee with an overview of the issue.

Keely Hibbitt

Group Head of Business Integrity, Balfour Beatty plc

9 September 2018

HM Prison and Probation Service - written evidence (BRI0050)

1. Introductory Statement

- 1.1. In response to the Bribery Act 2010 Committee's request, we are pleased to submit written evidence on behalf of Her Majesty's Prison and Probation Service (HMPPS).
- 1.2. HMPPS provides effective and humane Prison, Probation and Youth Custody services which protect the public from harm and help people who have been convicted of offences to reform so they can contribute positively to society.
- 1.3. Corruption is a serious issue and, in prisons, enables the illicit economy and undermines the authority and stability of the regime. The trafficking of contraband, in particular drugs, drives violence and drug use – reducing prisoners' rehabilitation prospects. Prisoners' ongoing criminality in prison will affect their attitudes to crime after their release. Corruption in probation can compromise supervision levels, affect public safety and the courts' confidence that sentences are being served. As with prisons, corruption in probation can undermine rehabilitation efforts.
- 1.4. HMPPS's definition of corruption is **when a person in a position of authority or trust abuses their position for benefit or gain or themselves or of another person**. In HMPPS, this would include the misuse of a person's role to plan or commit a criminal act, or a deliberate failure to act to prevent criminal behaviour, and bribery constitutes one type of corruption under this definition.
- 1.5. HMPPS's efforts to tackle corruption are integral to delivering a safe and secure Prison and Probation Service, and so tackling corruption, including bribery, is a key priority for HMPPS – we do not tolerate staff who engage in corrupt behaviour. Over the last 18 months, HMPPS and the Ministry of Justice have completed a root and branch review of our current approach to tackling corruption across the Agency.
- 1.6. As a result of our review, we have developed a new internal strategy for tackling corruption in HMPPS. Aligned with the Government's wider Anti-Corruption Strategy, it is based on four key objectives:
 - **Protect** against corruption by building an open and resilient organisation;
 - **Prevent** people from engaging in corruption, strengthen professional integrity;
 - **Pursue** and punish those who attempt to corrupt our staff as well as those members of staff who are corrupt; and
 - **Prepare** for corruption, reducing its impacts on our teams.

- 1.7. We are acting now to develop and deliver changes to make better use of our resources to tackle corruption across the Agency. This includes restructuring our Corruption Prevention Unit to improve our offer to prisons and probation; developing new guidance and brokering new ways of working with our delivery partners, including the Police; and improving our operational policies and processes currently set out in the Probation Instruction (PI) and Prison Service Instruction (PSI) 01/2016 on Corruption Prevention, to better clarify and streamline processes, roles and responsibilities.

2. The nature of the threat in HMPPS

- 2.1. HMPPS is a proud and professional organisation with over 80,000 HMPPS staff and contractors working in prison and probation. The vast majority of our staff and contracted providers carry out their duties honestly and to the best of their ability. However, as with all large organisations, we know that some of our staff engage in corrupt behaviour.
- 2.2. As corruption is by its nature a hidden activity, there is no perfect measure of the scale of corruption within any organisation, be it in the public or private sector. Reporting volumes are an informative but not conclusive indicator. Corruption related intelligence reports – which staff and others are encouraged to submit if they suspect wrongdoing – have been increasing year on year within HMPPS and last year the Corruption Prevention Unit actioned approximately 9,500. However, we have done much in recent years to encourage increased reporting, including introducing an electronic reporting system and numerous communication campaigns, and reports themselves are not actual evidence of corruption having taken place. Similarly, whilst the volume of prosecutions and dismissals is a useful guide, as set out in section four, there are myriad factors that lead us to be cautious about the extent to which this data reveals the prevalence of the threat.
- 2.3. Our overall assessment is that corruption is highly likely to be one of the key ways in which contraband can be smuggled into prisons, and therefore tackling is and will remain a top priority for the Agency.

3. Use of the Bribery Act 2010 in Prison and Probation Prosecutions

- 3.1. HMPPS does not hesitate to take firm action when we find evidence of corruption and we refer alleged incidents of corruption to the police for investigation.
- 3.2. There are a range of offences that *may* be used to charge and prosecute individuals or suppliers following an investigation into corruption, depending on the facts of the case. These include, but are not limited to, the Bribery Act 2010, the common law offence of misconduct in public office and offences under the Offender Management Act 2007.
- 3.3. With respect to the Bribery Act 2010, the offences of greatest pertinence to HMPPS are:

- The general bribery offences (Section 1 – offences of bribing another person and Section 2 – offences relating to being bribed)□
 - Failure of commercial organisations to prevent bribery (section 7)
- 3.4. However, between 2013 and 2017, we have no record of a member of staff (directly employed or contracted) being charged with offences under the Bribery Act 2010. There have been no prosecutions in relation to fraud and bribery within Community Rehabilitation Companies (CRCs) that we are aware of, since the start of the contracts in 2015. Nor have there been any prosecutions in relation to contracted providers of prison services.
- 3.5. Our records indicate that the offences most commonly used by the police and the CPS in prosecutions for wrongdoing and corruption in prisons are the common-law offence of Misconduct in Public Office and the various offences in the Offender Management Act 2007.
- 3.6. HMPPS do not decide which offences are used in prosecutions against prison and probation staff. It is the role of the CPS to decide on the appropriate offence or offences to charge an individual with. Their prosecutors will look across all legislation to establish what they are able to prove, based on the different types of offending.
- 3.7. However, the following passages may go some way to explain why it might be the case that other pieces of legislation are favoured over the Bribery Act, when it comes to charging individuals for corruption in prisons and probation.
- 3.8. One of the more prevalent forms of staff corruption in prisons involves the trafficking of prohibited items (such as drugs and mobile phones). Under the Bribery Act 2010, for an offence to have occurred there is a requirement to demonstrate that an individual has accepted, or agreed to accept, a financial advantage or other reward for the *improper performance of a relevant function or activity*.
- 3.9. Conveyance of drugs and other prohibited items into prisons is not a genuine function or activity of HMPPS, therefore it is not possible to perform conveyance 'improperly' and any payment given to staff to convey items does not fall under the Bribery Act 2010 offence. Conveyance of prohibited items is, however, an offence in and of itself and therefore individuals may easily be charged under the relevant offence under the Offender Management Act 2007.
- 3.10. If a member of staff is paid by a prisoner to perform an official function or activity improperly (e.g. not to conduct searches of prisoners, prison cells, visitors etc. at all or to the required standard), this is arguably a bribe. However, our understanding is that it is much more difficult to prove this as an offence under the Bribery Act 2010. The common law offence of Misconduct in Public Office can more easily

be proven and does not need to show that a member of staff was offered or accepted a bribe.

4. Criminal Justice and other outcomes

4.1. The table below provides the Committee with a breakdown of outcomes for staff who involved in the conveyance of contraband into prison. In this document, an asterisk (*) has been used to represent values of five or less, in keeping with FOIA principles, to avoid the risk of disclosure of personal data.

	2012	2013	2014	2015	2016	2017
Dismissals	8	13	8	*	11	6
Exclusions	20	22	36	37	29	47
Convictions	13	9	16	8	17	16
Police Cautions	*	7	*	*	*	*
TOTAL	*	51	*	50	*	*

4.2. Conveyance is not the only form of staff corruption. The following table provides the Committee with a breakdown of outcomes for staff who have been involved in non-conveyance related corruption. These included, but are not limited to, actions such as the unauthorised disclosure of information, forming inappropriate relationships, blackmail, bribery, fraud, theft, and assisting a prisoner to escape. An asterisk (*) has been used to represent values of five or less to avoid the disclosure of personal data.

	2012	2013	2014	2015	2016	2017
Dismissals	9	11	11	11	18	13
Exclusions	35	53	52	69	57	55
Convictions	10	11	10	16	12	11
Police Cautions	*	6	*	*	*	*
TOTAL	*	81	*	*	*	*

4.3. A number of successful prosecutions for staff corruption have taken place in recent months including:

- A former Prison Custody Office at HMP Altcourse, pleaded guilty to seven offences of Intent to Supply Class A, B and C drugs, three offences of conveying prohibited articles including a

mobile phone, SIM card, and mobile charger, and one offence of possession of criminal property. He received a 9-year custodial sentence on 6 September 2018 at Liverpool Crown Court.

- A former Officer at HMP Parc, who was found to be in regular contact with a prisoner, when a mobile phone was found in the prisoner's possession. The officer had provided the prisoner with his mobile phone number and home address, and exchanged over 170 messages with him. He was convicted at Cardiff Crown Court on 18 August 2018 and received a 6-month custodial sentence for Misconduct in Public Office.
- A former workshop instructor admitted to conveying Subutex (used to treat opioid addiction) into HMP Wayland, as well as possession of cannabis and spice. He received a 14-month custodial sentence on 13 March 2018.
- A former Operational Support Grade staff member at HMYOI Aylesbury, engaged in an inappropriate relationship with a serving prisoner; and between 10th November 2016 and 31st March 2017 exchanged 472 text messages and 197 calls with the prisoner. In May 2017, she received an eight-month custodial sentence, suspended for 18 months, for Misconduct in a Public Office.

4.4. For probation staff, there are fewer outcomes in relation to staff corruption. From 2012 to 2017, HMPPS recorded 9 dismissals and 7 exclusions. Other outcomes with values of five or less have been omitted to avoid the disclosure of personal data.

5. HMPPS policy and procedures on bribery and corruption since the introduction of the Bribery Act 2010

- 5.1. The Government's wider UK Anti-Corruption Strategy, published December 2017, sets out a vision of anti-corruption action leading to reduced threats to our national security; more economic opportunities, especially for British business; and greater public trust and confidence in our institutions.
- 5.2. The Strategy provides a framework to guide the Government's anti-corruption policies and actions in six priority areas:
- Reducing the insider threat in high risk domestic sectors;
 - Strengthening the integrity of the UK as an international financial centre;
 - Promoting integrity across the public and private sectors;
 - Reducing corruption in public procurement and grants;
 - Improving the business environment globally;
 - Working with other countries to combat corruption.
- 5.3. The Strategy underpins the Government's focus on economic crime, including fraud and bribery. The Joint Anti-Corruption Unit in the

Home Office works across Whitehall to implement the commitments in the Strategy.

- 5.4. HMPPS is fully committed to delivering its responsibilities under the UK Anti-Corruption Strategy, where prisons and probation have been identified as a priority sector. HMPPS's resilience to corruption is integral to delivering a safe and secure Prison and Probation Service and we have developed a strategy for tackling corruption where this takes place.
- 5.5. Historically, HMPPS has used a broad, non-statutory definition of "corruption" to inform its policies and practices in relation to staff. This definition, "*Corruption occurs when a person in a position of authority or trust abuses their position for their or another person's benefit or gain*", already covered the behaviours set out in the Bribery Act 2010 and did not need to be amended to implement the Act.
- 5.6. The definition is included in PSI 01/2016 and PI 05/2016 and continues to be utilised through various policies, procedures and practices in HMPPS which seek to prevent corruption and pursue it where it takes place.
- 5.7. The Ministry of Justice (MoJ) Counter Fraud, Bribery and Corruption Policy sets out the responsibilities of all staff regarding prevention, detection and reporting of fraud, bribery and corruption and this policy also covers Executive Agencies and Arm's Length Bodies, including HMPPS. The offences under the Bribery Act are clearly articulated in the Counter Fraud, Bribery and Corruption Policy.
- 5.8. HMPPS takes a range of steps to prevent bribery and corruption. This includes vetting all directly and non-directly employed staff prior to appointment, and periodically, to ensure that applicants and staff do not pose a threat to security and the integrity of the organisation. Part of the vetting process includes a review of any previous convictions, including offences related to bribery and corruption.
- 5.9. Once employed, HMPPS staff are subject to the Prison Act 1952, the Prison Rules 1999, Young Offender Institution Rules 2000, Secure Training Centre Rules 1998, the Civil Service Code and HMPPS's Statement of Professional Standards. Breaches of these standards, including for bribery and corruption, are managed according to PSI 06-2010 and PI 34-2014 Conduct and Discipline Policies.
- 5.10. Directly and non-directly employed staff undergo corruption prevention training. This training covers the definition of corruption in a prison and probation environment, how individuals can protect themselves from being targeted by offenders and how to report suspicions of corruption, fraud and bribery within the organisation.
- 5.11. In accordance with their duties under the Act, HMPPS and the MoJ also robustly commission and contract manage service providers in prisons and probation to prevent bribery and corruption. Suppliers are

required to declare whether they have been convicted of any offences in relation to corruption, fraud, money laundering in the previous five years and to provide details of the offence and any evidence of self-cleaning.

- 5.12. In 2018, MoJ Contract & Commercial Directorate commenced a programme of works to develop a Third Party Risk Management framework (TPRM). The framework includes a Risk Questionnaire to be completed in respect of new suppliers to assess the risk of financial crime (and other key risk domains), to ensure appropriate control and assurance activity to mitigate the risk is incorporated in the contracts. The questionnaire focuses on the anti-bribery & corruption activities which the Supplier maintains. The consistency given by the framework enables better monitoring of contract management behaviour and identification/mitigation of higher risk contracts.
- 5.13. Furthermore, all contracted staff are subject to the Prison Act 1952, the Prison Rules 1999, Young Offender Institution Rules 2000 and Secure Training Centre Rules 1998 as for HMPPS staff.

6. Monitoring service providers activity – including Community Rehabilitation Companies

- 6.1. MoJ and HMPPS have clear policies and procedures to pursue suspected fraud, bribery and corruption in providers of prison, probation and auxiliary services. Where there is intelligence or evidence that an individual or supplier has been engaged in corruption, including bribery, HMPPS refers that matter to the police for criminal investigation and to charge as appropriate.
- 6.2. The MoJ has processes in place to mitigate the risk of bribery and collusion within and with its contracted providers. For significant contracts, the MoJ engages broadly with the market ahead of the bid documents coming out, reducing the risk of collusion for major contracts.
- 6.3. Contract managers monitor ongoing activity as a part of BAU contract management activities and any suspected fraudulent activity is reported in line with MoJ central fraud reporting procedures. Gifts and hospitality must be declared as per MoJ policy and the contract between MoJ and each CRC can be terminated in the event of the giving of any gifts with the intention of corrupting staff.
- 6.4. The Committee has asked specifically about the risks of bribery related to probation services and how this is managed. National Probation Service (NPS) staff are part of HMPPS. Alongside the NPS are Community Rehabilitation Companies (CRCs).
- 6.5. As with all contracted services it is a contractual requirement that CRCs have adequate procedures in place to prevent bribery and corruption. Each CRC is required to provide detailed financial information to the Ministry of Justice on a monthly basis and the

Ministry of Justice Contract Management Team completes data accuracy compliance checks and service delivery checks for CRCs to assure services are being delivered.

- 6.6. All HMPPS and CRC probation staff, undertake training to understand how to avoid being targeted by offenders, how to detect corrupt practices in others and what steps should be taken should they be approached by an individual and offered a bribe.
- 6.7. HMPPS and CRC probation staff are obligated to report corrupt practices and suspicions of bribery and corruption. CRCs are obligated to report any such occurrences or bribery and corruption to HMPPS as well as following any internal disciplinary or prosecution procedures.
- 6.8. HMPPS has Quarterly General Meetings in place to discuss and raise issues which Community Rehabilitation companies attend. Authority contract management teams are also in place to monitor service delivery against the contract.

Claudia Sturt

Director of Security, Order and Counter Terrorism

19 November 2018

HM Government – Supplementary written evidence (BRI0059)

- **The amount of 'Brexit budget' allocated to each department.**
 1. *Allocations to departments for EU-exit spending for the 2018/19 financial year were announced by the Chief Secretary to the Treasury in a Written Ministerial Statement on 13 March – the statement can be found at Annex A.*
 2. *The Chancellor announced at Budget that he would allocate £2bn to departments for 2019/20. These allocations have been announced by the Chief Secretary to the treasury in a Written Ministerial Statement on 18 December – the statement can be found at Annex B.*
 3. *To be clear, the Home Office is not the lead department for the Crown Prosecution Service. It is a matter for the Attorney General's Office to agree funding to support EU Exit planning for the Crown Prosecution Service. However, the Home Office is working closely with key government departments – including the Attorney General's Office – to ensure preparedness for all potential scenarios.*

- **Safeguards against using section 13 of the Bribery Act 2010 to mitigate other offences, especially in relation to the aerospace industry.**
 3. *In relation to the armed forces, according to the Ministry of Defence, section 13 defence under the Bribery Act 2010 has not been used in any cases conducted by or on behalf of the MOD. Likewise, the SFO has not seen the use of Section 13 in any of its cases to date.*
 4. *The defence is tightly constrained in that it is only available to members of the intelligence services; members of the armed forces engaged on active service; or civilians subject to service discipline when working in support of members of the armed forces engaged on active service. In other words, the defence is not available to the defence industry so it is difficult to see how it could discourage prosecutions relating to that industry.*
 5. *The SFO and CPS have given evidence to the Committee so the Committee could request further information from these parties if it is required.*

- **Whether John Penrose has enough time to dedicate to being Anti-Corruption Champion while also a Northern Ireland Minister, and the resources at his personal disposal.**
 6. *John Penrose MP remains fully committed to his role as Anti-Corruption Champion while also a Minister of Northern Ireland. He will continue to help drive change both across government and internationally. In the past the responsibility as Anti-Corruption Champion has been allocated to a range of office holders including junior ministers so there is clear*

precedent for Anti-Corruption Champions to have a dual role as a Minister.

- 7. In terms of resources, the Joint Anti-Corruption Unit (JACU) in the Home Office provides dedicated support to the Anti-Corruption Champion. JACU meets the Champion on a weekly basis to discuss the implementation of the 2017 UK Anti-Corruption Strategy. These meetings involve thorough scrutiny of all 134 actions in the strategy to identify areas of concern where the Champion can intervene as required. In addition to strategy monitoring meeting, JACU's support involves providing a private office function and a wide range of other activities which includes: arranging and briefing the Champion on meetings with key stakeholders both inside and outside government, developing policy initiatives in conjunction with and on the request of the Champion, providing expert policy advice, supporting the Champion at international fora and organising the Inter-Ministerial Group which the Champion co-chairs alongside the Security Minister.*
- 8. JACU transferred to the Home Office in December 2017 to enable better co-ordination of domestic and international anti-corruption efforts and to promote stronger links between anti-corruption and other economic and organised crime. JACU is a joint integrated unit, co-ordinating anti-corruption work across government, representing the UK at international anti-corruption fora and providing support to the Anti-Corruption Champion. It is also responsible for developing strong relationships with business, civil society and foreign governments.*

Annex A: Written Ministerial Statement – Elizabeth Truss (The Chief Secretary to the Treasury) 13 March 2018

Making a success of EU exit is a priority for the Government and the Treasury. At the Autumn Budget 2017, my right honourable friend the Chancellor of the Exchequer (Philip Hammond) committed £3 billion over the next two financial years to helping departments and the devolved administrations to prepare. Working with colleagues across government to prioritise the essential programmes to realise the opportunities from EU exit, the Treasury has allocated funding to departments as follows in 2018-19:

Department	£m
Cabinet Office	49.4
Competition and Markets Authority	23.6
Department for Business, Energy and Industrial Strategy	185.1
Department for Digital, Culture, Media and Sport	26.2
Department for Environment, Food and Rural Affairs	310.0
Department for International Trade	74.0
Department for Transport	75.8
Department of Health and Social Care	21.1
Food Standards Agency	14.0
Foreign and Commonwealth Office	29.6
HM Revenue & Customs	260.0
HM Treasury	24.8
Home Office	395.0
Ministry of Defence	12.7
Ministry of Justice	17.3
Northern Ireland Office	0.4
Office for National Statistics	2.0
Scotland Office	0.3
The National Archives	1.2
Wales Office	0.3

This has generated the following Barnett consequential for the devolved administrations:

	£m
Northern Ireland Executive	15.2

Scottish Government	37.3
Welsh Government	21.4

This Government is committed to seeking a new future economic partnership with the European Union and this funding will help us to prepare for all eventualities. As the negotiations continue, we will need to reflect upon any progress and consider requirements accordingly. I will work with my colleagues across government to ensure these allocations achieve value for money for the taxpayer. Final allocations will be made at the 2018-19 Supplementary Estimates in early 2019.

Annex B: Written Ministerial Statement – Elizabeth Truss (The Chief Secretary to the Treasury) 18 December 2018

HM Treasury, along with all of HM Government, is committed to ensuring that we make a success of EU-exit. At Autumn Budget 2017, my right honourable friend the Chancellor of the Exchequer (Philip Hammond) committed £3 billion to help departments and devolved administrations make necessary preparations for EU-exit in 2018-19 and 2019-20; this was subsequently increased by £0.5bn in the 2018 Budget, meaning the Government has invested over £4bn in preparing for EU-exit since 2016. Working with colleagues across Government to deliver on the referendum while protecting jobs, businesses and prosperity and to support departments in planning for EU-exit, HM Treasury has allocated the following funding to departments for financial year 2019-20:

Department	£m[*]
Attorney General's Office	3
Cabinet Office	59
Competition and Markets Authority	20
Department for Business, Energy and Industrial Strategy	190
Department for Culture, Media and Sport	30
Department for Environment, Food and Rural Affairs	410
Department for International Trade	128
Department for Transport	25
Department of Health and Social Care	50
Department for Work and Pensions	15
Food Standards Agency	16
Foreign and Commonwealth Office	45
HM Revenue & Customs	375
HM Treasury	35
Home Office	480
Ministry of Defence	12
Ministry of Housing, Communities and Local Government	35
Ministry of Justice	30
Northern Ireland Office	1
Office for National Statistics	2
Police Service of Northern Ireland	16
Scotland Office	0.3

HM Government – Supplementary written evidence (BRI0059)

Single Intelligence Account	3
The National Archives	2
The Supreme Court	1
Wales Office	0.3

This has generated the following Barnett consequentials for the devolved administrations:

	£m*
Northern Ireland Executive	20
Scottish Government	55
Welsh Government	31

* Numbers rounded to the nearest million unless otherwise stated

19 December 2018

Louise Hodges – Supplementary written evidence (BRI0054)

What would be the impact on the investigation and prosecution of [not just international] bribery cases if the European Arrest Warrant, European Investigation Order and other EU law ceased to apply in the UK? How could we mitigate this impact?

1. The SFO annual report 2017-18 identified a series of strategic risks. Identified as at 31 March 2018 these included:
 - a loss of access to EU measures and tools arising from Brexit leading to an adverse effect on investigations and prosecutions (new for 2017-18).¹⁰⁰

Debate to date

2. As has been extensively debated in the committees of the House of Lords and the excellent reports that followed, the UK's withdrawal from the European Union will affect a number of mechanisms including: the European Arrest Warrant; European Investigation Order; membership of Eurojust and Europol as well as use of Joint Investigation Teams. Data transfer and access to databases could also be restricted.
3. In evidence to the Bribery Act committee from Director of Public Prosecutions, Max Hill QC, on 13 November 2018, he confirmed that the demise of the EAW and EIO would have an impact because law enforcement would have to fall back on mutual co-operation instruments which were in place previously. Therefore it is expected, he stated, that this would mean 27 bi-lateral arrangements which would have a definable impact in terms of resource and management, and speed of cases. In the same evidence session, the Director of the Serious Fraud Office was keen to emphasise that co-operation would not cease.
4. In debate to date, a number of options regarding the European Arrest Warrant had been put forward. These are well rehearsed in the House of Lords Select Committee on European Union report *on Brexit: Judicial Oversight of the European Arrest Warrant*.¹⁰¹ Options include:
 1. Retaining the European Arrest Warrant
 2. Alternatives to the European Arrest Warrant - Norway/Iceland model.
 3. Alternatives to the European Arrest Warrant – 1957 Council of European Convention.
5. As to the problems with each of these options, the House of Lords report articulates this perfectly:

¹⁰⁰ <https://www.sfo.gov.uk/publications/corporate-information/annual-reports-accounts/>

¹⁰¹ <https://publications.parliament.uk/pa/ld201719/ldselect/ldcom/16/16.pdf>

The Government has been clear that it wishes to retain all the benefits of the European Arrest Warrant. But this is unlikely to be achievable: even the EU's agreement with Norway and Iceland (which has yet to be brought into force) allows an 'own-national exemption'. It also provides an indirect but influential role for the CJEU. Compromises will be needed—the alternative is to fall back on the 1957 Council of Europe Convention on Extradition, which would lead to delay, higher cost, and potential political interference.

The Government's 'red line' could still restrict the UK's continued involvement in those security cooperation frameworks where the CJEU acts as a dispute resolution mechanism. Other Government policies, such as the refusal to incorporate the Charter of Fundamental Rights of the European Union in domestic law post-Brexit, could also reduce the UK's room for manoeuvre in specific areas, such as extradition.

6. Whilst it is not possible to narrow down the statistics (certainly not with publicly available data) as to how many European Arrest Warrants have been issued in relation to Bribery Act offences, the National Crime Agency has released data relating to the European Arrest Warrant categorised into "wanted by the UK" and "wanted from the UK". These can be accessed on the National Crime Agency Arrest Warrant page.¹⁰² It is worth noting that between 2010-2017 the UK issued 1773 requests which resulted in 956 surrenders and 1101 arrests. The UK has long been a proponent of the efficacy of the EAW and it would arguably be a significant loss in its law enforcement armoury post-Brexit. As noted in the House of Commons, Home Affairs Committee report UK–EU security cooperation after Brexit (Fourth Report)¹⁰³, the simplified extradition procedure introduced through the EAW is 'significantly faster and cheaper than its predecessor arrangements, based on the 1957 European Convention on Extradition'.
7. Regarding the European Investigation Order which was implemented in the UK in May 2017, the Home Office reported in March 2018 that in the calendar year 2017 the UK Central Authority Authority received 6,757 incoming requests for MLA (355 of these requests were made through using the European Investigation Order) and 1,967 requests for service of process.¹⁰⁴ One of the important features of the EIO, is that the executing authority then has 90 days by which to gather the evidence for the requesting state.
8. Regarding the impact on the SFO there are concerns that without these enhanced cross-border law enforcement tools and mutual co-operation mechanisms the UK may seem weak in terms of anti-bribery action or a "safe-haven".
9. The UK government has sought to counteract any such rhetoric by confirming in its Anti-Corruption Plan 2017-20 that the "UK is strong on UK global leadership anti-corruption and bribery". Indeed the Bribery Act did not come from any European Union legislation and could be seen

¹⁰² <http://www.nationalcrimeagency.gov.uk/publications/european-arrest-warrant-statistics>

¹⁰³ <https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/1632/1632.pdf>

¹⁰⁴ <https://www.gov.uk/guidance/european-investigation-orders-requests>

rather as a reflection of the US Foreign Corrupt Practices Act and OECD standards.

10. In 2017 the OECD review of the UK's anti-bribery regime welcomed the UK's "strong anti-corruption drive" and concluded that the UK had made significant progress in fighting foreign bribery. With its current focus on tackling "illicit finance" and the launch of the National Economic Crime Centre it is unlikely the UK will wish to row-back on its "gold-standard" anti-bribery legislation and there will no impact on the interpretation of the Act.
11. As with many of the policy areas there are questions in relation to the withdrawal and transition (or implementation) period, and the future relationship. Given the current parliamentary turmoil and, at the time of writing, postponement of the vote on the Withdrawal Agreement, there may be no transition to speak of and we leave the EU on 29 March 2019 with "no deal".

Transition

12. As for transition, the Draft Agreement on the withdrawal of the United Kingdom from the EU¹⁰⁵ published on the 14th November 2018 includes a chapter relating to on-going judicial co-operation proceedings in criminal matters - Title V. This sets out that the Framework Decision governing the European Arrest Warrant (EAW) shall apply where the requested person was arrested before the end of the transition period irrespective as to whether the requested person is to remain in detention or be provisionally released. It also refers to other instruments, including the European Investigation Order (EIO) where the relevant directive will continue to apply in respect of EIOs received before the end of the transition period.
13. Depending on future political debates the transition period is currently set to end of the 31 December 2020 but there are media reports currently that suggest this could be extended.
14. It is worth noting that in article 185 (formerly cited as 168) of the Withdrawal Agreement a "Member State which has raised reasons related to fundamental principles of national law ... may declare that, during the transition period, in addition to the grounds for non-execution of a European arrest warrant ... the executing judicial authorities of that Member State may refuse to surrender its nationals to the United Kingdom pursuant to a European Arrest Warrant. In such a case, the United Kingdom may declare... that its executing judicial authorities may refuse to surrender its nationals to that Member State". This reciprocal nationality bar could have significant operational consequences.

The future relationship

¹⁰⁵ <https://www.gov.uk/government/publications/progress-on-the-uks-exit-from-and-future-relationship-with-the-european-union>

15. The UK sought to mitigate risks, such as those identified in the SFO annual report, with a proposed Framework for the UK-EU Security Partnership presented in May 2018.¹⁰⁶ Though this “commitment to Europe’s security” was welcomed by the European Commission shortly after in a speech by Michel Barnier, no formal progress was been made on this.
16. The proposed Security Treaty sought to incorporate and replicate existing arrangements such as the European Arrest Warrant, and provide the UK with access to the Second Generation Schengen Information System database (SIS II), as well as some form of continued participation in Europol and Eurojust, the EU agencies for police and judicial cooperation. The Government has also suggested that it hoped to maintain some form of access to the European Criminal Records Database (ECRIS), Passenger Name Records (PNR), and the Prüm databases containing fingerprint, DNA and vehicle registration information.
17. The House of Lords EU Home Affairs Sub Committee: *EU Brexit: the proposed UK-EU security treaty* has conducted an extensive inquiry into this issue and published its report on 11 July 2018. The Government responded on the 2 November.¹⁰⁷
18. As set out above, the EU did not take up the UK proposal as such. A document from the European Commission of July 2018 regarding *“Preparing for the Withdrawal of the United Kingdom from the European Union on 30 March 2019”* refers to the negotiation of the Withdrawal Agreement and states that: “the issues related to on-going police and judicial cooperation in criminal matters remain open. In addition, issues surrounding the governance of the Withdrawal Agreement, including the role of the Court of Justice of the European Union, are still unresolved”.¹⁰⁸
19. The issue of the jurisdiction of the Court of Justice of the European Union remains a key issue for both sides. The EU is concerned as to divergence in standards and approach and lack of symmetry between rights and obligations. It is concerned for the “integrity” of the justice and home affairs area. Moreover given that the core instruments are based on mutual recognition and in turn mutual trust, then the EU’s position is there can be no presumption of such without the jurisdiction and oversight of the Court of Justice.
20. The UK had set out removing itself from the European Court of Justice as a “red-line”. The Political Declaration accompanying the Withdrawal Agreement underlines the difficulty in this area stating that the future relationship “should reflect the commitments the United Kingdom is willing to make that respect the integrity of the Union’s legal order, such as with

¹⁰⁶https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705687/2018-05-0_security_partnership_slides_SI_FINAL.pdf

¹⁰⁷ <https://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-home-affairs-subcommittee/inquiries/parliament-2017/brexit-proposed-security-treaty/publications/>

¹⁰⁸ <https://ec.europa.eu/info/sites/info/files/communication-preparing-withdrawal-brexit-preparedness.pdf>

regard to alignment of rules and the mechanisms for disputes and enforcement including the role of the Court of Justice of the European Union (CJEU) in the interpretation of Union law”.

21. Whilst there is a recognition that police and judicial co-operation/ security co-operation is critical and the UK government continues to emphasis its experience and resources in this area, the position in relation to future operational mechanisms is far from clear.
22. The Political Declaration¹⁰⁹ accompanying the Withdrawal Agreement gives no clear indication as to the legal basis for the “future relationship” that is set out. Instead the chapter on “Security Partnership” is a number of statements and, arguably, vague commitments to satisfy political imperatives under the term “future relationship”. A relationship that will provide for *“comprehensive, close, balanced and reciprocal law enforcement and judicial cooperation in criminal matters, with the view to delivering strong operational capabilities for the purposes of the prevention, investigation, detection and prosecution of criminal offences, taking into account the geographic proximity, shared and evolving threats the Parties face, the mutual benefits to the safety and security of their citizens, and the fact that the United Kingdom will be a non-Schengen third country that does not provide for the free movement of persons.”*
23. As to how far such co-operation might go and what it might entail all we have learnt is that the *“scale and scope of future arrangements should achieve an appropriate balance between rights and obligations – the closer and deeper the partnership the stronger the accompanying obligations.”*
24. **As to law enforcement cooperation, Europol and Eurojust are seen by Member States as valuable vehicles for facilitating operational co-operation. Indeed the UK has held leadership positions in both organisations and a key proponent of each institution. However all the Political Declaration states is that the EU and UK will “work together to identify the terms for the United Kingdom’s cooperation via Europol and Eurojust”. It is worth noting that no third country has ever had access to these bodies on the same footing as a Member States and certainly no access to the operational files.**
25. **Further arrangements are to be “considered”. These should be “appropriate” to the UK’s “future status” for practical co-operation between law enforcement and judicial authorities. Such operation co-operation should as “far as is technically and legally possible.... approximate those enabled by relevant Union mechanisms. “ Where these are considered necessary and in both Parties’ interests.**

¹⁰⁹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759021/25_November_Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_European_Union_and_the_United_Kingdom_.pdf

26. **The only specific reference we have to replacing any specific instrument is for “streamlined procedures and time limits enabling the United Kingdom and Member States to surrender suspected and convicted persons efficiently and expeditiously”. So a replacement for the European Arrest Warrant. This section goes on to confirm that this could include “the possibilities to waive the requirement of double criminality, and to determine the applicability of these arrangements to own nationals and for political offences.” This seeks to move further than the Withdrawal Agreement.**

27. It appears the main impact on the investigation and prosecution of bribery cases if the European Arrest Warrant, European Investigation Order and other EU law ceased to apply in the UK would be in relation to speed of co-operation and access to operational mechanisms. As to how to mitigate this impact of losing these instruments, data sharing between authorities could perhaps be the key here.

Louise Hodges, Partner, Kingsley Napley LLP

13 November 2018

Professor Dan Hough – Written evidence (BRI0021)

1. Is the Bribery Act 2010 deterring bribery in the UK and abroad?

Whilst there is no academic work that can (yet) definitively answer this question, there is work that shows that the OECD's push to encourage countries to embrace UK Bribery Act-like laws is having mixed effects. This is important as the UK Bribery Act grew out of an international commitment that the UK government made as part of the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

On the one hand, Transparency International (TI) argues that the OECD's anti-bribery treaty is only very patchily enforced. In 2016, for example, TI noted that only four countries could be described as actively enforcing the treaty. The UK was one of them, the other three were Germany, Switzerland and the USA. Six states (Austria, Australia, Canada, Finland, Italy and Norway) were "moderately" enforcing the treaty. In just under half of the signatory states (20), there was very little or no enforcement taking place at all. This group included Denmark, the state that came first in the 2016 Corruption Perceptions Index (CPI).¹¹⁰

If, however, one looks at the behaviour of firms in specific countries then the picture looks a little different. If one takes Vietnam as a case study, for example, there is evidence that the OECD's decision to bring in a peer review phase made a clear difference to the bribery behaviour of signatory countries' firms that were active there. Jensen & Maleskey (2016) put this down to OECD signatory governments threatening to police the behaviour of "their" firms abroad.¹¹¹ That is clearly a positive development.

However, there may well be a cloud to accompany this particular silver lining. There is also evidence of a series of "unanticipated effects" on the behaviour of firms from states that do not participate in the convention. These firms, according to research by Terrence Chapman and his colleagues, are more likely to bribe than they were before the OECD brought in its system of peer review. Furthermore, firms from non-signatory states "will tend to increase their bribery effort", as less competition from firms across the 41 signatories "translates into a higher probability of accessing rents". To compound that even further, they add that this increased rate of bribery "is exacerbated as the quality of monitoring and the severity of enforcement under the convention increases". In other words, the more the OECD polices its own convention, the more bribery we see from the 150 plus non-signatory states.¹¹²

If the aim of the OECD's convention is to reduce overall levels of bribery, then this is a worrying finding, and it poses plenty of awkward questions. Further research is needed before those findings can be generalised more broadly.

¹¹⁰ Transparency International (2015), "Exporting corruption". Available at www.transparency.org/exporting_corruption/

¹¹¹ N. Jensen & E. Malesky (2016), "Does the OECD Convention affect bribery? Investment liberalization and corruption in Vietnam". Available at http://www.natemjensen.com/wp-content/uploads/2014/09/20141205_OECD_Working-Paper_ejm.pdf

¹¹² T. Chapman et al. (2016), "International bribery laws and firm strategic behavior: did the OECD anti-bribery convention increase bribery?" IPES Working Paper, Princeton University. Available at <http://bit.ly/2IHT2Ds>

Vietnam is, after all, just one country. One way forward will certainly be to sign up more countries to the treaty's aims. If those signatories are states with significant export sectors, then there is good reason to believe that the OECD's treaty can make a real impact on international bribery transactions. If that proves elusive, then the treaty's advocates may have a real problem. If nothing else, this is a perfect example of how the road to successfully fighting corruption is nothing if not winding.¹¹³

9. What impact has the Bribery Act 2010 had on UK businesses and individuals operating abroad?

Assessing the direct impact of any single piece of legislation is very difficult. One thing we do know is that the culture within which a firm or an individual operates at the domestic level can and will travel with them as they do business abroad. Given that, a strong piece of legislation such as the UK Bribery Act can condition UK firms and individuals in to behaving in ways that are not viewed as corrupt. The 'tone at home' makes a difference and it is for that reason alone that it's important that the UK sets high-anti-corruption standards.

One neat example of how this dynamic plays out comes from an altogether different context. A decade or so ago Raymond Fisman and Edward Miguel looked in quite some detail at the behaviour of UN diplomats based in New York. Fisman and Miguel devised a clever natural experiment looking at how cultures of corruption do (or do not) travel. Over a period of five years, they analysed which diplomats were given parking tickets across New York City. Given that the roughly 1,700 consular personnel in NYC enjoyed diplomatic immunity, they could, until 2002 at least, park where they liked and not have to fear the consequences. That led to a lot of bad parking: between 1997 and 2002, 150,000 of the parking tickets issued to diplomats (a cumulative total of US\$18 million to be paid in fines) were left unpaid. Nearly half (43 per cent) of those were for parking in "no-standing zones", 7 per cent were for parking in front of fire hydrants and 6 per cent were for expired meter readings.

Fisman and Miguel analysed whether there were any particular patterns in this bad-parking epidemic. They found strong evidence indicating that there were. Furthermore, these patterns held even when national GDP, employee salary levels and a range of other potential explanatory variables were held constant. Fisman and Miguel unearthed a direct correlation between the number of people who parked particularly badly and the level of corruption (as defined by TI's CPI) in their home countries. The five worst offenders were Kuwait (246 violations per diplomat), Egypt (139 violations), Chad (124 violations), Sudan (119 violations) and Bulgaria (117 violations). Just 22 countries saw their diplomats register no parking violations at all. Fisman and Miguel subsequently concluded that "even when stationed thousands of miles away, diplomats behave in a manner highly reminiscent of officials in the home country". This remained the case even when it would have been perfectly possible to break the rules and get away with it. The culture of their home country appears to have been imported to New York, and they acted accordingly.¹¹⁴

¹¹³ For more on this see Dan Hough (2017), *Analysing Corruption* (Newcastle upon Tyne: Agenda).

¹¹⁴ R. Fisman & E. Miguel (2006), "Cultures of corruption: evidence from diplomatic parking tickets", Working Paper 12312. Cambridge, MA: NBER. Available at www.nber.org/papers/w12312.

This neat natural experiment illustrates that nurture matters every bit as much as nature. People can and indeed are conditioned in to behaving in particular ways. Whilst we don't have any direct data illustrating that this is indeed the case with the UK Bribery Act, there's certainly an argument to be made that setting high standards is a good way of prompting actors to behave in 'better' ways even when they aren't compelled to do so.

31 July 2018

IBLF Global and GovRisk – Written evidence (BRI0023)

Introduction

This is a submission in response to the Call for Evidence issued by the House of Lords Select Committee on the Bribery Act 2010 on 20th June 2018. It is being submitted by IBLF Global, a not-for-profit NGO, and GovRisk, a consultancy. Both organisations work in the area of anti-corruption in the public and private sectors, mostly in high-risk markets. Countries and regions where we have delivered projects include China, Vietnam, Myanmar, Russia, Central Asia, Central and Eastern Europe, Latin America and others.

About IBLF Global and GovRisk

IBLF Global was established in 2013 as a spin-off from the International Business Leaders Forum from which it gets its name. IBLF Global promotes responsible business practices in emerging and developing markets. Its primary focus is anti-corruption, and it works closely with companies investing in these markets to create platforms for business, government and civil society to work together to reduce corruption.

GovRisk was established in 2010 and has since conducted over 70 projects across over 40 different countries, either directly with government agencies or through donor funding. GovRisk specialises in projects relating to Anti-Corruption, Procurement, Governance, Asset Recovery, Justice Reform, Financial and Cyber Crimes.

About the evidence we are submitting to the Select Committee

In providing evidence to the Committee, we are confining ourselves to the issues where we have direct experience: the impact of the law on companies. We are providing evidence on Deterrence, Guidance, Challenges, International Aspects, with a strong focus on guidance for SMEs and challenges faced by SMEs.

Our work brings us into contact with many companies operating in high-risk markets. Recently we acted as consultants on a new DFID/DIT/FCO Business Integrity Initiative to help UK businesses do business responsibly in overseas markets by having access to better analysis/guidance on anti-corruption and human rights.

In the project, our task was to provide anti-corruption and human rights guidance to companies on the DIT website www.great.gov.uk. We were given the opportunity to interview about 20 users of the site. This was preceded by consultation workshops which we helped DFID to organise. Eighty companies provided feedback to DFID about what guidance and information they would require from Government to help them conduct business abroad with integrity. We received valuable insights from the companies about the Bribery Act 2010 ("UKBA") and about how Government can support companies in high-risk markets.

Prior to that, in 2015, IBLF Global and GovRisk produced an unpublished paper for DIT about integrity support for British companies. IBLF Global also contributed in writing and orally to an inquiry by the APPG on Anti-Corruption on “Reaching Export 2020 with integrity: How can UK businesses be better supported to manage corruption risks in high-growth markets?”.

Sources of evidence:

The sources we have used to back our evidence include recent surveys of business, and our own work on the DFID/DIT project mentioned above. Not all of these are publicly available since they comprise material obtained during consultations that were held under assurance of confidentiality. The Committee may wish to approach DFID or DIT in respect of the information obtained during these consultations. The list of publicly available sources can be found in the appendix.

Thanks:

We would like to thank the following for looking over and commenting on earlier drafts of this evidence: Dr Jan Dauman, Chairman of IBLF Global; Robert Starr, Counsel to Dentons UK and Trustee of IBLF Global; Patrick Rappo, Partner, Steptoe & Johnson. We would also like to thank the Select Committee members for taking on this very important task and for considering our evidence.

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Evidence presented by IBLF Global and GovRisk

Deterrence

Is the Bribery Act 2010 deterring bribery in the UK and abroad?

According to one of the surveys, the number of organisations experiencing bribery and corruption in the past two years has increased from 6% (2016) to 23% (2018)¹¹⁵. Another survey concurs: the percentage of respondents in the UK that stated corrupt practices happen widely increased from 18% to 34% from 2014 to 2017¹¹⁶. Despite stronger enforcement by the British authorities and others, it would appear that the UKBA and other similar anti-bribery legislation have not succeeded in deterring bribery.

Respondents of the ACCA survey felt that high-profile prosecutions were one of the most effective ways to deter bribery¹¹⁷. The first prosecutions under the UKBA did not occur until 2016 and there was significant enforcement activity only from 2017. The headlines in the media have focused mainly on investigations and enforcement against large companies, rather than SMEs.

The larger companies we spoke to during our work for DFID seemed to be very aware of the dangers of exposure to corruption. They clearly understood the risks for their assets and human resources on the ground. They also understood the legal, financial and reputational risks associated with non-compliance with the UKBA. Accordingly, many larger companies have instituted new policies and compliance systems since the introduction of the UKBA in 2011. They also felt that UKBA and its enforcement provides a clear basis to refuse bribe solicitation (see section on Challenges below).

The opinion of British SMEs that we have spoken with concurs with the BIS/MoJ report¹¹⁸. Not all companies were aware of the UKBA. Furthermore, a majority believed that it had had no impact at all on their ability or plans to export. While several of the companies we interviewed were aware of the UKBA, they were not aware of its provisions. Many thought that it was intended for large companies. They were not aware of its extraterritorial reach, or the failure to prevent bribery clause.

The combination of the above factors would suggest that the UKBA may be having an impact on larger organisations, but information about the precise scope of the UKBA seems not to be reaching SMEs consistently. Thus, the UKBA may be deterring the larger companies from engaging in bribery overseas, but it is unlikely to be having a similar impact on SMEs.

Guidance

¹¹⁵ PwC (2018) p.14

¹¹⁶ EY (2018) p.13

¹¹⁷ ACCA (2013) p.12

¹¹⁸ BIS & MoJ (2015)

Is the statutory guidance on the Bribery Act 2010 sufficient, clear and well-understood by the companies and individuals who have to deal with it?

According to the BIS and MoJ survey of SMEs, 74% of SMEs that were aware of the UKBA were not aware of the MoJ guidance. Of the 26% of SMEs that were aware of the MoJ guidance, three quarters (75%) had read the guidance and the majority of these (89%) reported that they found the guidance to be useful¹¹⁹.

One-third of SMEs aware of the UKBA had used a form of guidance other than the MoJ guidance. Additionally, 24% of these SMEs had sought professional advice on the UKBA, nearly all of whom (96%) regarded the advice as useful¹²⁰.

Evidence received by the APPG Inquiry suggests that some of the guidance “lacks sufficient detail or tailoring specific to exporters’ concerns. Further, as a whole, the body of anti-corruption support could be improved by strategic coordination or a single global rationale among the sources and a “consistent methodology” to identify UK exporters’ needs”¹²¹.

During the Business Integrity Initiative consultations, companies asked for more practical advice from Government on managing corruption risk when bidding in public tenders and investing abroad, and on due diligence. They suggested more visible support from the Government to help them troubleshoot specific issues in the field, and to share practical intelligence and learning. In the next section we provide some specific examples.

Should alternative approaches be considered?

Our conclusion from the above is that alternative approaches to informing companies about the UKBA and their liabilities under it would be highly desirable.

The Government has begun to address the issue of guidance, on a non-statutory basis. The roundtables conducted by DFID at the end of 2017 which led to the creation of the Business Integrity Initiative made a number of recommendations:

- Tailor some of the existing guidance provided by HMG to better match exporters’ needs
- Signpost resources more clearly to business
- Improve, standardise and tailor the Country Reports and Overseas Business Risk reports
- Provide differentiated support to SMEs and multinationals. SMEs need special support. Multinationals asked for Government support in levelling the playing field internationally so that all companies can compete freely and fairly in overseas markets; the SMEs asked for corporate governance support due to lack of knowledge and resource.
- Incorporate anti-corruption coaching into the wider service offer provided by DIT
- Improve in-country support provided to business through UK missions

¹¹⁹ BIS & MoJ (2015) pp.18-19

¹²⁰ BIS & MoJ (2015) pp.20-22

¹²¹ APPG (2017)

- Support collective action between businesses, NGOs and governments in export markets to create networks of expertise, influence and information-sharing

Our own proposals, which correspond to the points above, were submitted to DFID at the end of our Business Integrity Initiative project:

- Support for UK Government officials:
 - Training for UK Government Officials. We do not believe that the UK Embassies, DIT representatives or British Chambers of Commerce are currently equipped to provide a service advising on corruption risk. If training was provided to these officials, they would be able to give much more meaningful advice to UK exporters and investors looking to work in high risk environments. The FCO committed to this in the UK Anti-Corruption Strategy 2017¹²² but we do not have information about how this is being implemented. It would be important to ensure that this is aligned with the Business Integrity Initiative (i.e. includes modules for HMG staffs on how to provide business integrity support).
 - An internal platform of extensive and organised integrity information for UK Government staff. The FCO, with the help of IBLF Global, created an online toolkit for British officials posted abroad in 2015. This toolkit is on the FCO's intranet site and is currently being updated by FCO staff. It is currently only available to people with access to this site. This could potentially become a platform to inform UK Government staff in all departments, both in Whitehall and abroad.
 - A network of anti-corruption specialists. A network of FCO officials and UK trade-support/promotion in the missions, trained in anti-corruption, was established by the FCO in 2015, but we have no information about how it has developed since. Trained specialists could become "ACEs" (Anti-Corruption Experts) with in-depth knowledge to advise UK organisations about Integrity issues. This could go beyond officials in the missions, to include staff of local British Chambers of Commerce representatives and even local NGOs specialised on anti-corruption support for business.
- Direct support for exporters in the UK:
 - Signposting and messaging

The Business Integrity Initiative, with help from IBLF Global and GovRisk, has already started to address how anti-corruption is signposted on Government websites. DFID and Business Fights Poverty have recently issued a Challenge aiming to identify the best

¹²² HMG (2017) p56

way to articulate and communicate the benefits of doing business with integrity to SMEs exporting to frontier markets, with a focus on eradicating bribery and corruption¹²³.

Some of the areas for improvement which we have already identified include:

- www.gov.uk: There is an [anti-corruption policy section](#) on gov.uk. It is “owned” by 4 departments - FCO, DFID, HM Treasury and Cabinet Office. This acts as a simple search engine. There is no sense of a clear unified policy on search results. Nor is there clear signposting to other resources. <https://www.gov.uk/government/publications> is a “library” of Government anti-corruption materials. There are similar challenges with Search Engine Optimisation.
- Government departments: Currently, the anti-corruption messages on different departments’ website vary considerably. There is currently no single cross-government message, or cross-referencing between department websites, and between www.gov.uk and the different departments. Generally, the messages are focused on risk mitigation rather than commercial benefits. Following our proposals, new wording has recently appeared on the [DFID website, and other government departments](#) (DIT, SFO and UK Export Finance) have all updated their wording on business integrity on their websites to make it more consistent and positive and have linked this to www.great.gov.uk.
- Training
 - A “curriculum” of training in the UK could be organised by DIT in the context of the “Export is Great” trade promotion. This could be organised centrally in London, in the DIT outposts around the UK and in export markets. There could be a selection of modules explaining the UKBA and specifically targeting SMEs.
- Advice
 - Telephone help desk: One way to provide this - at least until the network of ACEs is established - is to set up a UK-based telephone help desk, where companies can call for more information. It could be run under the new Business Integrity Initiative “hub” which DFID is working on.
 - A tailored guide to risk assessment and risk mitigation: This would include an assessment of participating companies’ current anti-bribery measures and guidance on how to identify potential corruption weaknesses and vulnerabilities.

¹²³ Business Fights Poverty (2018)

- Peer support: Peer-to-peer support or mentoring by experienced companies for less experienced exporters would be useful. For this to be effective, some kind of “exchange” of willing participants would need to be set up both in the UK and in key markets. The ACE in each country would be in a good position to create a database of willing participants and to facilitate such exchanges.
 - Integrity Risk Reports: These could be published on Government sites both by country and by industry. This could be part of a broader approach to provide basic due diligence and risk assessment support.
 - Anti-corruption resources: An online platform could be created to help organisations gain easier access to open-source anti-corruption resources.
- Improve the Business Environment globally
 - Incentives: Most of the emphasis of the UKBA’s impact has been on enforcement and the threat of prosecution. However, one suggestion was to recognise companies that are good examples of doing business with integrity, Why not have an award category for "Business Integrity" or "Responsible Business" under the Queen's Awards for Enterprise?
 - Level playing field in markets abroad: The idea of creating a level playing field for British business in emerging, frontier and developing markets came up repeatedly in our discussions with companies. In the UK Anti-Corruption Strategy 2017¹²⁴, there was a commitment to invest, through the UK Prosperity Fund, in “capacity building and technical assistance aimed at developing robust legislation and transparency standards, promotion of e-procurement platforms, reducing corruption at ports and border points.” It would be helpful to see how this investment is being made in practice with regard to anti-corruption and anti-bribery, both in terms of funding commitments and impact on the ground.

Challenges

What challenges have businesses faced in seeking to implement their compliance programmes? Are there any areas which have been particularly difficult to address? What impact has the Bribery Act 2010 had on SMEs in particular?

All the surveys that we have read suggest that SMEs’ awareness of UKBA is low. A BIS report in 2015 highlighted a considerable lack of awareness of the Act

¹²⁴ HMG (2017) p. 54

among SMEs. Only 56% of SMEs had heard of the UKBA¹²⁵. This concurs with our own user interviews during our recent project for DFID. Most of the companies we interviewed were aware of the UKBA, but had very little understanding of what it contained, such as extraterritoriality and adequate procedures. In short, the SMEs “don’t know what they don’t know”.

One possible explanation for this lack of interest is that the SMEs have very rarely experienced outright bribery. This was the evidence from the SMEs we interviewed. This is backed up by one of the surveys: only 10% of respondents think that bribery and corruption will be the most disruptive economic crime that they experience¹²⁶. Bribery and associated crimes are not seen as being particularly high risk.

Most of the SMEs we interviewed during the www.great.gov.uk user interviews said that whatever the provisions of the law, they would in any case not pay bribes – it was ethically wrong and made no commercial sense. They simply did not want to do business that way. Respondents to one of the surveys highlighted the benefits for those SMEs that establish strong anti-bribery credentials: it protects the business’s reputation, reduces risk of prosecution and enhances staff morale and consumer confidence¹²⁷. For SMEs, it can enhance their chances of working with the larger companies.

Companies recognised that the UK’s reputation as a country with a strong approach to bribery and corruption provided reputational benefits at company-level. The UKBA and its enforcement provides a clear basis to refuse bribe solicitation. For example, to help companies avoid bribery during commercial negotiations, the NCA has produced plastic cards that exporters can use to explain the scope and reach of the UKBA.

Some of the challenges that businesses have faced are as follows:

- Risk assessment: Around 60% of respondents to a survey declared that they had not assessed the risk of being asked for bribes or taken bribery prevention procedures¹²⁸. From our DFID/DIT interviews, companies seemed inadequately prepared to implement corruption mitigation procedures at the planning stages, to ensure compliance with the UKBA.
- Due diligence: One survey found that 58% of respondents have issues after completion of due diligence because of inadequate scoping and monitoring¹²⁹. The challenge is particularly acute for SMEs, because they simply do not have the resources for proper and often complex due diligence. Research commissioned by DFID suggests that companies in other developed countries may receive more Governmental support in this area than British SMEs¹³⁰.

¹²⁵ BIS & MoJ (2015) p.14

¹²⁶ PwC (2018) p.16

¹²⁷ ACCA (2013) p.11

¹²⁸ BIS & MoJ (2015) pp.24-25

¹²⁹ Kroll (2018) p.5

¹³⁰ K4D (2018)

- Facilitation payments: One area that poses some challenges for SMEs is facilitation payments. Facilitation payments are commonly solicited in many markets. In the UK, under the UKBA, they are illegal. Preventing facilitation payments is considered an essential part of reducing the acceptability of demanding informal payments for performing due functions. This position is supported by the OECD Anti-Bribery Convention which says facilitation payments are “generally illegal in the foreign country concerned”¹³¹. However, in some legislatures, they are legal such as the United States’ Foreign Corrupt Practices Act (FCPA). This has led to suggestions that the ban on facilitation payments puts British companies at a competitive disadvantage.

Some of the SMEs we talked to were not aware of the UKBA provisions making such payments illegal. Nor were they aware that their distributors and agents should not be making such payments on their behalf. While there was a sense of appreciation that the UK was upholding the highest possible standards of business integrity, there was also disbelief that anyone working in a high-risk environment could abide strictly by these rules in practice. The fact that there have not been any prosecutions of companies for illegal facilitation payments supports their indifference about this provision of the UKBA.

The ban on facilitation payments probably has not negatively impacted British exports, because directly or indirectly, such payments are still continuing undetected.

This is a difficult legal and practical issue. On balance, we support the stricter provisions of the UKBA as they stand but feel that more training and education of SMEs about how to avoid making facilitation payments would be desirable. More visible reporting and a more active role of the FCO in bringing bribery solicitation by public officials to the attention of the relevant country’s authorities.

- Lost business: Some companies felt that business was lost as a result of the UKBA’s strict provisions against bribery: over 20% of respondents of one of the surveys in 2018 felt that they had lost an opportunity to a competitor abroad who they believed had paid a bribe, up from 7% in 2016¹³². In fact, there are many reasons why British companies may lose business, the uncompetitive behaviour of companies not liable under the UKBA being just one of them¹³³. It should be pointed that British companies with a competitive advantage (such as technology-intensive products and services) would be unlikely to have to resort to bribery in order to win a contract.

In summary, according to the surveys, most SMEs felt that the UKBA had had little or no negative impact on their exporting ability or plans. Generally, they

¹³¹ [OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions](#), (1997) p.15

¹³² PwC (2018) p.16

¹³³ FCO (2017)

felt that it was a positive and necessary piece of legislation. Some support and further guidance from the Government in how to comply with it and deal with corruption challenges abroad would be welcome.

International Aspects

How does the Bribery Act 2010 compare with anti corruption legislation in other countries? Are there lessons which could be learned from other countries?

Most of the literature focuses on a comparison of the UKBA and the United States' Foreign Corrupt Practices Act (FCPA). We have not done a thorough investigation of this point, but we have been told that other jurisdictions such as the US dedicate much more resource to anti-corruption enforcement. The US allocates a large amount of funds to paying whistle-blowers to come forward. The US Department of Commerce in US missions abroad provides a lot of anti-corruption advice to US exporters and investors.

We are not aware of a comprehensive review of other countries' anti-corruption guidance and enforcement regimes, other than a soon to be published paper commissioned by DFID on "Due Diligence Services provided by Selected Governments"¹³⁴ which compares the due diligence services provided by the United States, Netherlands, Switzerland and Germany.

We think that a more comprehensive comparative study would be an opportunity to provide relevant services to UK companies. A report on other countries' government guidance and policies on combating corruption as they affect business would provide useful data on what to expect when doing business with companies in other markets. It would also feed into the UK's contribution to the international anti-corruption agenda.

One final point on international aspects. We are told by our partners abroad that the UKBA is perceived in the anti-corruption community in several countries as the gold standard for anti-bribery legislation and enforcement. The public authorities in several countries (for example Brazil, Columbia, Indonesia) are using the UKBA as a model for policies such as corporate criminal liability. It is not just a question of the UK learning from other countries: the UKBA is providing valuable lessons to other countries.

Appendix - Bibliography

Publication	Date	Published by
Global Economic Crime Survey	2018	<u>PwC</u>
Anti-Bribery and Corruption: Rising to the challenge in the age of globalization	2015	<u>KPMG</u>
Integrity in the Spotlight – 15 th Fraud Survey	2018	<u>EY</u>
Combating bribery in the SME sector: the UK findings	2013	<u>ACCA</u>

¹³⁴ K4D (2018)

Insight into awareness and impact of the Bribery Act 2010 among SMEs	2015	<u>BIS and MOJ</u>
Inquiry: Reaching Export 2020 with integrity	2017	<u>APPG on Anti-Corruption</u>
Removing Barriers to Trade (unpublished paper)	2017	IBLF Global and GovRisk
Business Integrity Initiative Newsletter (monthly email circulated by DFID)	2018	DFID
Doing Business with Integrity on www.great.gov.uk	2018	<u>DIT</u>
FCO intranet website for UK public officials posted abroad	2015	FCO
Corruption Enforcement Tracker	2018	<u>Simmons & Simmons</u>
Anti-Bribery & Corruption Benchmarking Report	2018	<u>Kroll/Ethisphere</u>
Open Contracting in West Africa	2017	<u>FCO</u>
United Kingdom Anti-Corruption Strategy 2017-2022	2017	<u>HMG</u>
Due Diligence Services provided by Selected Governments (unpublished paper)	2018	<u>K4D</u>
How can we engage SMEs exporting to frontier markets with the case for doing business with integrity?	2018	<u>Business Fights Poverty</u>

31 July 2018

Interchange Solutions Ltd – Written evidence (BRI0007)

Interchange Solutions (www.interchange-solutions.co.uk) has been a specialist provider of risk management services since 2006. We gave evidence to the Joint Parliamentary Committee on the Bribery Bill and are a UK member of the international development committee for the ISO 37001:2016 anti-bribery management system. We are members of the ADS Business Ethics Network committee and of the British Exporters Association. In addition to supporting companies of all sizes and industry sectors, both in the UK and overseas, in the mitigation of bribery and corruption risk, we also support companies in dealing with modern slavery and human trafficking issues.

Deterrence

1. Is the Bribery Act 2010 deterring bribery in the UK and abroad?

1.1 Due to the low number of prosecutions in the UK, and lack of media attention when a little-known company is involved, it is difficult to determine the effect the Bribery Act has had on smaller companies.

1.2 The Bribery Act has clearly been a deterrent for most of the larger UK organisations.

Enforcement

2. Is the Bribery Act 2010 being adequately enforced? If not, how could enforcement be improved? Do the Serious Fraud Office and the Crown Prosecution Service have the right approach and the resources they need to investigate and prosecute bribery offences effectively?

2.1 No comment on this question.

Guidance

3. Is the statutory guidance on the Bribery Act 2010 sufficient, clear and well-understood by the companies and individuals who have to deal with it? Should alternative approaches be considered?

3.1 The Guidance advising companies on the steps they might take to mitigate bribery risk and to implement a body of “adequate procedures to prevent bribery” is generally well written in its principles-based format. But it is “guidance” and not “prescriptive”. Larger organisations have the resources and experience to interpret, extract and apply the Guidance in the context of their business model, their strategy and markets. In contrast, most SMEs have a very light management structure particularly focused on their business and keeping it afloat. Major distractions such as new regulations, GDPR etc. are of a much higher priority in terms of business compliance than anti-bribery – that is until they are party to a bribery allegation. As a consequence, SMEs would benefit from enhanced “guidance” better signposting the

essentials of “adequate procedures”.

Since the MoJ Guidance primarily focuses on “adequate procedures to prevent” and the implications of Section 6 “bribing a foreign public official” are less well covered and understood and would benefit from better explanation for SMEs.

3.2 When the Bribery Act came into force, at the request of commercial organisations, a recognised management standard BS 10500:2011 anti-bribery management system was developed and introduced. It reflected the MoJ principles-based guidance but was better understood than the Guidance as it sat alongside other quality management systems with which companies are familiar; although the uptake for certification was small.

3.3 The benefits of BS10500 were recognised worldwide as a good practice benchmark and therefore a more detailed international standard, ISO 37001:2016 was developed and launched in 2016. This standard is recognised worldwide and can be certified by any accredited certification body. From public sources, 66 international companies worldwide have been certified to date. The majority are in the Far East with at least three in the UK but more in the pipeline. It is likely that those which have certified will propagate the standard throughout their supply chains, as they currently do with other standards. It will set the bar for tender pre-qualification as is already happening with the increasing demand of all companies for evidence of their anti-bribery policies.

3.4 The MoJ Guidance was and remains a one-time principles-based document with no mechanism nor stated intention of ensuring that companies implement the advice. However, implementation of “adequate procedures to prevent bribery” or similar is required for companies regulated by the UK Financial Conduct Authority as are those companies subject to French and Italian laws.

3.5 To be certified and to maintain certification for all ISO standards, be it quality, cyber or anti-bribery etc. the standard has to be embedded and evidenced in an organisation from board to employees; in the business processes, by business associates (such as agents, intermediaries, supply chain) and wherever that organisation operates in the world. To maintain its certification a company has to monitor and improve its performance year on year, measured by key performance indicators through regular surveillance audits by the independent certification body¹³⁵.

Challenges

4. *How have businesses sought to implement compliance programmes which address the six principles set out in the Ministry of Justice’s guidance on the Bribery Act 2010? What challenges have businesses*

¹³⁵ For example, BSI, LRQA and others.

faced in seeking to implement their compliance programmes? Are there any areas which have been particularly difficult to address?

4.1 In our experience, many UK companies are aware of the Act and its implications, but few really understand its business implications and how to extract the relevant areas of the Ministry of Justice Guidance in relation to “adequate procedures to prevent”. Their challenge is often to identify the existence of the Guidance and understand its purpose. SMEs then need to interpret and implement those principles relevant to their company, according to their business needs and risk assessment.

4.2 Given a SME paucity of experience/resource in anti-bribery compliance, or where directors are minded, implementing by word and not deed, they are in danger of creating an imbalanced approach to mitigating bribery risk. This may put their organisation and its employees at risk. It should be noted that involvement in bribery may also lead to dire consequences, including being subjected to associated crimes such as extortion and worse.

4.3 Mitigating bribery is a business issue and should be a part of not apart from the business processes. Many companies minded to implement a bribery compliance programme are likely to seek guidance from a professional firm. If local to that company they may be inexperienced in how bribery is enacted, especially in other countries or provide their client with legalistic and complex policies which reflect only the law and are difficult for employees to assimilate and implement. This approach is both expensive and often the policies rarely see the light of day and therefore become ineffective in practice.

5. *What impact has the Bribery Act 2010 had on small and medium enterprises (SMEs) in particular?*

5.1 Companies that have a properly embedded anti-bribery compliance programme within the business and its employees, particularly those relating to the appointment and management of overseas business associates (esp. concerning the bribery of foreign public officials), of gifts and hospitality etc. do not in our experience face any negative impacts. In fact, it is the reverse, in that through a robust business risk assessment process, they are better able to identify opportunities, build stronger local partner relationships thereby obtaining competitive advantage, yet knowing how to avoid bribery.

5.2 Those few companies that have implemented ISO37001 have done so to gain competitive advantage in tenders – especially where there is an increasing demand for stronger evidence of anti-bribery compliance such as in SMEs bidding for contracts with larger companies or for export reinsurance (e.g. UK Export Finance)

5.3 There is no doubt that some smaller companies may use the Bribery Act as a reason to constrain their exporting activities by not venturing beyond the EU and North America. However, that may change post BREXIT, where they may be forced to export to higher risk of corruption

countries. The updated Exporting is Great¹³⁶ website has some guidance on anti-bribery which is not easy to find and fails to mention the MoJ Guidance to the Bribery Act.

6. *Is the Act having unintended consequences?*

6.1 Not that we are aware of. In fact, the opposite - it underpins the drive to strengthen corporate governance, identify and manage risk and obtain competitive advantage through the adoption of good business practices from sales through to procurement.

Deferred Prosecution Agreements

7. *Has the introduction of Deferred Prosecution Agreements (DPAs) been a positive development in relation to offences under the Bribery Act 2010? Have DPAs been used appropriately and consistently? Has their use reduced the likelihood that culpable individuals will be prosecuted for offences under the Act?*

7.1 No comment on this question

International aspects

8. *How does the Bribery Act 2010 compare with anti-corruption legislation in other countries? Are there lessons which could be learned from other countries?*

8.1 Overseas - to an extent. The Bribery Act has certainly influenced other jurisdictions which have incorporated a corporate liability offence such as that set out in Section 7 of the Act. An example is the recent French Sapin II law and amendments to Italian anti-bribery legislation Law 190/2012 which supplements Law 231/2001. There are others too.

8.2 The guidance for Sapin II includes a defined list of 192 questions issued by the AFA (Equivalent to the SFO) which companies have to have answers to, and evidence of, in the event of an enforcement visit. The AFA has the right to visit a company's office and request evidence of the answers to those questions. If they consider the evidence inadequate, the company may be heavily fined. Therefore, if the MoJ Guidance was more directed towards a specific checklist of adequate procedures which can be worked through by a company and receives legislator endorsement (even if for a fee) it would give more certainty to a company.

9. *What impact has the Bribery Act 2010 had on UK businesses and individuals operating abroad?*

9.1 Our experience would indicate none. Unless there is a sudden spike

¹³⁶ https://www.great.gov.uk/operations-and-compliance/anti-bribery-and-corruption-training/?source=operations_and_compliance

in allegations, SMEs tend not to be concerned until they become aware of other SMEs under investigation/convicted and especially the directors/senior managers.

9.2 The larger UK exporters, particularly those which have been investigated, have dramatically reduced the number of overseas agents and have withdrawn from some high-risk markets.

John Burbidge-King
CEO

28 July 2018

International Chamber of Commerce UK – Written evidence (BRI0027)

About the International Chamber of Commerce (ICC)

ICC is the world's largest business organisation, representing 6.5 million companies in 134 countries. ICC is the only business organisation with UN observer status. ICC has three central functions: to promote free trade and investment, provide the rules and standards that govern international business and help companies and states settle international disputes. ICC United Kingdom is the representative office of the ICC in the UK.

Following consultations with our members, we would like to highlight the following:

- 1.1 We recognize the importance of legislation in deterring corruption and commend the role of the Bribery Act in driving higher compliance standards across businesses, as well as prompting a wider discussion around due diligence and corporate governance within companies.
- 1.2 We recommend increased efforts towards timely enforcement of the Bribery Act, as a means of enhancing the effectiveness of the legislation. Delays in processing cases may discourage companies from self-reporting due to a lack of certainty and clarity around the benefits of doing so.
- 1.3 Where multiple enforcement actions are concerned it is important to agree on a primary jurisdiction and strive for greater cooperation between law enforcement agencies, in order to provide greater certainty for business.
- 1.4 With regards to compliance and deterring corruption, it is vital that businesses have strong and clear guidance. Small and medium sized enterprises (SMEs) in particular are mostly unaware of the Bribery Act and how to comply. SMEs often lack the resources to implement in depth compliance programmes found in larger companies. Given the relevance of exports to the UK economy, it is crucial that companies have clarity on the standards they need to achieve in order to be compliant with the Act.
- 1.5 Best practice guidance is of particular importance to SMEs when navigating corruption risks in overseas markets.
- 1.6 We also suggest clarification on how companies can fulfil their obligations in relation to 'adequate procedures' under Section 7 of the Act, as the current wording is ambiguous.
- 1.7 We recognize that the Act has been instrumental in strengthening the UK's position as a safe place to do business, but we note it has created the

unintended consequence of adding significant complexity and cost in managing supply chains and sub-contractors.

- 1.8 For multinational corporations and larger institutions, the Act is increasing the compliance cost of doing business with SMEs and mid-caps, as the latter can't always meet the due diligence standards that MNCs have in place.
- 1.9 The Act may have also created a situation abroad whereby UK companies are aiming to operate at the highest ethical levels but their competitors are not. We recommend greater inter-governmental cooperation to raise international standards of compliance and level the playing field globally.
- 1.10 Finally, we encourage greater international cooperation towards expediting investigations and judicial processes, in order to provide certainty for companies, individuals and the wider public interest.

31 July 2018

Lord Advocate James Wolffe QC – Supplementary written evidence (BRI0056)

At the close of the oral evidence session, you invited me to consider submitting written evidence on Question 7 – namely, whether England & Wales could learn anything from Scotland. It would not be appropriate for me to comment on the position in England & Wales; and the legal systems and constitutional context are different. I can identify the following as strengths of the Scottish system, without offering any comment as to whether or not they are features from which England & Wales might learn:

- A focus on specialism, and a dedicated, multi-disciplinary team approach to investigations, reflected both within COPFS and in Police Scotland;
- Strong multi-agency working, supported by the constitutional relationship between the Lord Advocate and Police Scotland, and by co-location of prosecutors and law enforcement agencies at the Scottish Crime Campus;
- The opportunity for input to be obtained from Crown Counsel at an early stage in a case, with a view to developing a case strategy and focusing investigations appropriately from the outset;
- A flexible approach: the self-report initiative places the onus on the business to conduct a full investigation. But allows SOCU to retain control of the case and to await the outcome of investigations by the business and by law enforcement before deciding on referral to CRU; equally, after a referral to the CRU, the matter may be referred back to SOCU for consideration of criminal proceedings if it transpires the business has not been fully cooperative;
- Where there is a self-report and civil settlement is reached, corruption is addressed which might otherwise go undetected, lengthy prosecutions are avoided and significant sums, representing profit gained through corruption, are recovered and re-invested into Scottish communities. The fact that, in order to be considered for the self-report initiative, the business is required to put in place measures to ensure there is no recurrence of the unlawful conduct, is an effective means of preventing corruption in the future.

The Committee asked the witness from the Law Society of Scotland some questions about funding and it is appropriate that I comment briefly on that matter. The funding of COPFS is a matter for the Scottish Government and the Scottish Parliament. It is allocated from the Scottish Consolidated Fund in accordance with Budget legislation enacted by the Scottish Parliament. As the Committee noted in that evidence session, the Service was recently allocated additional in-year funding of £3.6 million and it is correct, as the witness from the Law Society of Scotland stated, that the Service intends to apply the additional resource in various areas.

The Service intends to apply part of that resource to the management of complex cases. This is in line with the aims of a protocol for the management of lengthy and complex cases issued earlier this year by the High Court of Justiciary. Some bribery cases may fall within the terms of that protocol; and I attach a copy of the protocol for the Committee's information.

The Committee discussed with me the publicity given to Bribery Act cases. I have asked COPFS officials to create a single page on the Service's website which contains links to relevant information on the Bribery Act, for the benefit of business and of the general public. As the Committee heard, to date five Bribery Act cases which were self-reported to COPFS have resulted in civil settlement with the Civil Recovery Unit.

I attach press releases for four of those cases at Annex A. The businesses involved were:

- Abbot Group Ltd
- Braid Group Ltd
- International Tubular Services Ltd
- Brand Rex Ltd.

Of these companies, three were part of multinational groups. In the fifth case, Thomas Gunn Navigation Systems Ltd, I am advised that publicity was not, in fact, given to the case at the time of the civil settlement because the managing director of the company was still to be prosecuted and during the oral evidence session I stated that in each civil settlement proactive publicity is given to the settlement; I apologise to the Committee for that error. Information on that case will be included on the anticipated new website page; and COPFS Media Relations staff have been briefed on the need to include fuller details in press releases where it is possible to do so.

The Braid Group case was covered by the BBC, Record, Herald, Scotsman, Times, Metro, and Scottish Financial News on 4.4.16, and by the Hindustan Times and Belfast Telegraph on 15.4.16. Some of the articles are attached at Annex A. A Google search reveals that the Abbot Group case was covered by the BBC, Telegraph, Financial Times, Scotsman, and Bloomberg on 23.11.12, and by the Times and the Express on 24.11.12. The International Tubular Services case was carried in the Herald, Press and Journal, and BBC on 17.12.14, by the Express, Scottish Business Insider, Energy Voice on 18.12.14, by Global Investigations Review on 19.12.14, and Global Banking and Finance Review in December 2014. The Brand-Rex case was carried in the Herald, Scottish Legal and Journal Online on 25.9.15, by Compliance Week in October 2015, and the Scotsman on 22.12.15. A Google search of the company names brings up the press coverage of these cases relatively high in the list of search results.

COPFS produces guidance to businesses on the approach to self-reporting of bribery offences. This is attached at Annex B. This is published on the Publications page of the COPFS website and may also be found quite easily on conducting a Google search.

W. JAMES WOLFFE QC

23 November 2018

Nathan Jensen and Edmund Molesky – Written evidence (BRI0004)

Dear Members of the House of Lords Select Committee on the Bribery Act 2010,

We are both tenured professors in the United States, conducting research on the impact of anti-corruption laws on business bribery. Your staff contacted us about our recently published work. We are honored to submit a summary of our study for evaluation of the effectiveness of the 2010 Bribery Act.

Our work, published in a top peer-reviewed journal (*International Organization*) tests how anti-corruption laws affect bribery behavior among foreign firms investing in Vietnam. Vietnam is an important case of both a country with high levels of business bribery and large numbers of foreign investors from states with both strong and weak anti-bribery laws. This variation allows us to compare the impact of strong anti-bribery laws on actual bribery behavior in a developing country with one of the highest rates of foreign direct investment (FDI) in the world.

We specifically examine how the OECD-Anti-Bribery Convention affected business bribery in Vietnam. The OECD-Anti-bribery Convention is an international agreement that now includes 43 signatory countries. Key to this convention is the passing of domestic anti-bribery legislation, along with enhanced monitoring and enforcement of these laws. The 2010 Bribery Act is a prominent example.

We find that this convention, and more importantly the underlying domestic laws such as the 2010 United Kingdom Bribery Act, are very effective in reducing bribery behavior relative to countries that haven't enacted bribery laws. In short, strong domestic laws that criminalize bribery and enforce these laws, reduce bribery.

There are two major caveats however. First, we find increased bribery behavior by countries that didn't join the convention. Second, we observe no change in bribery for countries that enacted bribery laws but did not effectively enforce them. Together, these two caveats imply that firms from countries with weak bribery laws may be increasing their bribery.

In sum, anti-bribery legislation across the world generally has positive effects. Additional countries have continued to join the OECD Anti-Bribery Convention and existing signatories have begun to strengthen their laws. As this convention expands to more countries and early signatories strengthen enforcement, we believe this is an effective step in reducing business bribery. Although central to this effectiveness is to encourage additional countries to enact and enforce anti-bribery laws.

The UK is a leader in this area and the 2010 Bribery Act is in many ways a model piece of legislation. The Convention's working group identified the United Kingdom as one of the top enforcers and noted that the United Kingdom has continued to make strides in improving domestic laws and enforcement. The details and recommendations of the working group are beyond the scope of our

Nathan Jensen and Edmund Molesky – Written evidence (BRI0004)

own research. However, our work strongly suggests that the 2010 Bribery Act is an exemplary version of exactly the type of legislation that is effective in deterring extraterritorial bribery in developing countries.

Nathan Jensen, Professor of Government, University of Texas at Austin, USA
Edmund Malesky, Professor of Political Science, Duke University, USA

“Nonstate Actors and Compliance with International Agreements: An Empirical Analysis of the OECD Anti-Bribery Convention” *International Organization* 72 (Winter) pages 33-69.

20 July 2018

John Penrose MP – Supplementary written evidence (BRI0047)

PRIME MINISTER'S ANTI CORRUPTION CHAMPION

Thank you for inviting me to give evidence about the Bribery Act – I'm looking forward to seeing your final recommendations. During the session I promised some supplementary evidence, which follows.

On the question posed by Lord Hutton of Furness^[1] on the change of business attitudes towards corruption and bribery in the UK, I can confirm that a number of surveys cataloguing the attitudes of small businesses have been undertaken since the inception of the Bribery Act. They found that there was a positive link between robust anti-corruption legislation and business performance. I've enclosed a summary of their findings in **Annex A**.

On the question from Lord Plant of Highfield^[2] about transparency of Deferred Prosecution Agreements, I agreed to check the answer and, after consulting with colleagues in the Serious Fraud Office, I can confirm it was correct: the process is in the public domain. There is more detail in **Annex B** showing conduct is covered in the Deferred Prosecution Agreement Code of Practice ("DPA Code"), issued by the Director of Public Prosecutions and Director of the Serious Fraud Office.

On the points made by Lord Hodgson of Astley Abbotts^[3] about guidance for small and medium-sized enterprises (SMEs), I thought you might also like to consider the Business Integrity Initiative (BII), a new joint DFID/DIT/FCO

^[1] **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*

^[2] **Lord Plant of Highfield:** *Is any of this [DPA] process known to the general public, and if not, why not?*

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.*

^[3] **Lord Hodgson of Astley Abbotts:** *We can all read that: it is very special. 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.*

initiative to help UK businesses do business responsibly in overseas markets by having access to better guidance on anti-corruption and human rights. Specific advice around compliance, prevention and collective action will be available to SMEs from the end of 2018 through the UK-based Business Integrity Hub. I have enclosed more details in **Annex C**. [attached after Annex D]

On Lord Hutton of Furness^[4] question about the relevance of Companies House data to the Bribery Act, I suspect both he and I underplayed its value a little during the session, because shell or front companies can also be used to pay bribes^[5]. **Annex D** contains examples of recent UK bribery cases whereby shell companies were used in the bribery scheme.

Finally, I was very interested in Baroness Primarolo's^[6] point about New Zealand's high ranking in the Transparency International Corruption Perception Index (CPI), even though they take a more relaxed approach to overseas 'facilitation payments' (small bribes) than we do. As a result I asked the team in the Joint Anti-Corruption Unit to take a closer look, and they report that Transparency International scores countries on corruption in their public sectors. So, while New Zealand takes the same absolute approach as the UK in banning domestic facilitation payments, their less-rigorous approach to overseas facilitation payments has little or no weight in determining New Zealand's ranking in the CPI.

^[4] **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?*

^[5] 2014 Transparency International Report 'How to Pay a Bribe'

^[6] **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?*

ANNEX A

Business Surveys

- In July 2013 as part of the Red Tape Challenge, the Ministry of Justice and the Department for Business, Innovation and Skills commissioned a survey¹³⁷ of 500 SMEs who were either exporting goods or were planning to do so. The survey found that for the majority, the Bribery Act had not impacted upon the company's ability or plans to export. The SMEs that felt the Bribery Act has had a positive impact on their company's ability to export believed the positive impacts encompassed: making them more careful and aware of the risks of bribery when engaging in business deals. 90% of SMEs that were aware of the Bribery Act had no specific concerns or problems related to the Act.
- The Control Risks International Business Attitudes to Corruption Survey 2015/2016¹³⁸ found that globally tough extra-territorial, anti-corruption laws are seen to be a force for good. Where once they were held to be an unfair handicap to Western (particularly US) firms, hobbling their ability to compete on the international stage, now they are seen more positively. Most respondents believe such laws improve the business environment (81%), deter corrupt competitors (64%) and make it easier for good companies to operate in high-risk markets (55%). For many international companies, compliance with anti-corruption laws has become a competitive advantage. The Survey consider that companies from the countries with the toughest laws and the highest levels of international enforcement – the US, Germany and the UK – feel emboldened by the robust compliance programmes they have been forced to implement because of tougher laws.
- A further report (U4, 2018)¹³⁹ on the link between business integrity and commercial success found that firms with a propensity to pay bribes not only find themselves spending more time and money dealing with the bureaucracy, but also suffering from the indirect costs such as lower productivity, slower growth, and more expensive access to capital. According to Barlow (2017)¹⁴⁰, business performance is improved in companies with proactive or "heightened" integrity in which staff are competent, act ethically and are held accountable through transparent delegation processes.

¹³⁷https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/440661/insight-into-awareness-and-impact-of-the-bribery-act-2010.pdf

¹³⁸<http://www.profesjon.no/wp-content/uploads/2016/11/15-10-Control-Risks-corruption-survey-2015.pdf>

¹³⁹ <https://www.u4.no/publications/the-relationship-between-business-integrity-and-commercial-success>

¹⁴⁰ Barlow, A. 2017. *Profiting from Integrity: How CEOs Can Deliver Superior Profitability and Be Relevant to Society*.

ANNEX B

Transparency of DPAs

Conduct in respect of Deferred Prosecution Agreements is covered in the Deferred Prosecution Agreement Code of Practice ("DPA Code"), issued by the Director of Public Prosecutions and Director of the Serious Fraud Office pursuant to paragraph 6(1) of Schedule 17 to the Crime and Courts Act 2013 ("the Act").

Negotiating with an organisation in respect of a DPA takes place when a prosecutor is considering prosecuting the organisation for an offence specified in the Act. If the prosecutor decides to offer the organisation the opportunity to enter into DPA negotiations, it will do so by way of a formal letter of invitation outlining the basis on which any negotiations will proceed.

Where the organisation agrees to engage in DPA negotiations, the prosecutor will normally send the organisation a letter setting out the way in which the discussions will be conducted. This letter should make undertakings in respect of:

- the confidentiality of the fact that DPA negotiations are taking place;
- The confidentiality of information provided by the prosecutor and the organisation in the course of the DPA negotiations.

This confidentiality is required to preserve the organisation's right to a fair trial should a DPA not be concluded and the prosecutor chooses to pursue criminal proceedings against the organisation.

If the prosecutor decides to apply to the court to approve a DPA, the prosecutor should contact a court designated to approve DPAs in order to request a listing. The draft proposed application and any supporting documents must be submitted on a confidential basis to the court before the preliminary hearing. The application must explain why the agreement is in the interests of justice and fair, reasonable and proportionate.

The application for approval of the DPA may be in private (and always has been so far). This is almost always necessary as the prosecutor and the organisation will be uncertain as to whether the court will grant a declaration under paragraph 8 (1). For the parties to make an application in open court which was refused might lead to the uncertainties and destabilisation that private preliminary hearings are designed to avoid.

If a DPA is approved, the court must make a declaration to that effect along with reasons **in an open hearing**. Once the declaration has been made in open court the prosecutor will, unless prevented from doing so by an enactment or by an order from the Court, publish on its website:

- the DPA;
- the declaration of the court pursuant to paragraph 8 (1) of Schedule 17 to the Act with the reasons for making such a declaration;
- the declaration of the court pursuant to paragraph 7 (1) of Schedule 17 to the Act with the reasons for making such a declaration; and
- If appropriate, any initial refusal to make such a declaration with reasons for declining.

This occurs unless the court has issued reporting restrictions, which the judge did in the case of XYZ. In that DPA, the names of the company, its parent company, and its legal advisors were redacted due to ongoing legal proceedings. The full documentation (the Deferred Prosecution Agreement, Statement of Facts and full judgment) will be published when these proceedings are concluded.

ANNEX D

Case Examples

Chad Oil

The Serious Fraud Office (SFO) is set to recover millions lost in a corruption case which saw Griffiths Energy bribe Chadian diplomats in the United States and Canada. Securing exclusive contracts with corrupt deals, Griffiths Energy bribed Chadian diplomats with discounted shares deals and 'consultancy fees' **using a front company 'Chad Oil'** – which was set up just five days before agreements were signed. 'Chad Oil' was a vehicle used by senior diplomats at the Chadian Embassy to the United States to facilitate a deal which saw the wife of the former Deputy Chief, Mrs Ikram Saleh purchase 800,000 shares at less than 0.001\$CAD each, later selling them for significant profit.

<https://www.sfo.gov.uk/2018/03/22/sfo-recovers-4-4m-from-corrupt-diplomats-in-chad-oil-share-deal/>

Airbus

Airbus, Europe's largest aerospace multinational, has launched an internal investigation into possible corruption after the Guardian uncovered a series of questionable financial transactions resulting in an unexplained payment. Hundreds of pages of leaked bank records, internal memos and financial statements reveal that two companies secretly controlled by the aviation giant engaged in transactions involving €19m (£16.7m), a large part of which was then **routed to a mysterious company via a tax haven.**

<https://www.theguardian.com/business/2017/sep/18/airbus-launches-internal-corruption-investigation-after-guardian-expose>

Sweett Group

UK-based construction firm Sweett has been fined £2.3 million (\$3.3 million) for bribery in securing a hotel construction contract in the UAE. The London court ruled last Friday that the company had failed to prevent a bribe representing a first major prosecution for the Serious Fraud Office. Section 7 of the Act clearly stipulates that a company has a responsibility to prevent a bribe connected with its business paid anywhere in the world. Issues for the Sweett originated in 2010, where its auditors KPMG flagged 'irregularities' within its payments. **The court heard that its Middle Eastern subsidiary funneled funds to North Property Management, a shell company owned by a member of the board that later awarded the \$63 million consultancy contract to Sweett.** The construction firm's accounts listed the items as "hospitality development services", a vague description which itself can be considered a red flag. The words 'hospitality' and 'development' are often associated with concealed bribes. Conveying these payments through third parties is another identifier of illicit finance.

<https://www.forbes.com/sites/jwebb/2016/02/22/sweett-bribery-fine-sparks-new-era-for-anti-corruption-prosecution/#66fcac1e33a5>

Annex C



Governance, Open Societies and Anti-Corruption Department



Business Integrity Initiative

SUMMARY

The Business Integrity Initiative will help UK businesses integrate analysis and management of integrity issues into their strategies for doing business successfully in frontier markets. Promoting the UK as a trustworthy partner to do business with is an essential part of our 'Global Britain' strategy as we move towards Brexit, and the integrity of companies plays into this. Doing business with integrity means applying ethical principles to business practices, including the prevention of bribery. DFID is working across the UK government, particularly with DIT and FCO, to ensure a joined up approach to business integrity.

Enabling companies to put anti-corruption and human rights front and centre of their strategies is in the interest of developing countries, as this will attract long-term, sustainable investment, and help tackle corruption and human rights abuses. The Initiative is in line with Goals 3 and 4 (Global Business Environment) of the [UK Anti-Corruption Strategy](#) (increased investment by UK companies in challenging overseas markets and strengthened business-led collective action).

THE CHALLENGE

Corruption, bribery and poor human rights standards are major barriers faced by companies seeking new markets. Corruption adds an extra tax on firms and drives incentives for governments to create more regulations. It is also an important determinant of the origin and destination of investment. At the firm level, the costs of bribery outweigh the benefits in the long run.

- 43% of compliance officers of UK firms indicated their companies had decided not to do business in a country due to the perceived risk of corruption (Control Risks, 2015).
- An OECD study (2014: 8) reports that bribes average 10.9% of the value of a given transaction and a staggering 34.5% of profits.

EXPECTED RESULTS

- To attract investment into high-risk markets, where corruption is one of the main barriers to trade and investment;
- To tackle one of the international drivers of corruption in developing countries (i.e. the supply of bribes by UK companies); and
- To use the influence of potential, big investors to bring pressure on host governments to undertake policy reforms.

SERVICE OFFER

The support that will be provided by the Business Integrity Initiative will be based on the requests from over 80 companies consulted in 2017 as part of the Initiative's scoping phase. The aim is to move beyond compliance towards prevention.

- By providing practical information and advice on how to implement integrity responsibilities, we will support companies to protect and strengthen brand reputation, enjoy more sustainable commercial success, and minimise the risk of prosecution.
- By piloting a one-HMG approach to the provision of business integrity support through UK missions in one to two countries, a menu of tested interventions that can be selected to suit particular contexts and resources will be created.
- By using the voices of investors to influence host governments to undertake policy reforms and promoting collective action initiatives with and for the private sector, we will help increase the prospects for all companies to compete freely and fairly in overseas markets.

DELIVERY MECHANISM

The Hub for Business Integrity will coordinate integrity support provided by UK government departments to firms and signpost companies to anti-corruption and human rights support.

06 August 2018

The Law Society of England and Wales, The City of London Law Society and the Fraud Lawyers Association - Written evidence (BRI0025)

INTRODUCTION

This submission is made on behalf of the Law Society of England and Wales, the City of London Law Society and the Fraud Lawyers Association.

The Law Society of England and Wales is the professional body for the solicitors' profession in England and Wales, representing over 170,000 registered legal practitioners. The Society represents the profession to Parliament, Government and regulatory bodies and has a public interest in the reform of the law.

The City of London Law Society represents 17,000 solicitors practising in the City of London which tend to have both a national and international commercial clientele.

The Fraud Lawyers Association ("FLA") was founded in 2012 to educate and train its members in all matters relating to their practice as fraud lawyers. Its membership consists of several hundred solicitors and barristers who practice mainly in the area of criminal and/or civil fraud.

The individuals contributing to this response are listed below. Of course, the views expressed herein may not represent the views of all individual members or firms, several of whom may wish to make their own submissions to the Committee.

DETERRENCE

1. IS THE BRIBERY ACT 2010 DETERRING BRIBERY IN THE UK AND ABROAD?

- 1.1 As far as deterrence in the UK is concerned, the answer, in our opinion, is "yes". Many UK based clients of member-firms are more aware of the serious criminal consequences of bribery, especially overseas bribery, as a result of the Bribery Act.
- 1.2 We would say the same about overseas clients, at least those who consult lawyers in the UK. There is a widespread awareness of the Bribery Act among international businesses in particular. Of course, it is unlikely that UK legislation has had a significant impact on the

international "demand side" of bribery, for example the conduct of any corrupt foreign public officials.

2. IS THE BRIBERY ACT 2010 BEING ADEQUATELY ENFORCED? IF NOT, HOW COULD ENFORCEMENT BE IMPROVED? DO THE SERIOUS FRAUD OFFICE AND THE CROWN PROSECUTION SERVICE HAVE THE RIGHT APPROACH AND THE RESOURCES THEY NEED TO INVESTIGATE AND PROSECUTE BRIBERY OFFENCES EFFECTIVELY?

- 2.1 Successful prosecutions under sections 1, 2 and 7 and the ability to use Deferred Prosecution Agreements (DPAs) are cited by the Ministry of Justice post-legislative scrutiny memorandum in support of its contention that "*the Bribery Act has fulfilled the functions that Parliament intended it to perform in the seven years since it became law*". However, although prosecutions are now more common they are still unusual... There have been no prosecutions under section 6, a total of 16 for sections 1 and 2 and just 2 prosecutions under section 7.
- 2.2 In terms of resource, the changes to the SFO's funding arrangements which were announced in April 2018 are welcome. Better investment in permanent staffing and a reduced reliance on contractors should have a positive impact in relation to the expedited resolution of investigations. It should be noted however that SFO pay and conditions are not only below what the corporate criminal defence sector will offer, but also believed to be below those of the FCA.
- 2.3 The SFO is able to guarantee a high quality of work to its employees (in terms of the most complex investigations). Nevertheless, it appears that a problem in terms of recruitment and retention remains, perhaps because pay and conditions are uncompetitive, and also because of the duration of investigations. It may be unlikely that an employee would see a five-year case through from the start to its conclusion. There is a strong case for better pay for SFO staff in order to attract and retain more high- quality candidates.
- 2.4 Whilst investigations into bribery and corruption will very often be complex, frequently involving overseas jurisdictions, a better-resourced SFO and CPS (both in terms of numbers of people and specialist knowledge) would be able to speed up these investigations, meaning more effective evidence gathering and, for those prosecutions which rely on witness evidence (and therefore a degree of memory), better justice outcomes. Defendants experience

lengthy investigations, with extended periods during which little activity is apparent.

- 2.5 The effectiveness of the SFO's pursuit of overseas corruption is dependent to a large degree on its ability to secure formal and informal international cooperation. The extent to which existing criminal justice cooperation within the EU will be affected by Brexit is still very unclear but will inevitably suffer as cooperation mechanisms continue to evolve among the EU27. The deterrent effect of the Bribery Act outside the UK could suffer if there were any perceived decline in the SFO's ability and willingness to pursue companies and individuals for their conduct overseas.
- 2.6 For example, the European Investigation Order (EIO), introduced in July 2017. The EIO provides prosecutors with a much speedier tool to obtain evidence from overseas. Its effects are yet to be felt from the defence side. This may be because the use of the EIO is yet to be bed in, or it may be because the investigations which have used EIOs are yet to reach court. However, the future of this instrument of mutual recognition in the UK is in doubt because of the unknown consequences of Brexit. If the security arrangement that the UK comes to does not include the retention of the ability to use the EIO, this will amount to a step backwards for law-enforcement generally and the enforcement of bribery and corruption laws in particular. The same can be said for the European Arrest Warrant (EAW) which allows a prosecuting authority to seek the surrender of a wanted person from an EU member state without undergoing lengthy extradition proceedings.
- 2.7 In terms of approach, the practices adopted by the SFO in investigations involving Bribery Act 2010 offences attract many of the same concerns which have arisen in connection with the SFO's investigations more generally. Although these concerns are not particular to the Bribery Act they can be seen to be exacerbated in overseas corruption cases precisely because these tend to be large-scale investigations spanning multiple jurisdictions, multiple suspects and raising complex legal issues.
- 2.8 For example, the introduction of amended guidance for independent legal advisers representing witnesses required to attend interviews under section 2 of the Criminal Justice Act 1987 may well have had an adverse impact on the willingness of witnesses to assist the SFO. Under section 2, witnesses are compelled to answer questions under peril of criminal sanction. The SFO guidance seeks to limit the actions that can be taken by a solicitor when acting for someone under section 2 and suggests a series of undertakings to be given by the lawyer in advance of the interview, sometimes putting them in potential conflict with their professional duties. This approach is

short-sighted. Introducing such an adversarial tone to dealings with witnesses may well deter witnesses from assisting further.

- 2.9 This discussion has focussed on enforcement efforts by the SFO. Of course, there should be consistency of approach between the SFO and those of other agencies with enforcement responsibilities, for example the FCA, CPS and NCA.
- 2.10 The Committee might care to note the paper published by Transparency International in 2015 entitled "Exporting Corruption, Progress Report 2015". This compares enforcement efforts in various jurisdictions and offers the view that the UK is actively enforcing its legislation, alongside Germany, Switzerland and the US.

GUIDANCE

3. IS THE STATUTORY GUIDANCE ON THE BRIBERY ACT 2010 SUFFICIENT, CLEAR AND WELLUNDERSTOOD BY THE COMPANIES AND INDIVIDUALS WHO HAVE TO DEAL WITH IT? SHOULD ALTERNATIVE APPROACHES BE CONSIDERED?

- 3.1 The existence of guidance was initially helpful for businesses during the implementation and early stages of the Act. However, the present guidance requires review and regular updating, in the same way as the Joint Money Laundering Steering Group Guidance. A version of the Quick Start Guide should be retained.
- 3.2 Businesses in the UK and overseas find some areas of the guidance to be confusing, especially around Section 6, bribery of a foreign public official, on exactly how the local law provision should work, and on what is said in the guidance about hospitality. There is a more profound problem about the efficacy of any guidance in relation to highly fact-sensitive defences, and how this can be communicated to businesses, as to which see section 4, below.
- 3.3 In the case of other major pieces of legislation there have been some successes as regards oversight and maintaining currency of guidance by means of a group of contributors from appropriate fields to keep the guidance under review. Examples include the PACE Review Board and the Joint MoneyLaundering Steering Group.

CHALLENGES

4. HOW HAVE BUSINESSES SOUGHT TO IMPLEMENT COMPLIANCE PROGRAMMES WHICH ADDRESS THE SIX PRINCIPLES SET OUT IN

THE MINISTRY OF JUSTICE'S GUIDANCE ON THE BRIBERY ACT 2010? WHAT CHALLENGES HAVE BUSINESSES FACED IN SEEKING TO IMPLEMENT THEIR COMPLIANCE PROGRAMMES? ARE THERE ANY AREAS WHICH HAVE BEEN PARTICULARLY DIFFICULT TO ADDRESS?

- 4.1 This is a complex subject which is not susceptible to any but the most generalised of answers. Industry bodies such as the CBI may be able to provide specific information about general awareness of the Act and take-up of ABAC procedures among member-companies.
- 4.2 As lawyers in private practice, our experience suggests that the majority of UK-based businesses which are not SMEs and which have exposure to export markets have at least an awareness of the Bribery Act and have attempted to respond by putting written ABAC policies in place. The majority of these will have had some regard to the statutory guidance when doing so.
- 4.3 The main challenge for many businesses is likely to stem less from the terms of the guidance, or any potential guidance, but from the nature of the defence itself. There is, in the UK, no safe-harbour or one-size-fits-all solution: what is "adequate" is ultimately a jury question and each case will depend on its own facts.
- 4.4 Moreover, even before a procedure is examined by a court, it is inevitable that what is sufficient or adequate is in the eye of the beholder. A business may feel it has invested sufficiently in ABAC procedures and that it cannot be expected to detect every possible infraction. But the starting point of a regulator or prosecutor is more likely to be that written procedures will be *ipso facto* inadequate if they have failed to deter the bribery in question or at least detect it within a very short time.
- 4.5 The Criminal Finances Act of 2017 (ss. 45, 46) also provides for a "failure to prevent" offence as regards facilitation of tax-evasion, modelled on S.7 of the Bribery Act, subject to a similar defence. However, the defence hinges on a different standard. The standard under the CFA is not "adequate" procedures but "such prevention procedures as it was **reasonable in all the circumstances** to expect B to have in place"¹⁴¹ .
- 4.6 This may be seen as recognition by Parliament that the "adequate procedures" defence presents a particularly high bar to defendant companies and that a standard approximating to taking reasonable care is more appropriate, at least in cases of failing to prevent facilitation of tax-evasion.

¹⁴¹ Or whether it was reasonable in all the circumstances to expect B to have **any** prevention procedures in place.

- 4.7 Bribery is a different offence for which Parliament has set the standard of adequacy of procedures rather than that of reasonable expectation. This may have been justified on the basis of the particular gravity of bribery as an offence. However, the fact that a specific standard is more difficult to identify in particular cases of bribery gives rise to uncertainty as to whether a procedures defence will ever be acceptable in such a case.
- 4.8 This in turn gives rise to a sufficiency problem. How much investment in compliance, audit, KYC, legal advice and other processes, and how much caution in dealing with counterparties, will be enough? It is very difficult indeed for any company to answer such questions with confidence in circumstances where all but the most minor infractions will be seen as evidence that its efforts were inadequate. This is notwithstanding the plethora of commercially-available products which offer to assist companies in this endeavour.
- 4.9 Thus the "real world" answers to the question of sufficiency will be subjective and may vary quite widely according to each business's circumstances and their assessment of and attitude towards risk.
- 4.10 There are some examples of practice as regards guidance which we believe may be instructive for the UK. The US Department of Justice is less cautious about making positive recommendations as regards good corporate conduct than the SFO has been in recent years. The DOJ is permitted to publish "declinations", i.e. decisions against prosecuting a particular firm, giving reasons, which are usually based on identified good conduct by the firm in question.
- 4.11 US DPA decisions often also refer to a proposed compliance programme which the company has agreed to enter into and which is, obviously, approved of by the DOJ. In some instances, US law also permits companies to obtain "safe harbour" protection in relation to specific future transactions by seeking the opinion of the DOJ as to whether the transaction would infringe the FCPA. These practices provide a more developed framework within which businesses can benchmark their ABAC procedures. They may be seen as demonstrating that a more prescriptive approach to good practice is not necessarily harmful to prosecutorial zeal and effectiveness.
- 4.12 However, no matter how much guidance exists, it important for businesses to understand that mere written procedures are not a panacea and that effective ABAC procedures require ongoing commitment and vigilance.
- 4.13 Similarly, law-enforcement authorities and prosecutors should also understand the nature of the defence. A defence based on adequate procedures means that there must be a margin for good faith error – i.e. that not every incident or particular pattern of bribery is proof

of the inadequacy of the procedures. If it were, then the defence would be meaningless in every case.

5. WHAT IMPACT HAS THE BRIBERY ACT 2010 HAD ON SMALL AND MEDIUM ENTERPRISES (SMES) IN PARTICULAR?

- 5.1 Again, it is difficult to offer more than anecdotal evidence in this regard. Business representative groups such as the Federation of Small Business and the Institute of Directors may be better placed to enlarge upon this question.
- 5.2 During the passage of the Bill and the coming into force, there was much publicity about the changes the Act would bring. Training for business was available from various sources and a state of awareness was achieved amongst senior managers in many businesses, including SMEs.
- 5.3 Anecdotal evidence is of reduced levels of demand for training in these areas by SMEs as time has gone on. Recently the pre-occupation with GDPR has been a higher focus for many small businesses. The extent of the take up and demand for certification standards such as ISO 37001:2016 Anti-bribery management systems would be a useful indicator of current awareness.

6. IS THE ACT HAVING UNINTENDED CONSEQUENCES?

- 6.1 As outlined in our response to Q.1 and Q.2, it appears to us that the Bribery Act has achieved two of the main intended consequences, i.e. increases in deterrence and increases in prosecution-rates. Another consequence is that the UK is seen as taking a lead against international bribery by having comprehensive legislation in place, although this was probably also intended by HM Government.
- 6.2 However, of course, un-intended consequences are also entirely possible. For example, our membership is aware of anecdotal evidence that some companies subject to UK jurisdiction have curtailed investments in more high-risk countries because of concerns about liability under the Bribery Act. We have been told of concerns about competition from less ethical competitors. It would be useful to study to what extent international investment-flows have been impacted by domestic legislation such as the Bribery Act. We would accept that at least some impact is likely. No doubt the corporate hospitality industry might have evidence of the impact of the Act on sponsorship of sporting events and so forth.

DEFERRED PROSECUTION AGREEMENTS

7. HAS THE INTRODUCTION OF DEFERRED PROSECUTION AGREEMENTS (DPAS) BEEN A POSITIVE DEVELOPMENT IN RELATION TO OFFENCES UNDER THE BRIBERY ACT 2010? HAVE DPAS BEEN USED APPROPRIATELY AND CONSISTENTLY? HAS THEIR USE REDUCED THE LIKELIHOOD THAT CULPABLE INDIVIDUALS WILL BE PROSECUTED FOR OFFENCES UNDER THE ACT?

Positive Development?

- 7.1 The introduction of the DPA legislation was used as an opportunity to raise awareness of the Bribery Act. Although DPAs are available for a number of offences which can be committed by corporates (not just Bribery Act offences) many publications and discussions linked the two when the DPA legislation was first introduced, the section 7 offence being highlighted.
- 7.2 There have only been four DPAs finalised to date and therefore it is difficult to draw any meaningful conclusions about their impact. However, three of the four DPAs related to offences under the Bribery Act. The DPAs and the large penalties imposed thereby resulted in publicity about the Act and the type of offending targeted by it. Although there has been speculation about other DPAs in the pipeline, it is now 18 months since the last DPA dealing with Bribery Act offences was announced by the SFO.
- 7.3 DPAs involve compromise. It could be argued that not prosecuting a company which has committed offences is to let it off the hook by avoiding a conviction. However, it is difficult to see how the objectives of incentivising self-reporting and businesses "cleaning their own houses" as regards bribery could be more effectively achieved in the absence of an available resolution similar to a DPA.
- 7.4 Although DPAs involve the publication of the Court's Judgement, Statements of Facts and the Deferred Prosecution Agreement itself, they are not a mechanism by which key concepts fundamental to the Act itself (for example the S.7(2) defence or the proper scope of the associated persons concept) are contested in argument. Both parties arrive before the court with an agreed solution which is the product of private negotiation and compromise. Although of course the facts are analysed in depth by the court, this is largely for the purpose of considering the criteria applicable to DPAs under the Crime and Courts Act 2013

and various SFO policies, rather than the operative elements of the underlying offences. This has led to a lack of significant jurisprudence about the Act itself.

7.5 There are other potential costs. It is notable that, so far, no individual connected to a published DPA has been prosecuted, although we believe there have been charges in certain cases. It is notable that, in the US, the use of DPAs is very common but the individual prosecution-rate arising from these cases is lower than might be expected. Of course, this may well be a price worth paying. DPAs are seen as the optimal means of balancing various policy objectives notably incentivising better ethics and governance while also allowing for at least some punishment of corporate wrongdoing.

Used appropriately and consistently?

7.6 Only four DPAs have been agreed so far and only three in relation to Bribery Act offences so it is difficult to draw any meaningful conclusions. It is difficult to judge whether DPAs have been used appropriately without information about non-DPA dispositions during the relevant period. That said, it is at least somewhat encouraging that DPA dispositions are published and can be analysed.

7.7 There are some differences in how DPAs have been applied which call into question the consistency of the approach of prosecutors. These indicate that there is an element of pragmatism, realism and negotiation in the use of DPAs, for example in the determination of compensation, the calculation of disgorgement, the discount on the financial penalty, the application of aggravating and mitigating factors and the totality principle.

7.8 The approach of prosecutors to self-reporting and cooperation has varied. For example, the SFO had begun investigating Rolls-Royce independently prior to any contact with the company, so that the matter did not stem from a self-report. During the investigation Rolls Royce plainly did cooperate with the SFO and reported additional wrong-doing. Former SFO Director Sir David Green stated that "*exemplary cooperation put Rolls-Royce in the same position as a company that has self-reported*".

7.9 By contrast, in the recent *Skansen Interiors* case the CPS chose to prosecute the company despite the fact that it had self-reported by way of a suspicious activity report with the National Crime Agency, and had also reported the suspected bribery to the City of London police.

7.10 DPAs are likely to be more easily applied to larger businesses. Smaller enterprises, such as Skansen, are less likely to have the resources or longer-term enterprise value to be able to cooperate

with authorities and/or to change their leadership to the same extent. Nor will they carry the economic weight of a Rolls Royce or the concomitant impact of a prosecution on third parties.

Effect on likelihood of prosecution of culpable individuals?

7.11 DPAs are only available to corporates which cooperate, cooperation being said to include assistance as regards the potential prosecution of individuals. It follows that DPAs are apparently expected to increase the likelihood that culpable individuals will be prosecuted.

7.12 However, as outlined above, although we believe charges have been laid, no prosecutions have emerged out of DPA cases so far.

INTERNATIONAL ASPECTS

8. HOW DOES THE BRIBERY ACT 2010 COMPARE WITH ANTI-CORRUPTION LEGISLATION IN OTHER COUNTRIES? ARE THERE LESSONS WHICH COULD BE LEARNED FROM OTHER COUNTRIES?

Comparison with Legislation Elsewhere

8.1 In our view, the best available comparative work on the effectiveness of national antibribery laws, as least as regards the bribery of foreign public officials, is that produced by the OECD Working Group on Bribery.

8.2 As practitioners in England and Wales we recognise our inherent bias towards the familiar. However, it is clear that many overseas lawyers and commentators admire the Bribery Act because, among other things:

- It offers a recognisable definition of bribery;
- It applies a less taxing standard as to the mental element in relation to the bribery of foreign public officials;
- It applies both to "private to private" and "private to public" bribery;
- It does not make exception for facilitation payments, such an exception being notoriously hard to define and rarely, if ever, relied upon in litigated matters;
- It at least attempts to provide an incentive towards good governance by means of the "failure to prevent" offence and the defence of adequate procedures.

- 8.3 The main lesson which might be learned from other countries is that predictable enforcement is the key to the effectiveness of any criminal legislation. The effectiveness of the US Foreign Corrupt Practices Act ("FCPA") for example derives largely from the way it has been enforced by the US authorities rather than the terms of the legislation itself (which are not always easy to interpret).
- 8.4 Other distinguishing features of the Bribery Act include its broad extra-territorial reach and the strict liability corporate offence of failing to prevent bribery.
- 8.5 *Extra-territorial jurisdiction:* Prior to the Bribery Act, the FCPA was considered by many to be the legislation with the widest reach. However, under Section 7 of the Act, a company incorporated or carrying on business in the UK may be liable for conduct of an 'associated person', wherever that associated person is located. For all other offences under the Bribery Act, the courts have jurisdiction over offences committed outside of the UK where the individual concerned has a 'close connection with the UK' (section 12). This extra-territorial reach is broader than that of the FCPA. Canada has also (since 2013) had jurisdiction over offences committed anywhere in the world by a Canadian citizen, resident or company and jurisdiction over foreign companies and individuals may be established pursuant to a test of a 'real and substantial connection' with Canada.
- 8.6 *Knowledge, intent and Corporate Liability:* Section 7 of the Bribery Act is a strict liability offence: knowledge of the bribe by the commercial organisation is not a requirement. The only defence is that the organisation had in place 'adequate procedures' designed to prevent incidences of corruption.
- 8.7 *Bribery of Private Persons and/or Public Officials:* The Bribery Act goes further than the FCPA as it outlaws bribery of private persons. It goes further than the FCPA in relation to the bribery of a public official in that it does not require an intention that that person will improperly perform his duties, nor does the payment need to be made corruptly¹⁴². However, under the Bribery Act a 'foreign public official' is defined more narrowly than under the FCPA.
- 8.8 *Facilitation Payments:* Whilst the US courts have held that a defendant may raise an economic coercion defence for small facilitation payments, these are illegal under the Bribery Act no matter how small or routine or expected by local customs these may be. In general, the German, French and Canadian legislation (as amended and in force since October 2017) also extends the

¹⁴² The 6(3)(b) exception regarding foreign laws permitting influencing of an official is unlikely to be relevant to most cases.

offence to all forms of gifts, gratuities and invitations that the recipient is perceived to benefit from.

Lessons which could be learned from other countries

8.9 In our view, the Bribery Act compares favourably with anti-corruption legislation in most other countries. Any lessons to be learned are more in the field of investigation and enforcement of the law, including in relation to the use of DPAs, which have been used extensively in the US for well over 20 years.

9. WHAT IMPACT HAS THE BRIBERY ACT 2010 HAD ON UK BUSINESSES AND INDIVIDUALS OPERATING ABROAD?

9.1 Again, this is a very broad question which would benefit from detailed scholarly analysis, for example by an international organisation or a trade body.

9.2 As lawyers in private practice our experience has been that our corporate clients, especially those based in the UK, tend to be aware of the Bribery Act and bribery risk when doing business abroad. Anecdotally, it is apparent that there is greater caution among clients, especially in head-office functions, as regards such activities as gift-giving or corporate

hospitality overseas. It is now also quite normal for businesses to carry out due-diligence checks on intermediaries. Intermediaries themselves have become more sophisticated and responsive to the demands of international companies.

9.3 As mentioned above, we have occasionally encountered businesses which weigh up the reputational and legal risks of bribery when making decisions as to whether or how to invest or operate in particular countries or whether to bid for particular contracts. However, we are not aware of an obviously inappropriate degree of risk-aversion as a result of the Bribery Act. Companies with major operations in high-risk territories seem more inclined to improve systems and controls rather than abandon investments or market opportunities in difficult markets. This may change if there is a feeling that such companies are being unfairly targeted in relation to minor infractions, i.e. that law-enforcement activity is disproportionate.

9.4 It is more difficult to estimate the effect on individuals. In our view, the existence or terms of the Bribery Act are likely to have had a meaningful effect on individuals temporarily doing business abroad but ultimately based in or domiciled in the UK. The effect on people

domiciled abroad with fewer long-term ties to the UK may be less. There remains the archetype of the ex-pat of thirty years who is far from bashful about bribery as being "how things are done" and "part of the culture".

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31 July 2018

Law Society of Scotland – Written evidence (BRI0042)

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland’s solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee welcomes the opportunity to consider and respond to the UK Government consultation on the post-legislative inquiry into the Bribery Act 2010 (2010 Act). We have the following comments to put forward for consideration.

General Comments

Seven years have passed since the 2010 Act came into force: although some provisions commenced in 2010, the majority came into effect in July 2011. The questions under consideration include judging whether the 2010 Act is effective by assessing that in light of stricter prosecution regimes/higher conviction rates and a reduction in occurrence of the conduct that the 2010 Act addresses. These matters are difficult to evaluate substantively within that timescale for a number of reasons.

The 2010 Act is the first Act of its type that sought to adopt:

‘[an] international consensus against bribery.....[which] was the result of the recognition among statesmen, parliamentarians, international organisations, prosecutors, the legal profession, police forces, the media, civil society and many in the international business community, that bribery had become a substantial global problem. Bribery is a serious crime that has far reaching economic and social consequences. It corrupts the ethical values upon which the operation of our society and institutions are founded and is particularly damaging in developing and emerging economies. Bribery hampers economic development, sustains poverty, and challenges the proper rule of law. It is market distorting, creating unfair and expensive barriers for legitimate business’¹⁴³.

There were four policy objectives of the 2010 Act that included¹⁴⁴:

- Consolidation and modernisation of the law
- A robust and effective enforcement tool with global reach

¹⁴³

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/713452/bribery-act-2010-post-legislative-scrutiny-memorandum.pdf

¹⁴⁴

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/713452/bribery-act-2010-post-legislative-scrutiny-memorandum.pdf

- Corporate good governance
- Prosecution policy

As far as consolidation and modernisation of the law is concerned, the laws that were replaced by the 2010 Act were fragmented and outdated. That made any such conduct difficult to prosecute in relation to 21st century corporate and global conduct, whether by common law and/or statute. The review of the existing law¹⁴⁵ is designed at modernising the law. It has allowed for consolidation and provides a basis on which to build the necessary processes to deal with bribery offences. It allows for future development so that the legislation provides an enforcement tool with global reach. The 2010 Act does appear, at least on paper, to meet the needs of law in that:

- It deals with the reality of up to date corporate UK and global business
- It is in language that can be clearly understood and
- It has the benefit of clarity promoting an understanding of what conduct should be treated as criminal for the purposes of the public, prosecutors and defence.

Whether it is an effective tool is much harder to ascertain, as it will take a considerable amount of time before a rigorous assessment can be made. Inevitably, given the nature of the crimes involved, any investigations and thereafter prosecutions in relation to the 2010 Act are going to be complex and will take a considerable amount of time. Such crimes or conduct must have arisen after the 2010 Act came into force, because it is not retrospective. As far as Scotland is concerned, for prosecutions to have taken place to date, such prosecutions would require having been reported to, considered and marked for prosecution by the Crown Office and Procurator Fiscal Service (COPFS). Furthermore, judgment as to the effectiveness of the 2010 Act cannot necessarily be determined merely by evidence of successful prosecutions, though it helps in providing deterrence by way of example. We acknowledge that publicity regarding successful convictions is obviously very helpful in raising awareness and promoting the State's ability to enforce the relevant legislation. The fact that the legislation has potentially a global reach is of international importance.

Creating clarity as to the exact nature of the criminal conduct and providing a means to impose appropriate sanctions assists in regulating the conduct of business organisations that are then aware of the law. They require observing the law, undertaking the appropriate reporting mechanisms as well as putting in place the relevant and necessary training and education to ensure their business's compliance and monitoring (the purpose outlined in creating the Deferred Prosecution Agreement (DPA) or civil settlement framework).

There have been successful high-profile prosecutions that have received much publicity. That includes the first conviction¹⁴⁶ under section 7 of the 2010 Act which also provided clarification of how the legislation is to be interpreted (see below). The Serious Fraud Office (SFO) secured a section 7 conviction against the Sweett Group PLC (Sweett) for failing to prevent its subsidiary, Cyril Sweett International (CSI) from paying bribes in the United Arab Emirates from 2012 to 2015. These bribes related to securing a contract for the building of a £63

¹⁴⁵ THE LAW COMMISSION LEGISLATING THE CRIMINAL CODE: CORRUPTION
<http://www.lawcom.gov.uk/app/uploads/2015/04/c145-Corruption.pdf>

¹⁴⁶ (conviction was on 5 June 2016)

million hotel in Dubai which as a result, Sweett was fined £2.25 million and its share price value fell by 23 per cent.

Such cases also provide clarification on the interpretation of the 2010 Act in: Meaning of terms such as 'associated person':¹⁴⁷ Though the term is defined as a person who performs services for or on behalf of the relevant commercial organisation, having a parent and subsidiary relationship is not sufficient to conclude that the subsidiary is performing services for and on behalf of the parent. This case illustrates how the facts and circumstances of the relationship to be considered. What is significant from the Sweett case is that there was no indication that the CSI bribery took place with the knowledge or agreement of Sweett.

Relevance of the defence: The only defence available to an organisation which is being prosecuted under section 7 of the 2010 Act is to establish, on the balance of probabilities, that they had in place at the relevant time 'adequate procedures' to prevent bribery. Sweett had been unable to rely on this defence, since reports on their control framework over CSI's activities had identified numerous weaknesses and failings in its anti-bribery systems and financial controls. The actual issue of adequacy was not tried out in court owing to the plea of guilty. What the Sweett case does in particular is to highlight the importance of exercising oversight on all third-party companies including subsidiaries (no matter what the exact relationship is) who are involved in performing services for or on an organisation's behalf. It stresses the importance for all businesses to review their dealings with third parties and to be proactive (since inactivity will not avail themselves of the defence) to prevent conduct being done on their behalf that may render the organisation liable to prosecution. It is about risk management, in order to minimise the potential risks of being engaged directly or indirectly in acts of bribery and corruption. Organisations must have robust measures in place; the need for which is amply demonstrated by the proliferation of guidance emanating from financial and legal organisations. We consider corporate good governance and prosecution policy under the various questions below.

Deterrence

Question 1: Is the Bribery Act 2010 deterring bribery in the UK and abroad?

We refer to our answer above with regard to the issues in judging deterrence by prosecutions. The question cannot be answered since previously, bribery prosecutions were extremely rare. There has not been time for the numbers of prosecutions substantially to have increased since the 2010 Act came into force. There will be greater publicity when there have been more successful convictions.

The legislative approach under the 2010 Act, as outlined above, is designed to shift the burden of detection and investigation onto companies, through the provisions of section 7 of the 2010 Act and the accompanying DPA/civil settlement frameworks. This has led to a much greater corporate focus on the types of conduct which the 2010 Act was designed to attack. Though we understand that many companies may have put in place anti-bribery policies, by

¹⁴⁷ section 8(1) of the 2010 Act

accepting that there is a business case for anti-corruption, according to the CBI, *'there is still much more to be done in translating that into practical action'*¹⁴⁸.

Eversheds¹⁴⁹ undertook a survey of 500 business leaders worldwide about their approach to business, bribery and corruption, from which only 45 per cent of their respondents thought that anti-bribery policy was appropriate for their business and only half thought that the policy had improved in the last five years. Having policies in place is important as this will provide guidance to employees about how to handle the issues when they arise. The effect of internal anti-bribery guidance should be to discourage and prevent such behaviour. If companies do not have anti-bribery policies, such businesses risk not being able to invoke the defences under the 2010 Act.

However, mere observance in having a policy in place is not sufficient. They must be awareness by employees of such policies through education and training and action taken to ensure that such policies are adequate and capable of being understood.

To the extent that there have not been many convictions, the 2010 Act certainly promotes good practice. The true measure may not arise until a company's anti-bribery policy and practice is tested when an incident arises: how it is handled internally and thereafter in relation to discussion and/or action taken by the enforcement authority.

Enforcement

Question 2: Is the Bribery Act 2010 being adequately enforced? If not, how could enforcement be improved? Do the Serious Fraud Office (SFO) and the Crown Prosecution Service (CPS) have the right **approach and the resources they need to investigate and prosecute bribery offences effectively?**

This question has been posed from the English and Welsh standpoint.

The COPFS is Scotland's prosecution service. The distinct roles of COPFS and the Procurator Fiscal are not relevant in this context, since we would anticipate that any crimes being prosecuted in relation to the 2010 Act would proceed by way of indictment in the High Court (though competent to proceed of course in the Sheriff & Jury courts) given their serious nature. The SFO and CPS have no jurisdiction in Scotland.

COPFS receives reports about all crimes including those arising in respect of serious organised crime from the police and other reporting agencies. It then decides whether there is sufficient admissible evidence according to the law of Scotland and that prosecution is merited in the public interest.

All cases under the 2010 Act are referred to the Serious and Organised Crime Unit (SOCU) of COPFS, which is a specialist, multi-disciplinary unit including experienced investigators, prosecutors and forensic accountants. SOCU oversee the investigation of such cases by law enforcement and will identify any further enquiries which require to be conducted. SOCU receives many of the most evidentially complex cases that the COPFS has to deal with, involving hundreds of witnesses and thousands of productions.

Such cases are generally investigated by specialist teams within the Economic and Financial Investigation Unit of the Police Service of Scotland. SOCU teams

¹⁴⁸ <http://www.cbi.org.uk/businessvoice/latest/bribery-is-not-just-a-legal-problem/>

¹⁴⁹ 'Beneath the Surface' <https://www.eversheds-sutherland.com/global/en/what/practices/white-collar-and-investigations/publications/bribery-report/bribery-corruption-report.page>

are co-located with police and other law enforcement agencies at the Scottish Crime Campus at Gartcosh. They also work closely with COPFS International Co-operation, Proceeds of Crime and the Civil Recovery Unit (CRU). Decisions in relation to the prosecution of cases are made by SOCU and experienced Crown Counsel, in accordance with internal guidance for prosecutors issued by the Lord Advocate¹⁵⁰.

COPFS is a party to Memorandum of Understanding¹⁵¹ with other UK enforcement agencies¹⁵² (such as the SFO, Crown Prosecution Service, Financial Conduct Authority, National Crime Agency, City of London Police and Ministry of Defence Police). It outlines the cross border arrangements for fulfilling the international obligations of the United Kingdom as a party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Bribery Convention), the Council of Europe Criminal Law Convention against Corruption (and its Additional Protocol) and the United Nations Convention against Corruption with regard to the investigation and prosecution of foreign bribery, including Section 7 of the 2010 Act). In effect, COPFS is involved in the regulation of the sharing of information and inter-agency co-operation within the UK to ensure that an effective, joined-up approach is and can be taken to cross-border bribery cases. What is important though is given the global nature of such crimes is the emphasis of the UK Government, which indicated that:

*'Continued criminal justice cooperation is a critical justice priority for Brexit negotiations: it impacts upon the safety of citizens, of both the UK and the rest of the EU. Cross-border solutions are required to combat the growth of transnational crimes....'*¹⁵³.

The occurrence of cross-border cases is by no means uncommon. By way of example, person A, in Glasgow, works for company B, based in Manchester; makes an unlawful payment by bank transfer to person C, in London, who works for company D, based in Berlin, in relation to a contract for work in the Middle East. There is no doubt that the 2010 Act allows for such matters to be prosecuted in the UK. While the 2010 Act provides flexibility as to where such conduct will be prosecuted, in practice, much will depend upon the way in which the matter comes to the attention of the authorities and to which authority. Resources of the authorities may also be a consideration.

Senior COPFS officials regularly attend meetings of the UK Bribery, Corruption and Sanctions Evasion Threat Group and the Foreign Bribery Intelligence Clearing House, both of which are UK-wide multi-agency groups. As regards cross-border cases extending beyond the UK, the COPFS International Co-operation Unit has prosecutors with specialist knowledge and experience in

¹⁵⁰ GUIDANCE ON THE APPROACH OF THE CROWN OFFICE AND PROCURATOR FISCAL SERVICE TO REPORTING BY BUSINESSES OF BRIBERY OFFENCES

http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Guidelines_and_Policy/Guidance%20on%20the%20approach%20of%20COPFS%20to%20reporting%20by%20businesses%20of%20bribery%20offences%20JUNE%202017.pdf

¹⁵¹ TACKLING FOREIGN BRIBERY MEMORANDUM OF UNDERSTANDING

<https://www.fca.org.uk/publication/mou/mou-tackling-foreign-bribery.pdf>

¹⁵² Paragraph 8.1

¹⁵³ <https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/651/65102.htm>- The implications of Brexit for the justice system: Government Response to the Committee's Ninth Report of Session 2016–17

securing cooperation and evidence from international partners. The SOCU make full use of resources such as Eurojust, the European Judicial Network, and UK Liaison Magistrates, in order to coordinate investigations and agree questions of jurisdiction in complex international cases. It is unclear, as the Brexit negotiations continue, exactly what our relationship will be with EU Member States, though ensuring the international reach of the 2010 Act will require close co-operation with these countries as with others internationally to combat bribery.

The resources which are required to investigate and prosecute bribery offences will be resource intensive in relation to both time and expertise. Very large cases, such as the Rangers¹⁵⁴ fraud prosecution, may often require provision of additional resources. The experience from the defence perspective is of complex cases can take some time to be progressed at COPFS which is also referred to in the OECD report discussed below. This may indicate that resources from time to time may be pushed.

Another factor which may well contribute to such inevitable delays is the original quality of police investigations and reports that are then assessed by SOCD. Experience has shown that even large fraud cases may be reported by relatively junior police officers. By way of example, the UK's longest trial, a mortgage fraud¹⁵⁵ case that concluded in 2017, was reported to COPFS by a constable. Similar examples have been seen with reports about conduct under the 2010 Act.

The interests of justice require investigations and prosecutions to take place without undue delay. The UK Government's policy intentions under the 2010 Act require this too. Bribery must be seen to be a priority, and conduct for which offenders will be caught and prosecuted successfully. Otherwise the culture behind the 2010 Act may otherwise unravel.

COPFS has successfully prosecuted a number of cases under the 2010 Act and several others are understood to be currently under investigation. Prosecutions to date have taken place for offences in terms of sections 1 (offences of bribing another person) and 2 (offences relating to being bribed). Those who have been prosecuted included a City Council Valuation Officer¹⁵⁶ and a former juror in an organised crime trial (section 2 of the 2010 Act).¹⁵⁷ There have not been any Scottish prosecutions for offences under sections 6 (bribery of foreign public officials) or 7 (failure of commercial organisations to prevent bribery) in Scotland. A number of section 7 offences have been addressed by way of civil settlement under the Lord Advocate's self-report initiative (see below).

All cases which are prosecuted are referred to COPFS Proceeds of Crime Unit for financial investigation to consider confiscation proceedings under Part 3 of the Proceeds of Crime Act 2002. That permits the seizure of any available assets which are the proceeds of crime. Funds which are recovered are reinvested into

¹⁵⁴ <https://www.bbc.co.uk/news/uk-scotland-glasgow-west-34272273>

¹⁵⁵ <http://www.scotland.police.uk/whats-happening/news/2017/may/two-convicted-of-large-scale-mortgage-fraud>

¹⁵⁶ <https://www.pressandjournal.co.uk/fp/news/aberdeen/1378243/north-east-official-council-houses-scam-jailed/>

¹⁵⁷ <http://www.scotland-judiciary.org.uk/8/1961/HMA-v-Catherine-Leahy>.

Scottish communities through the Scottish Government’s CashBack for Communities programme¹⁵⁸.

It is also worth noting that COPFS’ roles include both prosecution of the various offences under the 2010 Act and operating civil settlements in relation to the operation of section 7 of the 2010 Act. Inevitably that is resource demanding, especially where there may well be anticipated to be an increase in self-reporting as referred to below.

It is important to note the effect of English cases decisions which while not binding on Scottish courts may have a persuasive effect on future Scottish cases. Whether to prosecute is of course a matter for COPFS as indicated above. The recent case of Skansen Interiors Limited was the first UK case where there was a conviction under section 7 of the 2010 Act following a trial. This prosecution took place despite the company’s self-report. This contrasts with Sweet which had been a plea. This case may be relevant when considering action in the case of dormant companies. Justification for the prosecution was said to relate to the absence of assets or resources to pay any fines that might have been imposed. The reason why prosecution took place was to send out a message to other small and medium-sized companies about bribery being taken seriously and how appropriate procedures must be put in place regardless of how big or small the company is.

Guidance

Question 3: Is the statutory guidance on the Bribery Act 2010 sufficient, clear and well-understood by the companies and individuals who have to deal with it? Should alternative approaches be considered?

The statutory guidance¹⁵⁹ is both extensive and informative. There are two observations:

- The guidance has been written by the UK Government’s Ministry of Justice. It contains only passing reference to the fact that Scotland is a separate jurisdiction¹⁶⁰. We suggest that the guidance should be revised in this respect.
- Due to the very limited number of prosecutions that have been brought since the 2010 Act came into force, the guidance has been largely untested by the courts. The guidance explains the UK Government policy which is *‘intended to help commercial organisations of all sizes and sectors understand what sorts of procedures they can put in place to prevent bribery as mentioned in section 7(1) [of the 2010 Act]’*¹⁶¹.

It specifically states that the guidance is designed to be of general application and outlines six guiding principles. It is not to be prescriptive, leaving the interpretation to the courts as the issue whether an organisation had adequate procedures in place to prevent bribery, with the onus on the defence to establish it had adequate procedures in place to prevent bribery.

¹⁵⁸ <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf><https://www.gov.scot/Topics/Justice/policies/community-engagement/cashback>

¹⁵⁹ <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>

¹⁶⁰ Paragraph 2 of the Introduction does acknowledge that Scottish Ministers have been consulted regarding the content of this guidance.

¹⁶¹ Paragraph 3

No doubt the courts will have regard to the guidance when considering any matters of interpretation. It is hard to consider that any company that demonstrably complies with the terms of the guidance will face conviction of an offence under the 2010 Act. However, as matters stand, the UK Government has set out what are deemed to be acceptable levels of conduct and until now, as part of this post-legislative scrutiny, without detailed consideration by either Parliament or the judiciary.

Challenges

Question 4: How have businesses sought to implement compliance programmes which address the six principles set out in the Ministry of Justice’s guidance on the Bribery Act 2010? What challenges have businesses faced in seeking to implement their compliance programmes? Are there any areas which have been particularly difficult to address?

Question 5: What impact has the Bribery Act 2010 had on small and medium enterprises (SMEs) in particular?

Question 6: Is the Act having unintended consequences?

In relation to Questions 4-6, we believe that it is likely that the 2010 Act has focused corporate attention, but we have not conducted any research in this area. As highlighted above, it is now common for companies to have anti-bribery policies in a way that rarely happened before. As a result of prosecutions to date, those advising companies are better placed to comment on the impact of the legislation on small and medium sized enterprises.

Deferred Prosecution Agreements

Question 7: Has the introduction of Deferred Prosecution Agreements (DPAs) been a positive development in relation to offences under the Bribery Act 2010? Have DPAs been used appropriately and consistently? Has their use reduced the likelihood that culpable individuals will be prosecuted for offences under the Act?

The system of DPAs which is in place in England and Wales do not currently apply in Scotland.

Civil settlement regime

Instead, Scotland has a civil settlement regime, which is dependent upon companies self-reporting instances of bribery to COPFS. This self-report initiative (paragraph 1 of the Guidance on the approach of COPFS to reporting of businesses of bribery)¹⁶² has been in place since 1 July 2011, having been introduced by the then Lord Advocate to mark the commencement of the 2010 Act.

Under this initiative, businesses which discover bribery or corruption within their own organisation are encouraged to make a report to COPFS, having identified unlawful conduct and examined its policies and processes which failed to prevent

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http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Guidelines_and_Policy/Guidance%20on%20the%20approach%20of%20COPFS%20to%20reporting%20by%20businesses%20of%20bribery%20offences%20JUNE%202017.pdf

the conduct taking place. Through its solicitors, it submits a full report to COPFS, who will then investigate. The anticipation is that they may avoid prosecution and be referred to the CRU for civil settlement instead. An agreement may be struck with the company to pay a particular sum (reflecting the profit that has been earned from the criminal conduct) in return for not being prosecuted. The CRU acts on behalf of Scottish Ministers and is the enforcement authority for the civil recovery of the proceeds of unlawful conduct under Part 5 of the Proceeds of Crime Act 2002.

There are stringent conditions with which businesses must comply with if they are to be considered appropriate for the self-report initiative. That includes conducting a thorough investigation, disclosing the full extent of the criminal conduct that has been uncovered and by taking robust steps to prevent a repetition of that unlawful conduct. There is no guarantee that, in making a self-report, this will allow a company to avoid prosecution. Each case is evaluated on its own merits. The SOCU, together with Crown Counsel, consider various factors in assessing the public interest in any prosecution and in deciding whether the civil settlement is appropriate. These factors include the nature and seriousness of the offence, whether senior management were complicit and the adequacy of the anti-bribery systems in place at the time of the unlawful conduct and those introduced subsequently. Detailed guidance is available on the COPFS website for businesses who wish to submit a self-report¹⁶³, which outlines the factors to be considered.

If it is in the public interest for criminal proceedings to be considered, SOCU will instruct an independent investigation by law enforcement and the information provided by the business may be used for this purpose. Alternatively, if the matter is referred for possible civil settlement, the CRU will carry out a comprehensive investigation that includes forensic accountancy input. That verifies the information provided by the business and assesses the appropriate level of settlement, i.e. the total value of the benefit which has been obtained by the business through the unlawful conduct. In the event that a settlement is reached with the company, directors and employees may still be prosecuted separately as individuals. Money which is recovered by way of civil settlement is also paid into the CashBack for Communities fund.

To date, five businesses¹⁶⁴ have reached civil settlement in relation to bribery offences since the introduction of the self-report initiative. There are understood

¹⁶³

http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Guidelines_and_Policy/Guidance%20on%20the%20approach%20of%20COPFS%20to%20reporting%20by%20businesses%20of%20bribery%20offences%20JUNE%202017.pdf

¹⁶⁴ Abbot Group Ltd - £5.6m: <https://www.ft.com/content/a6d7afea-3587-11e2-bd77-00144feabdc0> ;

Braid Group - £2.2m:

http://www.heraldscotland.com/news/14401365.Freight_company_pays_2m_to_Crown_Office_after_self-reporting_bribery_cases/ ;

Thomas Gunn Navigation Services (TGNS) Ltd - £138,000;

International Tubular Services (ITS) Ltd - £172,200: <https://www.bbc.co.uk/news/uk-scotland-north-east-orkney-shetland-30514824> ;

Brand Rex Ltd - £212,800:

http://www.heraldscotland.com/news/13785563.Firm_pays_fine_after_reporting_itself_to_Crown_Office/

to be further cases currently under consideration. Those companies which have reached civil settlements include businesses operating in the oil and gas sector, freight and logistics and shipping industry. These cases have involved the payment of bribes by employees or subsidiaries, often overseas, in order to secure contracts. According to COPFS, the total value of funds to date recovered by way of civil settlement in respect of bribery is in excess of £8.3 million¹⁶⁵. Several cases illustrate the use of the Scottish civil settlement procedure:

Brand- Rex Limited

In September 2015, Brand-Rex Limited, a Scottish network cabling company, admitted that the company had failed to prevent bribery and had received an improper benefit between 2008 and 2012 (a contravention of section 7 of the 2010 Act).

The initiative 'Brand Breaks' aimed at distributors and installers, allowing them to qualify for a range of rewards. An agent of Brand-Rex exceeded the terms of the scheme and was in a position to influence purchasing decisions related to cable supplies. The solicitors for Brand-Rex self-reported the violation, accepting that Brand-Rex had failed to prevent the infringing activity when the company was able to do so, accepting responsibility for a contravention of Section 7 of the 2010 Act. The COPFS, in deciding not to prosecute, considered the following factors:

- The nature and seriousness of the offence and the extent of harm caused
- The extent of wrongdoing within the company, including whether or not senior management consented or connived
- Early action was taken by senior management upon discovery of the offence
- The company's previous record for bribery conduct
- The disciplinary action, if any, taken against the wrongdoers
- Whether the company had engaged fully and meaningfully with COPFS
- Whether the company had anti-bribery systems in place
- The impact of prosecution on the company's employees and stakeholders

Brand-Rex agreed to pay £212,800 which was the amount of Brand-Rex's gross profit from the unlawful activity.

Abbot Group Limited¹⁶⁶

Abbot Group is an Aberdeen based drilling business operating in the oil and gas sector. They were the first Scottish business to enter into a civil settlement under the self-reporting initiative. Abbot Group limited admitted that it had benefited from corrupt payments made in connection with a contract entered

¹⁶⁵ COPFS no longer produces annual reports however the figures are included in the UK Bribery Digest: [https://www.ey.com/Publication/vwLUAssets/EY-UK-Bribery-Digest-edition-12-March-2018-table-of-cases/\\$FILE/EY-UK-Bribery-Digest-edition-12-March-2018-table-of-cases.pdf](https://www.ey.com/Publication/vwLUAssets/EY-UK-Bribery-Digest-edition-12-March-2018-table-of-cases/$FILE/EY-UK-Bribery-Digest-edition-12-March-2018-table-of-cases.pdf)

¹⁶⁶ <https://www.bbc.co.uk/news/uk-scotland-north-east-orkney-shetland-20462004>

into by one of its overseas subsidiaries. In 2012, a civil settlement was reached in the sum of £5.6m, based on the gross profits derived from the contract.

The self-report initiative must be reviewed and approved each year by the Lord Advocate. It was recently extended until June 2019¹⁶⁷. With these cases of bribery being dealt with what can be said is that these may not otherwise have come to light or have involved extensive and lengthy investigations and prosecutions. Lengthy prosecutions have been avoided and significant sums, representing profit gained from bribery, have been recovered and re-invested into Scottish communities. The fact that businesses are required to put in place measures to ensure there is no recurrence of the unlawful conduct is viewed as an effective means of preventing corruption.

Senior officials from COPFS regularly engage with private sector organisations to provide training on the 2010 Act to promote the self-report initiative. Following the conclusion of any civil settlement, COPFS issues a pro-active media release to raise awareness and provide deterrent effect.

Deferred Prosecution Agreements (DPAs)

In England and Wales, a system of DPA operates introduced by the Crime and Courts Act 2013. There are a number of similarities between DPAs and the civil settlement process:

- DPAs deal with a similar range of cases involving corporate economic bribery.
- DPAs are negotiated with the relevant prosecutor. In Scotland, that will be solely COPFS but then approved (our emphasis) by the court. In England and Wales, the court makes the judgment that entering a DPA is in the interests of justice and that its terms are fair, reasonable and proportionate. Effectively the prosecutor's discretion requires endorsement by the court. In Scotland, there is no independent arbiter who decides whether the civil settlement and the proposed penalty is fair. If the company rejects COPFS's assessment, criminal and other sanctions may well follow.
- Where a DPA is to be entered into, the offence(s) will not be prosecuted.
- There exists a DPA Code by the SFO and CPS¹⁶⁸.

In the matter of section 45 of the Crime and Courts Act 2013 between SFO and XYZ Limited¹⁶⁹ the factors that the court considered when assessing the public interest can be seen to be substantially similar to those outlined above in the Scottish case of Brand-Rex above:

- The seriousness of the predicate offence or offences.

¹⁶⁷

http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Guidelines_and_Policy/guidance%20on%20the%20approach%20of%20the%20crown%20office%20and%20procurator%20fiscal%20service%20to%20reporting%20by%20businesses%20of%20bribery%20offences%20-%20June%202018.pdf

¹⁶⁸ <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/>

¹⁶⁹ http://www.qebholliswhiteman.co.uk/cms/document/preliminary_redacted.pdf

- The importance of incentivising the exposure and self-reporting of corporate wrongdoing.
- The history (or otherwise) of similar conduct.
- The attention paid to corporate compliance prior to, at the time of and subsequent to the offending.
- The extent to which the entity has changed both in its culture and in relation to the relevant personnel.
- The impact of prosecution on employees and others innocent of any misconduct.

In March 2017, the Organisation for Economic Cooperation & Development (OECD) published a report on the effectiveness of the UK law in relation to bribery and corruption¹⁷⁰. It noted that there was scope to improve communication between law enforcement authorities from England and Wales and those in Scotland. It suggested that at paragraph 8(b) that:

'Scotland consider adopting a scheme comparable to the DPA scheme in the UK to overcome the weaknesses apparent in civil settlements and to achieve consistency across the UK with regard to the tools available to law enforcement authorities for the resolution of foreign bribery cases'

Bribery, particularly where multiple jurisdictions are involved, is notoriously hard to detect, investigate and prosecute. Investigations are heavily resource-dependent and can depend upon systems of international cooperation. As a result, it is unsurprising that a large proportion of cases come to the prosecution authorities by means of self-report. However, for a system that relies on self-reporting to work, companies have to see the risks involved in failing to do so. There has to be sufficient investment in detection, investigation and prosecution to enable cases to be detected and brought to court without self-reporting. If bribery simply goes undetected, companies may start questioning whether it is in their corporate interest to reveal unlawful conduct to the authorities, thereby opening a door that would otherwise remain firmly shut.

Exactly how self-reports will evolve in the future is not certain. The SFO's Joint Head of Bribery and Corruption Ben Morgan¹⁷¹ referring to a DPA in the case of Rolls-Royce indicated that:

'in this case [what would] a prosecution have achieved that the DPA did not? And if you can think of anything, then how much more public money would it have taken to achieve that incremental difference? How much more time would it have taken? How many other cases would have remained un-done while we worked on that? A DPA will not be appropriate in every case; and where it is not we will and do prosecute. But the court was satisfied that it was here'.

As we indicated above, it will take time before the effectiveness of DPAs and civil settlements can be made. They are clearly evolving with only a handful of cases resolved to date. Companies will need to consider whether to self-report by understanding the problem while making an informed decision on a risk-based approach by applying the law to the facts. They then need to consider the practical implications. The more details about the use of DFAs and civil

¹⁷⁰ <http://www.oecd.org/corruption/anti-bribery/UK-Phase-4-Report-ENG.pdf> Phase 4 evaluation on the UK's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments

¹⁷¹ <https://www.sfo.gov.uk/2017/03/08/the-future-of-deferred-prosecution-agreements-after-rolls-royce/> March 2017

settlements will allow companies to assess what is involved financially as any settlement under these agreements should be the same as any fine that would have been court imposed with the advantage of no criminal conviction. Nevertheless, the Working Group identifies in this report some key issues that may undermine the effective enforcement of foreign bribery laws in the UK. In particular, Scotland's practices and frameworks for foreign bribery enforcement could be brought in line with those in place in England and Wales; there is also scope to improve communication between law enforcement authorities from England and Wales and those in Scotland. Furthermore, the persistent uncertainty about the SFO's existence and budget is harmful, especially given the SFO's prioritisation of foreign bribery cases and its demonstrated expertise in such cases.

International aspects

Question 8: How does the Bribery Act 2010 compare with anti-corruption legislation in other countries? Are there lessons which could be learned from other countries? What impact has the Bribery Act 2010 had on UK businesses and individuals operating abroad?

Question 9: What impact has the Bribery Act 2010 had on UK businesses and individuals operating abroad.

Others are best placed to comment on structures in other countries. We are aware that there was support for the UK's strong anti-corruption drive which included the organisation of the London Anti-Corruption Summit¹⁷² in 2016, which announced significant legislative reforms to further enhance foreign bribery enforcement. The report highlighted positive achievements by the UK, including efforts to enhance its detection capacity of foreign bribery, notably through intelligence analysis by the SFO, improved whistleblowing channels, and mobilisation of its overseas missions.

We note that the OECD report above at paragraph 8(a) refers to:

'UK law enforcement authorities, particularly in Scotland, exercise considerable caution in deciding whether to resolve foreign bribery cases through civil settlements to ensure cases result in effective, proportionate and dissuasive sanctions'

How the UK responds to the recommendation is to be made by a written follow-up report within two years on steps taken to implement its recommendations. This follow-up report will also be made publicly available.

Gillian Mawdsley
Secretary, Criminal Law Committee
Law Society of Scotland

10 August 2018

¹⁷² <https://www.gov.uk/government/topical-events/anti-corruption-summit-london-2016>

**Rt Hon Sir Brian Leveson, President of the Queen's
Bench Division – Supplementary written evidence
(BRI0066)**

In my oral evidence to the Committee on 13 November 2018 I explained the procedure which is followed by the court in giving, first, preliminary consideration under paragraph 7 of Schedule 17 to the Crime and Courts Act 2013 as to whether a deferred prosecution agreement is “likely” to be in the interests of justice and that its proposed terms are fair, reasonable and proportionate, followed by further consideration under paragraph 8 as to whether the DPA is in fact in the interests of justice and that that its proposed terms are indeed fair, reasonable and proportionate. In each case the court is required, if satisfied, to make a declaration and give its reasons. I also explained to the Committee that it was difficult to see the basis on which it would be possible to change my mind between the two hearings. Thus, I had come to the view that there was no reason why one judgment was not sufficient.

In the Rolls-Royce case the hearings were on successive days, and I delivered only one judgment. Now that the reporting restrictions on the Tesco case have been lifted, the Committee will have seen that in that case I reserved judgment after the preliminary hearing, and delivered only one judgment, dealing with both the paragraph 7 and paragraph 8 decisions. In practice the procedure envisaged in the Act is somewhat rigid; it is, of course, a matter for Parliament but, as a matter of practice, my experience suggests that it would help if the court was given greater discretion as to the management of the hearings.

I understand the need for separate hearings under paragraphs 7 and 8: only if provisional approval is expressed will the parties be prepared to enter into a DPA which is, after all, a binding agreement with enforceable terms: the precise approach to the resolution of the two-stage process, however, could be a matter left to the court.

I hope that this additional observation is of assistance.

18 February 2019

Professor David Lewis - Written evidence (BRI0001)

I am Professor of Employment Law and Head of the Whistleblowing Research Unit at Middlesex University. Given my specific area of expertise I am confining my evidence to the relationship between bribery prevention procedures and other arrangements for the reporting wrongdoing. Thus my comments relate most closely to Question 3: "Is the statutory guidance on the Bribery Act 2010 sufficient, clear and well-understood by the companies and individuals who have to deal with it? Should alternative approaches be considered?".

Employers in both the public and private sector are advised to have whistleblowing /confidential reporting/ speak up etc procedures as a matter of self-interest and good governance.¹⁷³ It is far better to learn about suspected wrongdoing through internal channels than to suffer damaging external disclosures. Problems can be dealt with before they escalate and business reputation suffers. There is also a specific legal advantage in having an internal procedure since external disclosures in breach of publicized reporting arrangements are less likely to be protected under Part IVA of the Employment Rights Act 1996. Thus the question arises about the nature of the relationship between general whistleblowing procedures and specific measures on bribery.

Employers are likely to want to know about financial wrongdoing generally and not just bribery in particular. Indeed, many of those with concerns could have difficulty identifying precisely what constitutes bribery, fraud etc. Thus many employers feel it appropriate to facilitate the raising of all types of concerns and do not require reporters to distinguish between bribery and other improprieties. Indeed, many would think it undesirable to have a procedure for reporting suspicions about bribery and a separate procedure for other matters. Thus I think the statutory guidance could say more about the relationship between adequate procedures for the purposes of the Bribery Act and general whistleblowing/speak up arrangements. For example, Page 22 of the current guidance mentions such arrangements but does not attempt to discuss whether or not there should be a duty to report concerns about bribery and the appropriateness of imposing sanctions for not meeting this obligation. On page 29 it is stated that "there must be adequate protection for those reporting concerns". However, there is no discussion about how this might be achieved, for example, maintaining confidentiality, allowing anonymous disclosures or undertaking risk assessments. Last but not least, there is no mention of the statutory rights of workers who make protected disclosures.

In conclusion, I would urge the committee to recommend that the statutory guidance be extended in order to include more detailed discussion about the relationship between adequate procedures under the Bribery Act and more general whistleblowing arrangements. It goes without saying that I would be happy to provide oral evidence if so requested.

10 July 2018

¹⁷³ In some countries such procedures are already required by law and the EU Draft Directive on Whistleblowing 2018 refers to mandatory arrangements.

Dr Nicholas Lord – Written evidence (BRI0019)

This submission is a summary of indicative findings from a research project funded by the British Academy/Leverhulme Trust between October 2016 and September 2018. For the purposes of the work of the committee, this research is less about the provisions of the UK Bribery Act 2010 (UKBA) than about its implementation by UK police forces within the domestic jurisdiction.

The research has completed its quantitative review but the analysis and the qualitative research continues. While the research findings will be unlikely to be finalised by the time the committee has finished its deliberations, the team would be pleased to discuss its emerging findings with the committee if that may facilitate its work. Below we provide an overview of the project before addressing specific issues related to the questions listed in the call for evidence.

Nicholas Lord, University of Manchester

Michael Levi, Cardiff University

Alan Doig, Northumbria University

Karin van Wingerde, Erasmus University Rotterdam

Katie Benson, Lancaster University

1. Project Summary

Project Title: Demystifying the Corruption Paradox by Exploring Bribery 'At Home': A Comparative Analysis of the UK and the Netherlands

Project Researchers: Nicholas Lord (Principal Investigator), Michael Levi, Alan Doig, Karin van Wingerde, Katie Benson

Duration: 24 months

2. Overview

2.1 Historically in the UK the attitudes and responses to domestic bribery have differed from those to bribery involving a foreign jurisdiction. Using bribery in foreign countries to further UK economic/political interests had been argued as a necessity driven by exploitative foreign public officials in a highly-competitive export environment, while bribery within the UK, particularly in terms of bribery involving public sector organisations was increasingly less acceptable and legislated against in the 19th century (although bribery in relation to elections and other areas, as well as the common law offence, were already criminalised). Nation-states are now under intense scrutiny from inter/nongovernmental organisations to stop their businesses from bribing officials in developing - countries¹⁷⁴ and this has led to improved enforcement in response to that scrutiny. But there is no evidence that domestic bribery occurring within UK business and public institutions has emerged as **a priority domestic law enforcement issue**: despite this being a requirement of the UN Convention

¹⁷⁴ The political profile of bribery of public officials in other developed countries is much lower, though also criminalised by the Bribery Act 2010.

Against Corruption 2003 (Article 15) and receiving encouragement in the UK Anti-Corruption Plan 2014 and UK Anti-Corruption Strategy 2017-2022.

2.2 The domestic bribery issue was identified because the majority of the research team have experience of research into policy and operational issues relating to the enforcement of anti-bribery legislation both before and after the Bribery Act 2010. The team considered this to be a major research gap, as much is known, and done, about the international context, but not the domestic context, and we wished to question why the response to domestic and international bribery would appear to vary significantly. This British Academy/Leverhulme-funded project aims to enhance the evidence-base on the nature and control of domestic bribery, comparing the UK with the Netherlands, an economically- and culturally-close neighbour. The project draws on data generated through desk reviews of existing materials, the use of systematic Freedom of Information requests, media analysis and interviews with law enforcement personnel.

3. Addressing the Threat: Context to Research

- 3.1 In order to place in context the purpose of the research it is worth noting a brief overview of the current anti-bribery landscape.

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- 3.2 Enacted in 2010, the UK Bribery Act (hereafter, UKBA) replaced the three Prevention of Corruption Acts (as well as the 2001 UK Anti-terrorism, Crime and Security Act which extended the jurisdictional reach of the Acts overseas) from July 2011. The UKBA applies to bribery at all levels in the UK as well as abroad. There are no *de minimis* amounts and only a very specific number of circumstances where payments may not be subject to the law. The Act has a number of key offences, one of which concerns 'relevant commercial organisations' where the focus is on the company alone and not on individuals (though individuals may be convicted for other applicable offences under the Act).

3.3 The factors that led to the UKBA are various, including the UK being signatory to the UNCAC and the OECD Convention, both of which involve periodic reviews of the UK's implementation of the Conventions, including their incorporation into domestic legislation and distribution of responsibilities among relevant agencies. To reflect this in relation to UNCAC, the UK is currently subject to a review of Chapters II and V. In anticipation of this and through formal inter-institutional engagement, the UK government published in January 2018 a self-assessment¹⁷⁵ based on consultations by the UK Government's Joint Anti-Corruption Unit with the Home Office, Crown Prosecution Service, Serious Fraud Office, National Crime Agency (NCA), Her Majesty's Treasury, Ministry of Justice, Financial Conduct Authority, HM Revenue and Customs, Department for Business, Energy and Industrial Strategy, and the Department for International Development.

¹⁷⁵UK

Second

Cycle

Review-20180108-134632:

https://www.unodc.org/documents/treaties/UNCAC/SA-Report/2018_01_09_UK_SACL.pdf

3.4 The self-assessment - shared across a range of departments and agencies - provides a view of the institutional and policy anti-corruption framework which comprises initiatives by a number of separate departments covered primarily by the Home Office and its agencies. The Treasury (HMT) leads on money laundering policy; and the Department for Business, Energy and Industrial Strategy (BEIS) leads on corporate integrity. Internationally, the Foreign and Commonwealth Office (FCO) leads on progressing objectives with foreign governments and the Department for International Development (DFID) leads on government, open society and rule of law programmes in countries in receipt of UK development assistance; it also funds the International Corruption Unit, now located within the NCA.

3.5 A dedicated Inter-Ministerial Group (IMG) on Corruption has provided coordinated governance on anti-corruption at the political level. The IMG has brought together Ministers and heads of operational agencies to oversee delivery of anti-corruption commitments and set the direction for the Government's domestic and international anti-corruption activity. Coordination lies with the Home Office's Joint Anti-Corruption Unit (JACU; this unit transferred from the Cabinet Office in December 2017), created in 2015 to oversee policy coordination between departments and agencies and implementation of international and domestic commitments. JACU represents the UK government at the G20 Anti-Corruption Working Group, UN Convention Against Corruption (UNCAC), and the OECD's Anti-Bribery Working Group. In 2016, the UK set up a Joint Money Laundering Intelligence Taskforce (JMLIT) led by the National Crime Agency (NCA) which includes representatives from the financial sector, City of London Police, Financial Conduct Authority (FCA), HMRC and the Home Office, to combat (undefined) 'high end money laundering'. The policy dimension is determined through the 2017 Anti-Corruption strategy (and its 2014 predecessor), the 2013 Serious and Organised Crime Strategy (currently under review), the 2015 National Security Strategy, and the 2016 Action Plan for Anti-Money Laundering and Counter-Terrorist Finance.

4. Addressing the Threat: Focus of the Research

4.1 The diversity of drivers for the UK's approach to bribery helps to account for a differential approach to bribery in the domestic context and international context. Overseas the government's Strategic Defence and Security Review identified corruption as a cause of conflict and instability, hollowing out the state institutions needed to tackle it; while bribery committed internationally by UK entities has reputational, financial, political and social consequences for the UK. Domestically the UK's role as a global financial centre is important to the country's prosperity but can also be exploited by both criminals and by politically-connected persons from abroad. The 2016 National Strategic Assessment of Serious and Organised Crime notes that the UK is one of the most attractive destinations for laundering the proceeds of grand corruption, and that professional enablers and intermediaries play a role in this. Subsequent reports and testimony to Parliamentary Select Committees have not modified this position.

4.2 We have noted that the UKBA has on occasion been seen primarily as part of this external or international response to the UK's commitment to its

international convention obligations and is an important component of the firm stance successive governments have taken on the policy and diplomatic stage, exemplified by the 2016 G20 summit in London. We have also noted that this international dimension has been reinforced by the formal inter-organisational framework, by the availability of funding for specific operational purposes, and by ownership of the strategy. Previous and current research by members of the research team suggests that this active approach does not extend to the domestic level (as it does not for other areas of acquisitive crime, such as fraud under the 2006 Fraud Act) and we wished therefore to explore this as a **domestic law enforcement issue** under the Act.

4.3 In responding to this aspect of the implementation, we wish to comment on Q1 and Q2 in the following sections

5. The Scale of the Threat at Domestic Level

5.1 Q1 of the call for evidence asks a highly appropriate question: *Is the Bribery Act 2010 deterring bribery in the UK and abroad?* From a research perspective, this ideally would require knowledge of how much corruption there was before and after the Act, and there is no valid evidence of pre- and post-conduct on this question, whether in relation to domestic or to overseas bribery. Though confidence in UK corporate and public service integrity is reasonably part of the 'threat', anyone seeking to use TI perception index data would be completely mistaken in inferring anything about the extent of corruption by or within the UK, and none of the other bribe payer indices are sufficiently robust to enable valid inferences to be properly made about actual behaviour. However confidently made, assertions about the scale of bribery are not themselves evidence of their truth.

5.2 Given the elapsed time involved in scandal exposure, we are not confident that a lower rate of discovery post-implementation is a sufficient basis for conclusions about the Bribery Act's effectiveness. Evidence of corporate concern about their liability for bribery is indeed relevant, but payment for anti-corruption consulting services and formal codes of practice – though better than not doing these things – are not good or sufficient indicators of behavioural change.

5.3 We are left reasoning about whether the corrupt behaviour in scandals exposed historically or recently would occur today, and if not, the extent to which the UKBA 2010 and changes in the policing and prosecution attitudes, powers and resources is the reason for this reduced willingness to bribe domestically and/or overseas. We respectfully suggest that the Committee adopt this approach to the question they have set.

5.4 Since there are significant reputational and other risks posed by bribery, the research team considered it important to identify the actual extent of cases brought under the UKBA, to examine the extent to which this reflected official rhetoric and policy.

5.5 We have one benchmark in that, in 1983, one of the team published data provided by the Home Office on cases brought under the 1889 and 1906 Acts (the 1916 Act increased the maximum penalty under these Acts for certain

offences) between 1965 and 1978 which suggested that the annual average number of cases brought under the 1889 Act was less than 3 while the number brought under the 1906 Act was over 30; conspiracy to commit corruption cases were less than 4 a year.

5.6 Since that date, a similar profile has been difficult to ascertain for reasons we note below in s.6 although data from 1970s inquiries suggested an average of less than 7 cases a year, with most involving local government officers involving in contracts, planning and undue influence).

5.7 Our current research suggests that while a significant minority of English forces have had no domestic cases under the UKBA, some 25 police forces plus the Ministry of Defence Police and the Serious Fraud Office have had 138 cases over a 6-year period (or >23 a year). We have identified that a large proportion of these cases were recorded by a handful of forces. We strongly suspect that the data undercounts bribery and corruption cases dealt with by the police, due to decisions taken by local police forces to record corrupt behaviours as fraud and CPS decisions to prosecute under the Fraud Act 2006.

5.8 We would argue that the number of cases shows no significant increase or decrease since 1964 and if we take into account a small number of significant variations often occasioned by a single case with multiple offences and offenders, the number per force appears to constitute an approximate 2-3 cases a year. We would add here that there are other means at the disposal of police forces, including the use of money laundering provisions in POCA, the 1889 Act for offences committed prior to the coming into force of the UKBA, the fraud by abuse of position offence in the Fraud Act 2006, and the continuing common law offence of misconduct in public office.

5.9 We note that, where information has been provided, all the offences relate to Section 1; there are no Section 7 offences.

6. Emerging Issues at Domestic Level

6.1 Q2 of the call for evidence asks: *Is the Bribery Act 2010 being adequately enforced? If not, how could enforcement be improved? Do the Serious Fraud Office and the Crown Prosecution Service have the right approach and the resources they need to investigate and prosecute bribery offences effectively?* We can properly assess levels of state enforcement against bribery and its adequacy only in relation to levels and organisation of bribery, but existing methodologies for systematically reviewing levels and nature are under-developed. For instance, relative to what variables are levels of enforcement understood? What is an appropriate threshold against which levels of enforcement can be compared? This is problematic both nationally and locally, as consistent data on both the levels of domestic bribery and enforcement practices are not collated. If enforcement here is being defined in terms of traditional policing practices, such as pursuing criminal prosecution, then an intended or unintended consequence of this may be to neglect the performance of other means or methods of changing behaviour in line with the law, such as self-regulatory practices and informal negotiation and persuasion of business to comply that may also be a product of the Act. For example, self-regulation in the

shadow of prosecution risks. Furthermore, we must also understand what 'non-enforcement' looks like (including non-prosecution agreements), as decisions not to prosecute can provide insight into the functioning of the enforcement framework.

6.1 Data are even sparser in relation to decisions not to investigate cases of bribery when systematic data on non-enforcement may be as illuminating, if not more, than data on enforcement. Thus we would predicate any response to Q2 by suggesting that a number of precursor questions need to be addressed as follows.

7. Ownership and consistency of data:

7.1 One of the difficulties of determining the level and type of offences under the UKBA is the absence of a specific category in the ONS recorded crime data (the data available from commercial studies appears limited to those identified from media sources). Another is the apparent discontinuance of the Public Sector Corruption Index (PSCI), set up as one of the requirements of the 1976 Royal Commission and requiring all forces to report allegations of corruption to the Metropolitan and City Police Company Fraud Branch (as it then was) which would maintain a register and would undertake a collating, evaluation and coordinating role.

7.2 A further issue, as highlighted in our systematic use of FoI requests to obtain data from across UK policing authorities, is that inconsistent data collection and retention methods exist. That is, there are no centralised expectations on how data should be stored, what data should be recorded, and for how long the data should be recorded. We found how far back data records go is dependent on individual force policies, ranging from over 20 years to 12 months. The data that are stored also vary in detail, with some forces supplying rich, contextual insight into individual cases, but others only superficial numbers. This is further complicated as different software and systems are being used across the different forces.

8. Ownership of Coordination of the UK Approach to Domestic Bribery

8.1 Apart from the central role played by the CoLP Economic Crime Academy in training police officers, there is currently no central unit or resourcing for the support of local police forces for what are complex, resource- and time-intensive investigations, often with cross-police boundaries implications.¹⁷⁶ Similarly within local policing, there are often more than one team responsible for investigation, including within police professional standards units for police corruption and within Special Operations Units (*de facto* regional organised crime units linked to the NCA) where organised crime is involved. (Though private to private commercial bribery and private to public sector bribery is only occasionally

¹⁷⁶ It is not yet known whether the new National Economic Crime Centre will have sufficient resources or motivation to provide such assistance, but given the range of likely demands on it and limited new funds granted to it, our default expectation is that it will have a modest effect on domestic and overseas corruption investigative assistance to local police.

connected to Organised Crime Groups who are the focus of the NCA.) We find that the SFO and the Metropolitan Police ICU have a very different and far more active role – and resourcing - when international bribery than when domestic bribery is involved.

9. Bribery: Causes

9.1 Finally we are also finding similar discrepancies when it comes to roles and responsibilities relating to policy and strategy; this also has impact when considering the inter-relationship between Section 7 of the UKBA, bribery, the public sector, expectations on commercial organisations and public sector arrangements to prevent bribery. We are exploring some of the contextual drivers for bribery in the domestic context and find that these vary significantly from those often identified at international level. We consider that these not only reflect many of the characteristics involved in earlier cases but will also have implications for the implementation and effectiveness of the current United Kingdom Anti-Corruption Strategy 2017-2022.

10. Summary

10.1 While our research is in mid-project, we are developing a case map that will illustrate the overall profile of UKBA cases across the UK, as well as identify divergences that may suggest further research to understand why there are variations in reporting. We are also exploring why bribery occurs in the domestic context and thus the implications for the effective delivery of the current strategy. We would be happy to discuss these in more detail in due course.

31 July 2018

Major Event Organisers Association – Written evidence (BRI0013)

1. The Major Event Organisers Association (MEOA) welcomes the opportunity to submit to the Bribery Act 2010 Committees' Call for Evidence. The MEOA is a forum for those responsible for organising Britain's major annual spectator events, both sporting and cultural. A full list of the Association's membership can be found in ANNEX A.
2. The MEOA as a collective are responsible for some of Britain's best loved events from Wimbledon, to the Chelsea Flower Show, to the Grand National and The Open. These events attract millions of spectators and global television audiences, are worth billions to the UK economy and are vital ingredients in the 'soft power' of the nation. The economic, social and cultural impact of one off events such as the London Olympics are widely recognised. However, the similar contribution of other events on an annual basis must not be forgotten. A significant contribution to the costs and profitability of our events comes from hospitality. Any legislation or regulation or interpretation thereof which negatively impacts that market affects in the short and long term the very nature of the event itself, its supply chain such as temporary facilities providers and contract labour, and elements of the local economy such as hotels, transport providers, and retail outlets.
3. There were concerns within the events industry at the time of the introduction of the 2010 Bribery Act, although the particularly helpful foreword to the Guidance for the Act from the then Secretary of State for Justice, Kenneth Clarke MP, was very useful clarification for all parties on how the Bribery Act was to be interpreted in relation to events and hospitality: "Rest assured – no one wants to stop firms getting to know their clients by taking them to events like Wimbledon or the Grand Prix."¹⁷⁷
4. Furthermore, in the Guidance document itself: "By way of illustration, in order to proceed with a case under section 1 based on an allegation that hospitality was intended as a bribe, the prosecution would need to show that the hospitality was intended to induce conduct that amounts to a breach of an expectation that a person will act in good faith, impartiality, or in accordance with a position of trust. So for example, an invitation to foreign clients to attend a Six Nations match at Twickenham as part of a public relations exercise designed to cement good relations or enhance knowledge in the organisation's field is extremely unlikely to engage section 1 as there is unlikely to be evidence of an intention to induce improper performance of a relevant function."
5. However, in recent years it appears that this common sense interpretation is no longer being followed. This has been exacerbated by the introduction of MiFID II at the start of 2018 and the interpretation by compliance officers of the guidance from the FCA. The impact is not only being seen in the hospitality area of business but also increasingly sponsorship, as hospitality is usually a significant element of any sponsorship package or partnership agreement.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/181762/bribery-act-2010-guidance.pdf

- 6.** By way of evidence, The Jockey Club has provided MEOA with three examples of lost business where legislation and / or MiFID have been quoted.
 - 6.1** Neptune Investment Management used to sponsor a trio of races at Sandown Park, Warwick and The Cheltenham Festival, entertaining over 100 guests at The Festival, and smaller numbers throughout the year in the annual box that they took at Cheltenham. Excluding catering, the sponsorship and box package were worth £207k per year in the 2016/7 jump racing season. Their guest numbers declined over a two year period to under twenty people due to the inability of people to accept their hospitality, and The Jockey Club has lost not only the latter but also the sponsorship and the annual box.
 - 6.2** Polar Capital used 'the FCA' as the reason that they cancelled an annual hospitality event at Sandown Park worth over £14k p.a.
 - 6.3** It is not just financial companies who are using compliance as a reason. Grey Point Media in Exeter has not renewed at their local racecourse quoting 'EU legislation'. In 2017 they spent £4k on sponsorship and hospitality at Exeter
- 7.** The Jockey Club has deliberately provided examples of different scales of loss but they illustrate a trend experienced by others as well. The Jockey Club sponsorship and corporate hospitality revenue is worth over £40m per annum. Given the margin on sponsorship in particular, even a small drop in revenue has a significant impact on its business.
- 8.** MEOA are aware that in another sport the title sponsor of a major televised event gave the receipt of a letter from the FCA warning about the giving of hospitality as their reason for not renewing their sponsorship. The FCA have refused an FOI request to disclose this letter or other similar letters written to regulated companies in the financial sector. The email from the FCA is included below as Annex B.
- 9.** All sports and arts events organisers are striving to replace lost business by being more creative in the packages available. Nonetheless, they are having to do so with their hands proverbially tied behind their back because of the attitudinal change to hospitality and sponsorship driven by compliance officers.
- 10.** Following discussions with the DCMS, MEOA recently approached Deloitte's, Ernst & Young, BDO, and Sheffield Hallam University with a brief of undertaking an economic impact survey on the sports and arts sponsorship and hospitality market place. All declined, with one going so far as to say that 'hospitality is a toxic issue'. Hospitality is a perfectly legitimate business sector, with not one single example of a prosecution for abuse following the introduction of The Bribery Act in 2010.
- 11.** It is the understanding of the group that there has been an overreaction from compliance officers, even those not working for firms under the FCA's jurisdiction and that our industry is suffering from significant unintended consequences of the 2010 Bribery Act and MiFID II. We would welcome the Select Committee to explore this area and in particular would greatly benefit from some further clarification, such as that provided by Kenneth Clarke in 2010 to ensure that our events are able to continue providing the economic and cultural benefits that makes them part of Britain's global image.

31 July 2018

ANNEX A

1. Full list of MEOA Members

The Jockey Club
Rugby Football Union
Festival Republic
Silverstone
Lord Mayor's Show
London Marathon
All England Lawn Tennis Club
R&A
Henley Royal Regatta
The Football Association
Burghley Horse Trials
Royal Horticultural Society
Farnborough International
England and Wales Cricket Board

ANNEX B

1 Text of email received from Financial Conduct Authority on 12th January 2018

Our ref: FOI5500
Dear Mr Wallis

We refer to your request under the Freedom of Information Act 2000 (the Act) for the following information:

- "1. Please provide all correspondence sent by the FCA to financial services companies in the last 12 months regarding (1) their sponsorship activities and/or (2) their hospitality arrangements at major UK sporting and cultural events.*
- 2. Please provide details of meetings or discussions with financial services companies in the last 12 months regarding (1) their sponsorship activities and/ or (2) their hospitality arrangements at major UK sporting and cultural events."*

Your request has now been considered.

We have determined that to respond to your request would exceed the FCA's statutory cost limit for complying with a request made under the Act, as contained within the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. For this reason the exemption to disclosure as set out under section 12 of the Act applies. For more information as to why this exemption applies, please refer to Annex A below.

Yours sincerely

Information Disclosure Team
Financial Conduct Authority

Your right to complain under the FoI Act

If you are unhappy with the decision made in relation to your request, you have the right to request an internal review. If you wish to exercise this right you should contact us within three months of the date of this response.

If you are not content with the outcome of the internal review, you also have a right of appeal to the Information Commissioner at Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF. Telephone: 01625 545

2 Section 12 (Costs of compliance exceeds appropriate limit)

- 2.1** We are not required to comply with a request under the Act if it would be too expensive to do so, as estimated in accordance with the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "Regulations") made by the Ministry of Justice. The Regulations provide that, for the FCA, the cost limit is £450, i.e. 18 hours at the rate of £25 per person hour. The Regulations allow us to take into account, when estimating the cost of complying with a request, time spent determining whether we hold the information

requested, locating and retrieving it and extracting the information from the relevant document(s).

- 2.2** As you may be aware, the FCA currently regulates 56,000 financial firms and the information you have requested is not held centrally. In order to carry out the exercise of identifying the information that falls within the scope of your request, we would need to carry out extensive searches of our records for each firm for the last 12 months. In addition, we would also need to search the Outlook repositories for all relevant FCA staff for the same period.
- 2.3** This exercise, we believe, would take well in excess of 18 hours. On that basis, we estimate that the cost of retrieving the information you have requested would far exceed the £450 limit.
- 2.4** Where the estimated cost exceeds the appropriate limit, there is no obligation on the FCA to comply with the request up to the point at which the appropriate limit has been reached nor to provide information for a particular aspect of a request that can be met within the cost limit. As our policy is not to divert our resources from our regulatory functions in order to meet requests under the Act in excess of the cost limit, we will not carry out an exercise to identify the information you have requested.
- 2.5** When we refuse a request because the appropriate limit has been exceeded, it is our general policy to provide advice and assistance to the applicant to indicate how the request could be refined or limited to stand a greater chance of falling within the cost limit. Due to the volume of information that we have to review in relation to your request, we are unable to suggest how your request could be refined or limited to come within the cost limit.
- 2.6** You should note that, in reaching the conclusion that your request exceeds the appropriate cost limit, we have not considered whether any other exemptions apply.

31 July 2018

Metropolitan Police Service - Written evidence (BRI0035)

Deterrence

1. Is the Bribery Act 2010 deterring bribery in the UK and abroad?

The MPS like all other UK Police Forces have responsibility for investigating domestic Bribery Act offences. The NCA and SFO have the national and international responsibilities for investigating and prosecuting such matters. The domestic, London focus was effective from the 29th May 2015, when the remit of the Metropolitan Police, Proceeds of Corruption Unit and the City of London Police (CoLP), Overseas Anti-Corruption Unit (OACU) transferred to the new NCA unit, named the International Corruption Unit (ICU).

It is understood from speaking with senior industry colleagues that there remains a high level of fraud and bribery in many industries in the UK and abroad that is accepted as being day-to-day business. Once corruption is engrained into the system it is very difficult to remove.

To assess the deterrent effect of the legislation the metrics that could be considered would be reporting levels, receipt of intelligence (whistleblowing mechanism outside of MPS) and the level of success in prosecuting those matters referred to the MPS.

Independently the MPS have 26 classified allegations of Bribery directly reported since July 2013, one in 2013, 5 each in 2014, 2015, 2016 and 2017 and 4 so far in 2018. Reporting levels remain fairly low and stable. Out of these allegations two have resulted in charges, one in an adult caution and four not proceeded with on advice of the CPS.

Anecdotally from our investigations, it is certainly clear that larger companies have been following the guidance on the Bribery Act and educating their staff. In reviews of seized electronic devices, we have seen companies with bespoke training packages sent out to all individuals that required completion and logging on personnel records. In one case, the company also had staff undertake a quiz to test their knowledge with a pass being required. Some companies are employing compliance officers to deal with the legislative requirements for them. We have seen published and displayed policies regarding Anti-Corruption, Gifts, Hospitality and Entertainment Policy as well as a

whistleblowing help line. However due to the low numbers of reported allegations it is unclear how much of a deterrent this is. If the rewards are high and risk of prosecution is low then offences will continue.

Any MPS Bribery prosecutions are supported by an appropriate media strategy to maximise the deterrent effect. An early conviction in 2011 of Munir Yakub Patel, who worked at Redbridge Magistrates' Court generated press interest so it is likely that this went some way to deterring bribery in the public sector and especially HMCTS.

Patel, of Green Lane, Dagenham, took £500 to avoid putting details of a traffic summons on a court database. He admitted one count of bribery but the prosecution believe he earned at least £20,000 by helping 53 offenders he became the first person convicted under the Bribery Act has was jailed for six years.

Enforcement

2. Is the Bribery Act 2010 being adequately enforced? If not, how could enforcement be improved? Do the Serious Fraud Office and the Crown Prosecution Service have the right approach and the resources they need to investigate and prosecute bribery offences effectively?

The MPS have had over 29 reported allegations of Bribery in the last five years. 26 of these offences were dealt with by local policing being low level offences, three currently sit with the Complex Fraud Team and incorporate major organisations.

This question seems to be from the standpoint that only SFO/CPS investigate offences under Bribery Act 2010. The reviewing committee should be aware that such offences are often investigated by the MPS and most likely other forces.

Two of the three cases the Complex Team currently have were referred to the SFO for investigation however rejected as they did not have evidence of National or International wrongdoing.

Complex investigations featuring large companies are very resource-intensive in terms of personnel and specialist equipment.

The resourcing requirements arise from the fact that suspect companies are targeted in these investigations leading to the collection/interrogation of large quantities of material. Often the company does not want to co-operate and will hide behind civil litigation and Legal Professional Privilege material requiring independent counsel interaction to review the material before the investigators can start to analyse the product.

Due to the lack of technical solutions, documents require manual analysis and with hundreds of thousands of documents in each case this review can take over 18 months to complete.

We are aware of the large workload currently facing the Crown Prosecution Service. CPS' Special Fraud Division have mentioned about having a limited ability to prosecute offences investigated within one of our operations due to its size.

International requests are taking anywhere between six to 12 months for commencement by CPS and charging advice takes beyond 12 months to authorise - even though we prepare our disclosure

before charging authority is sought and have ongoing liaison with the lawyer from the very start of an investigation.

Guidance

3. Is the statutory guidance on the Bribery Act 2010 sufficient, clear and well-understood by the companies and individuals who have to deal with it? Should alternative approaches be considered?

We believe this is the case for the bigger organisations. From our reviews of devices, we have seen companies with bespoke training packages sent out to all individuals that required completion and logging on personnel records. In one case the company also had staff undertake a quiz to test their knowledge with a pass being required.

Some companies are employing compliance officers to deal with the legislative requirements for them. We have seen published and displayed policies regarding Anti-Corruption, Gifts, Hospitality and Entertainment Policy as well as a whistleblowing help line.

However for some the smaller companies we have reviewed there is no evidence that they have complied with the Bribery Act or they had a belief that the Bribery Act was relevant to them. There is no evidence in regards to policies or training.

Challenges

4. How have businesses sought to implement compliance programmes which address the six principles set out in the Ministry of Justice's guidance on the Bribery Act 2010? What challenges have businesses faced in seeking to implement their compliance programmes? Are there any areas which have been particularly difficult to address?

Once the guidelines have been passed to staff, e.g. on line training packages for the MPS, suspects defences all fall away. There is a reliance on whistle blowers and some of these processes' can be difficult to manage as it is hard to define to what extent is that individual involved in the offence themselves. In Operation Isetta the whistle-blowers were not taken on as witnesses due to their behaviour within the company.

5. What impact has the Bribery Act 2010 had on small and medium enterprises (SMEs) in particular?

In our experience the Bribery Act 2010 is yet to have an impact on SME's as business practices are ingrained.

6. Is the Act having unintended consequences?

Although Bribery is a criminal offence, companies will primarily look at protecting shareholder interests therefore may not assist police in any criminal investigations.

We have seen a Board of Directors acting to contain the damage of any bribery offence discovered, choosing to go through the civil courts to retrieve losses to their company, rather than making an official report. The damage to their reputation and disclosing their company details in a criminal trial is something that companies are keen to avoid and therefore prefer to settle.

Deferred Prosecution Agreements

7. Has the introduction of Deferred Prosecution Agreements (DPAs) been a positive development in relation to offences under the Bribery Act 2010? Have DPAs been used appropriately and consistently? Has their use reduced the likelihood that culpable individuals will be prosecuted for offences under the Act?

DPA's have yet to be used within the MPS however it is under current consideration in one investigation and viewed as a positive strategy for the prosecution.

International aspects

Note points 8 & 9:

International Bribery is not investigated by the MPS therefore we have no experience of this and are not in a position to comment.

8. How does the Bribery Act 2010 compare with anti-corruption legislation in other countries? Are there lessons which could be learned from other countries?

9. What impact has the Bribery Act 2010 had on UK businesses and individuals operating abroad?

02 August 2018

National Crime Agency – Supplementary written evidence (BRI0052)

Further to my attendance before the House of Lords Committee on the Bribery Act 2010 on Tuesday 27th November 2018, I agreed to review whether the Action Fraud reporting system is also able to record instances of alleged bribery and corruption, and confirm the position in writing.

Action Fraud is the UK's national fraud and cybercrime reporting centre, and as such there is no current formal provision for it to receive reports on bribery and corruption.

In line with the UK's Anti-Corruption Strategy, the Home Office will launch a new initiative to provide a reporting mechanism for allegations of bribery and corruption, and are currently scoping options for this.

It may be worth noting that the Serious Fraud Office and the NCA's International Corruption Unit (ICU) do provide a means of reporting allegations of bribery and corruption by members of the public through their respective websites.

I hope that the above satisfactorily answers the Committee's question and provides reassurance around reporting mechanisms for bribery and corruption.

Donald Toon
Director Prosperity

5 December 2018

National Crime Agency – Supplementary written evidence (BRI0061)

Further to my letter of 5th December, the House of Lords Committee on the Bribery Act 2010 asked a further question, specifically what role do Suspicious Activity Reports ('SARs') play in the detection of possible bribery, and how often do SARs lead to active bribery investigations?

I can confirm that SARs are a valuable source of intelligence for law enforcement agencies and contributes to tackling a range of threats, including bribery. The contents of which, are made available through the UK Financial Intelligence Unit (UKFIU) to all UK law enforcement agencies, including NCA, SFO and all UK police forces. The UKFIU also proactively analyses the database to identify SARs relating to potential international bribery and corruption and refers relevant matters to the International Corruption Unit (ICU) in the NCA.

The ICU may then use their specialist resources, skills and assets to augment their understanding of the preliminary referral which, could then lead to engagement with domestic and international partners. Whilst the ICU HAVE examples where SARs have been used to initiate enquiries and investigations, their primary use has been to enhance existing activity and in turn inform the national strategic intelligence picture.

It may interest you to know that in 2017, the UKFIU received a SAR seeking its authority to complete a single transaction in the region of 500 million US dollars. The UKFIU conducted initial checks and identified links to overseas Politically Exposed Persons. The matter was referred to the NCA's ICU for advice which resulted in consent being refused on the basis that the transaction appeared to be linked with embezzlement and grand corruption, with the likely aim of stealing significant funds from the Central Bank of Angola. In order to ensure the monies were returned safely, the NCA needed to engage with the Angolan state authorities which would take longer than the time limits stipulated under the Proceeds of Crime Act 2002 and so took the decision to apply to the courts for the first ever extension of the SAR moratorium period, a new power under Criminal Finances Act 2017. This application was granted and illustrates how legislative tools are enhancing the capabilities of the NCA and our partners to tackle bribery and corruption. The Angolan state funds were recently repatriated safely back to the originating account and this successful outcome was highlighted in the recently published FATF mutual evaluation report on the UK, which can be found at www.fatf-gafi.org.

In conclusion, SARs provide valuable intelligence from the private sector that would otherwise not be visible to law enforcement. Some SARs provide immediate opportunities to stop crime and arrest offenders, others help to detect crime that needs investigating, while others provide intelligence useful for the future. All contribute to the UK's strategic assessment of the threat from criminality and that is why the NCA has been working closely with partners across the public and private sectors as part of the Home Office led SARs Reform Programme to improve analysis and move, we hope, to a more intelligence-led, risk based approach. More detailed information on this and this year's SARs

National Crime Agency – Supplementary written evidence (BRI0061)

report can be found at
www.nationalcrimeagency.gov.uk/publications/suspicious-activity-reports-sars .

Donald Toon
Director Prosperity

18 December 2018

Peters and Peters Solicitors LLP – Written evidence (BRI0028)

1. Peters & Peters is a leading UK law firm specialising in business crime, commercial litigation and regulatory investigations. We regularly advise corporations and individuals under investigation in complex and high-profile corruption (and other white-collar crime) cases. Our work encompasses:
 - a. defending individuals and corporates subject to investigation and prosecution by the SFO and other UK law enforcement
 - b. acting for compelled witnesses in SFO investigations
 - c. conducting internal investigations for companies
 - d. acting for individuals subject to such investigation
 - e. advising individuals and corporates subject to investigation by overseas law enforcement
 - f. providing advice on compliance with the Bribery Act, both for domestic and overseas companies
 - g. providing advice on the introduction, improvement or testing of ABC (and other) compliance frameworks
 - h. providing ABC remediation programmes, including training.

Is the Bribery Act 2010 deterring bribery in the UK and abroad?

2. The Bribery Act 2010 (the Act) has undoubtedly had a major impact both in the UK and abroad. Most companies are concerned about the wide extraterritorial reach of the Act and the sanctions they face if it is breached. They are committed to trying to implement policies and procedures to mitigate the risk of bribery.
3. In our experience, the greatest impact has been on large multinationals. These companies generally consider that exposure for paying bribes is likely to have a significant adverse impact on their business. The majority are therefore strongly motivated to mitigate that risk. Multinationals generally have substantial internal resource in legal, risk and/or compliance departments and are able to engage external service providers, often at a high cost, to advise them on compliance. Such entities tend to be in a better position to assess the likelihood of bribery occurring in their organisation, identifying the areas of risk and implementing a control framework. They are also more likely to have strict financial controls and centralised corporate governance and oversight, all recognised as important for embedding ABC controls, together with the support of experienced professionals who can monitor and report on bribery risks and controls at all levels of the business. In addition, large companies operating internationally are often able to rely on a number of factors to combat and overcome requests for bribes. These include, for example: recognition that what they are selling is highly sought after and cannot be substituted; their ability to withdraw from certain types of business or markets if the risk is too high; and the influence with governments that comes with payment of high levels of tax and employing high numbers of people.

4. At the other end of the spectrum, there is still a minority for whom the Act provides little or no deterrence. Typically, this group comprises more small to medium size businesses with limited internal legal, risk and compliance resources. Some entities lack awareness of the Act or fail to understand the implications of it, in terms of its extraterritorial effect, the scope of its provisions and/or how to identify/mitigate risk. Some consider it impossible to do business in certain sectors/geographical locations without bribing and are prepared to take that risk. The view that this is just “*part of doing business locally*” or part of “*local business culture*” is still given as a justification. In the worst case scenario, such systems and controls that are introduced pay no more than lip service to the concept of “adequate procedures”, whilst parallel measures are introduced to circumvent the Act (for example by moving certain business operations/authorisations overseas) or which attempt to conceal the payment of bribes. These businesses often do not have significant bargaining power and view the payment of bribes as necessary for the winning or retention of business. The deterrent effect of the Act on this minority is only likely to increase following widespread enforcement, thereby increasing the perceived risk of investigation/prosecution.
5. The vast majority of companies fall in the middle of this spectrum. They are aware of the Act and want to act ethically and in accordance with the spirit and letter of it. However, they may struggle both to identify and assess risk and to implement appropriate systems and controls. This may arise from a lack of internal expertise; the need to focus scant resources on business development and delivery; and/or budgetary restraints precluding them from accessing appropriate external advice. Whilst the Act has a deterrent effect for this group, additional support and guidance for organisations in this category would, in our view, would increase the effectiveness of the Act in actually preventing (rather than just deterring) bribery.

Is the Bribery Act 2010 being adequately enforced? If not, how could enforcement be improved? Do the Serious Fraud Office and the Crown Prosecution Service have the right approach and the resources they need to investigate and prosecute bribery offences effectively?

6. We are aware of 13 cases involving successful enforcement of the Act: 7 prosecutions brought by the CPS following investigation by the Police or NCA, and 6 disposals by the SFO. Of the latter, 3 involved criminal charges being brought and 3 involved Deferred Prosecution Agreements. The earliest prosecutions under the Act were carried out the CPS, following investigation by the Police. They involved individuals, either accepting or offering bribes, where the evidence was entirely domestic. The subsequent prosecution of a dormant company for the s7 offence demonstrated what many have considered an unsatisfactory consideration of the public interest in an apparent desire to be the first to prosecute a contested s7 case. In terms of enforcement of the Act, the CPS will continue to play a secondary role.
7. That the SFO took some time to dispose of its first case under the Act was entirely to be expected. It takes a considerable length of time to

discover, investigate (particularly where assistance is required from overseas) and prosecute substantial economic crime cases. Although the SFO's achievements are respectable, and in the case of Rolls Royce, rival the US Department of Justice, improvements to enforcement require speedier and more efficient investigation and prosecution. The SFO appears to be moving in the right direction. The announcement in April that the SFO had upgraded its capability to review large quantities of documents through use of artificial intelligence should lead to faster and less resource intensive investigation of cases that have (at least) many hundreds of thousands of pages of material to review. Also welcome is the news that the SFO's core funding is to be increased this year, with less reliance on blockbuster funding.

8. The latter was always a false economy. The optimum model for resourcing the SFO must involve permanent, well-motivated, and experienced staff, rather than reliance on temporary personnel allocated not based on need, but the funding model applicable to a particular case. That said, experienced SFO staff have become recruitment targets for the many US and City law firms developing investigations practices. It is self-evident that the SFO cannot compete on salary. Other retention methods must be relied upon: this should start with the maintenance of the organisation as an independent specialist economic crime investigation and prosecution body, following the Roskill model and free from needless uncertainty about its future.
9. The introduction of the European Investigation Order was welcomed by law enforcement as an instrument to streamline the process of obtaining and transmitting evidence between EU member states, with mutual recognition of judicial decisions, standardised forms and specified time limits. Like many things, their future post Brexit is uncertain. Considering that complex bribery investigations are almost invariably international in nature, a return to using Mutual Legal Assistance for all requests will act as a brake on investigations.
10. That is not to say that the SFO's approach to investigating and prosecuting corruption has been note-perfect. Far from it. Two policies seem designed to achieve entirely counter-productive results. The first is the SFO's policy on the attendance of lawyers at s2 interviews. A policy without statutory footing which alters decades of practice, and puts solicitors in conflict with their professional duties, does not aid the effective investigation and prosecution of corruption. Although not yet subject to challenge, no doubt it will be in the appropriate case.
11. Similarly, the stance taken to claims of litigation privilege over steps taken during an internal investigation, in particular interviews conducted by lawyers retained by the company, risks dis-incentivising companies from conducting an investigation. The issue is currently subject to consideration by the Court of Appeal (ENRC), but the voluntary disclosure of information to the SFO is at risk if companies fear that their range of available decisions will be more limited if they conduct a thorough investigation.

12. Consideration should be given to some form of reporting without consequence for smaller, facilitation type payments which are sought as a matter of course in some countries and in relation to which non-payment can result in delay, inconvenience or, at worst, threat to the safety of employees. Such reporting would enable the UK government to identify systemic bribery/extortion in real time and work at an inter-governmental level to find solutions.

Is the statutory guidance on the Bribery Act 2010 sufficient, clear and well-understood by the companies and individuals who have to deal with it? Should alternative approaches be considered?

13. The defence of adequate procedures has led to a huge growth of consultants and professionals promoting and devising corporate compliance programmes. For larger companies and the individuals they employ it is the training they receive and the compliance programme itself, rather than the underlying guidance, that they are likely to know and understand best.
14. The guidance is likely to remain more familiar to specialist practitioners than the companies themselves. Concepts such as “proportionate procedures” and “risk-based approach” may be well understood by legal practitioners or the Ministry of Justice, but their meaning may not be sufficiently clear to small and medium sized businesses that are impacted by the provisions of the Act. That said, the guidance issued by the Ministry of Justice when the Act came into force should be reviewed and updated to ensure that it reflects developments in best practice over the last seven years. In particular, it would be helpful if the case studies reflected real world examples encountered by the SFO since 2011.
15. Given the difficulties experienced by some small and medium sized enterprises in understanding the Act, how to assess risk and the implementation of “adequate procedures”, we consider that enhanced guidance would make the Act more effective in preventing, and not just deterring bribery. The current guidance provides high level principles described in very broad terms. Whilst it is important that guidance is not prescriptive and allows for the implementation of appropriate compliance frameworks, tailored to individual business needs, the guidance is of limited use as a practical stand-alone tool for companies seeking to implement appropriate policies and procedures. Examples of practical guidance include the ABC tool kit published for free online by Transparency International UK and the ISO 37001:2016 Anti-bribery management systems – requirements with guidance for use (a paid for resource). These set out how companies can assess risk, what types of controls can be implemented and provide checklists. These provide a clearer basis for a company seeking to devise/enhance an effective ABC compliance framework.
16. We also consider that information on how prosecutors will assess the adequacy of procedures would be useful and would address the concern of some companies that the assessment only takes place with the benefit of hindsight when an incident has been identified, and that in those

circumstances no procedures will ever be good enough. The US Department of Justice has published a document entitled "*Evaluation of Corporate Compliance Programs*" to help companies understand how any evaluation of procedures will be conducted. We would urge the UK government to consider providing similar guidance.

How have businesses sought to implement compliance programmes which address the six principles set out in the Ministry of Justice's guidance on the Bribery Act 2010? What challenges have businesses faced in seeking to implement their compliance programmes? Are there any areas which have been particularly difficult to address?

17. We consider that the House would be best assisted by considering the experience of companies who have implemented compliance programmes.
18. We do have one observation about the implementation of compliance programmes. Parliament has introduced two pieces of criminal legislation based on the same model of corporate criminality – the failure to prevent model: namely, the Act and the Criminal Finances Act 2017 (failing to prevent the facilitation of tax evasion). Both encourage compliance programmes designed to (a) address the risks faced by a business and (b) provide a defence in the event of breach. However, the standard against which each is judged is different. For the Act, procedures have to be 'adequate'. For the Criminal Finances Act, procedures have to be 'reasonable'. The rationale is not immediately apparent, and potentially confusing.

What impact has the Bribery Act 2010 had on small and medium enterprises (SMEs) in particular?

19. We have largely answered this question above. In our view, the majority of SMEs want to comply with the Act but some find this difficult to achieve given the limited resources they have available. These entities would benefit from freely available, clear, practical guidance to assist them in identifying risks and implementing proportionate procedures. We endorse Transparency International UK's role as a leading provider of such guidance.
20. A small minority of SMEs view the Act as unrealistic and an impediment to business. In these organisations, the impact is likely to drive an open culture of bribery to one of concealment.

Is the Act having unintended consequences?

21. In some instances, businesses are moving their operations or aspects of their operations outside of the UK in a bid to avoid liability whilst continuing to engage in the same conduct.
22. There is a perception by some that those who are not subject to such stringent anti-bribery provisions can continue to bribe, and win business in preference to those who are subject to the Act. A lack of empirical evidence makes it difficult to comment further.
23. The Act can prevent open discussion of the types of bribery issues faced and how they have been resolved both within and between organisations,

as well as at a governmental level. This means that opportunities for training, deterrence and counter-bribery programmes leveraged by communal support amongst businesses or between governments are being missed.

24. Individuals and entities based outside the UK have identified that whistleblowing programmes and self-reporting are concepts which they feel are being imposed upon them by (mainly) Western jurisdictions without sensitivity to the issues that these raise in other parts of the world. Reference has been made to the fear of whistleblowing/self-reporting in countries where authorities and courts may themselves be susceptible to corruption, and that informing, reporting and governmental investigations could lead to severe repercussions in jurisdictions without a strong rule of law, and reputation for serious human rights abuses. This point has been raised those doing business in, for example, Brazil, Venezuela, China, Zimbabwe, Indonesia and Myanmar.

Deferred Prosecution Agreements

Has the introduction of Deferred Prosecution Agreements (DPAs) been a positive development in relation to offences under the Bribery Act 2010? Have DPAs been used appropriately and consistently? Has their use reduced the likelihood that culpable individuals will be prosecuted for offences under the Act?

25. DPAs offer prosecutors an alternative disposal for economic crimes, including offences under the Act. The availability of a DPA alongside the s7 offence, which criminalises the failure to prevent, rather than the commission of, bribery, provides a far more palatable disposal for companies than prosecution. They offer speedier resolution; they avoid mandatory debarment; they avoid the costs of trial; and the publicity which flows from a DPA is (slightly) less adverse than from prosecution.
26. That three of the four DPAs seen so far have related at least in part to the s7 offence suggests a symbiotic relationship between the two. That is likely to continue. However, it is probably time to consider whether the financial incentive of a DPA rather than prosecution should be improved, to increase the volume of self-reporting of conduct the SFO may never otherwise discover. As it stands, the difference between a fine and confiscation post-conviction, and a financial penalty and disgorgement as part of a DPA is not sufficiently wide. Downward adjustment to the financial consequences which flow from a DPA may further encourage self-reporting.
27. There is also uncertainty about whether a self-report is necessary for a DPA, flowing from the decision to offer one to Rolls Royce. Rolls Royce did not self-report, but its extraordinary level of cooperation thereafter opened the door to a DPA. Companies may think they can do the same.
28. There have only been four DPAs so date: three for corruption (Standard Bank, XYZ, Rolls Royce) and Tesco. No individuals were prosecuted for Standard Bank. There are ongoing proceedings against individuals connected to XYZ. Three former senior employees of Tesco are due to

have a retrial, whilst the investigation into Rolls Royce employees continues. Unfortunately, the sample size is not sufficiently large to discern trends for individuals, but there remain concerns that the public perception of criminal wrongdoing that accompanies the announcement of a DPA may adversely affect individuals subsequently tried.

How does the Bribery Act 2010 compare with anti-corruption legislation in other countries? Are there lessons which could be learned from other countries?

29. The Bribery Act 2010 is widely perceived as being a tough piece of legislation, in light of both its lengthy extra-territorial reach and the strict liability for failure to prevent bribery. Compared to the US Foreign Corrupt Practices Act 1977, it is relatively new and clear, as well as being wider in scope, covering both public and private bribery. As such, it is arguably better designed for dealing with the complexities of modern business when prosecuting bribery.

30. That said, the FCPA is still regarded as the greater global threat. This is almost entirely due to the perception internationally that the US Department of Justice has a more consistent enforcement record, backed by greater resources, making it more likely that the DOJ will pursue foreign companies and foreign individuals as well as domestic. How the international attitude towards the Act develops is likely to be significantly affected by the level of enforcement activity in the coming years.

What impact has the Bribery Act 2010 had on UK businesses and individuals operating abroad?

31. We have nothing to add to our responses above.

Neil Swift (Partner), Hannah Laming (Partner), Celia Marr (associate)

31 July 2018

Ian Pigden-Bennett - Written evidence (BRI0053)

By way of background, I have uncovered two separate incidents of Bribery one in 2011 which resulted in many people being prosecuted with custodial sentences including the main perpetrator, Ron Harper a member of the Royal Household, who accepted £100K of bribes over 12 years for awarding contracts. The second incident was at Skansen Interiors Limited where the Managing Director paid a 3rd Party Project Director two payments of £3K and £7K in March 2013 with promised a 3rd payment of £29K to be paid in 2014 which I stopped. So in essence the Bribery Act is working and successfully processing perpetrators through the legal system with successful outcomes.

I have two main concerns about the Act;

Firstly I have seen and I have been made aware of cultural acceptance within some sectors where by excessive hospitality is still deemed to be acceptable and common practice. Apparently no specific demands are made for such favours, but a European golf trip or a weekend trip to a Grand Prix etc. I would say are excessive and must leave the recipient with some kind of conscious debt which may lead to them contravening the Bribery Act.

I think the Bribery Act should clearly define what is acceptable in monetary value or what type of entertainment is acceptable as I understand this is very much still dependant on the individual companies and there is a view that 'as long as it is logged in the in the hospitality book it's ok' type of mentality. Much stronger guidance is required.

The second issue is companies self-reporting and then being charged for offenses as it is deemed to be in the Public Interest. This maybe a CPS issue rather than specifically the Bribery Act but it is something that I believe the committee should be made aware of.

When I joined Skansen Interiors in 2014 and uncovered the wrong doings undertaken in 2013, I investigated, summarily dismissed the Directors involved, waited for their appeal period to expire and then reported my findings to the National Crime Agency with a Suspicious Activity Report and in parallel reported my findings to the City of London Police.

The City of London Police had mine and the company's full co-operation and I gave them weeks of my time and full access to staff/systems. During this 'free access' period of 21 months it was concluded that the company may have contravened the Bribery Act by having inadequate procedures to prevent a bribe from occurring. One could question if this was an abuse of privilege by the City of London Police? A Shareholder and Non Executive Director was cautioned and interviewed – 14 months later in early 2016 and company was charged in March 2017 for having inadequate procedures to prevent a bribe from occurring. Despite verbal CPS agreement via their Barrister in Southwick Crown Court to enter in to a Deferred Prosecution Agreement this was reneged on by the CPS as they believed it was in the Public Interest to prosecute the company.

My question for the Select Committee 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?

Further information to a specific question asked by the Select Committee on the Bribery Act 2010

In their written evidence, the City of London Police noted that "Prior to reporting this offence to the police, [Skansen] transferred all assets to the parent company and dissolved the company, sacking those responsible for the bribery", which meant that the company "would face no penalties". This was indeed the case, and Skansen Interiors Limited was given an absolute discharge after its conviction. Why was the decision taken to dissolve Skansen Interiors Limited before self-reporting? Could other companies with similar structures choose to do the same in future?

The City of London Police are totally incorrect with this statement about the company being dissolved to avoid any penalties and this was raised and accurately recorded in Southwick Crown Court. Therefore, for completeness I have laid out the actions that were taken below

The offences were reported to the National Crime Agency and City of London Police in March 2014 once I (Skansen Interiors) had completed internal investigations, disciplinary hearings, that resulted in two directors being summarily dismissed for gross misconduct and their appeal period had expired. Skansen Interiors was made dormant 30th April 2014 as part of a financial reconstruction which effectively converted loan notes in to equity, the value of the shares were reduced by £1 to 20 pence per share. Skansen Interiors assets were acquired by Skansen Group (its parent company) to create a positive balance sheet whilst retaining corporation tax 'credits' due to the previous 3 years of losses that exceeded £5M.

Skansen Interiors was made dormant at the end of this process as effectively there was effectively nothing there.

Further information on 'adequate procedures'

I strongly believe that Skansen Interiors had adequate procedures that were reasonable for the size and complexity of the business - but they did not have a bespoke policy until I put one in place.

Everyone knew at Skansen Interiors that making a bribe was wrong and illegal and even when I issued a bespoke anti-corruption policy as attached on the 13th February 2014, the MD, Stephen Banks, certainly had sight of it as it was emailed to every employee. This did not prevent him from authorising payment of a falsified invoice to pay Graham Deakin a further £29,000 some 11 days later copy attached as Exhibit IPB 12. Stephen Banks eventually signed to be compliant with the policy 4th March 2014.

My point here is that no matter how robust companies' procedures are if senior leaders are intent on acting inappropriately no procedures will prevent this.

Ian Pigden-Bennett,
Ex-CEO of Skansen, speaking in a personal capacity.

10 December 2018

Pinsent Masons LLP – Written evidence (BRI0041)

About Pinsent Masons LLP

Pinsent Masons LLP is a full service international law firm with offices across the UK, Europe, the Middle East, Africa and Asia. We have a band 1 Corporate Crime, Compliance & Investigations practice in the UK which works closely with our highly ranked Civil Fraud and Asset Recovery team to provide holistic, joined-up advice to our clients.

1. **Question 1: Is the Bribery Act 2010 deterring bribery in the UK and abroad?**
 - 1.1 Yes, in our experience the Bribery Act 2010 and, in particular, the corporate failure to prevent bribery offence has had a deterrent effect. For example, companies have responded to the introduction of the Bribery Act 2010 by adopting an increasingly cautious approach to the use of overseas agents, distributors, business partners and sponsors given the higher corruption risks that can arise with these third parties. We have also seen enhancements to the controls companies have put in place in other areas – for example, in respect of gifts, hospitality and paying for employees and officials of prospective customers to visit sites and facilities in the UK due to Bribery Act 2010 related concerns with this type of business expenditure.
2. **Question 2: Is the Bribery Act 2010 being adequately enforced? If not, how could enforcement be improved? Do the Serious Fraud Office and the Crown Prosecution Service have the right approach and the resources they need to investigate and prosecute bribery offences effectively?**
 - 2.1 Enforcement levels for corruption-related offending have increased since the introduction of the Bribery Act 2010, but remain low in terms of overall numbers of cases, particularly in comparison to some of other countries (for example, the US and Germany). This appears to be due, in part, to a lack of sufficient resources being allocated to UK law enforcement agencies and prosecutors. In turn, this leads to risks that companies perceive inconsistencies in the approach of those agencies when tackling unethical behaviours of their competitors or other potential wrongdoers. Resource issues can also mean cases take longer to reach a disposal, having a wider impact on businesses on a medium term basis.
 - 2.2 Although the general level of enforcement has been low, there have been a number of complex investigations against large companies, particularly relating to significant levels of bribery in monetary terms or relating to overseas bribery of foreign public officials, where there has been increased enforcement by the Serious Fraud Office ("SFO"). The stability to the SFO's funding going forward, and its relative increase in resources is to be welcomed, though more support for the agency should be assured going forward. In our experience the SFO's cases have also been assisted by corporate self-reporting or voluntary disclosures by companies once an investigation by the SFO commences.

- 2.3 While self-reporting and voluntary disclosures may be a welcomed development from a law enforcement perspective, there is also a need for proactive and intelligence-led enforcement in parallel to this. In our experience, suspicious activity reports to the National Crime Agency ("NCA") concerning suspicions of bribery that arise in the context of corporate transactions rarely result in any form of follow up investigation by the police or other agencies, although we understand there have been a number of enhancements in how this intelligence gathering is disseminated across agencies. However, the perception is that the low level of this type of proactive enforcement activity is partly due to a lack of adequate resources. There is also little sign of enforcement against lower level intra-UK bribery, particularly where there is not a corporate self-report. Most bribery cases fall below the SFO's threshold of interest and are matters for the police and Crown Prosecution Service ("CPS"). The police and CPS have challenges with depth of resource and expertise to take bribery cases forward, particularly if there is an international dimension. To date, the only successful prosecution of a company by the CPS for the failure to prevent bribery offence was of Skansen Interiors Limited. It is of note that the case resulted from the company self-reporting.
- 2.4 Positive steps have been taken to merge a number of different investigating units into one NCA bribery and corruption unit named the International Corruption Unit. Although it may be too early to measure the effect of this change, we note that we have not seen any publicised information about the number of bribery investigations being undertaken by this agency.
- 2.5 There is also a limited amount of information available in relation to the bribery-related matters that have been prosecuted by the CPS. This lack of publicity along with the very high levels of publicity in relation to SFO related prosecutions and DPAs can lead to the perception that UK authorities are only interested in prosecuting high level and complex bribery, and that other types of alleged misconduct may be falling through the gaps.
- 2.6 Collecting and then publishing details of the enforcement that does take place has been shown to be a very effective anti-corruption strategy in other jurisdictions. See for example the websites of CPIB in Singapore and ICAC in Hong Kong, which have regular case progression updates and disposals reported across sectors and even for lower level cases, therefore underlining the zero tolerance enforcement policy in anti-corruption in Singapore and Hong Kong.
3. **Question 3: Is the statutory guidance on the Bribery Act 2010 sufficient, clear and well-understood by the companies and individuals who have to deal with it? Should alternative approaches be considered?**
- 3.1 While the statutory guidance sets out helpful principles, and was a useful document at the implementation stage of the Bribery Act 2010, it is high level and would benefit from updating and more concrete guidance.

Secondly, given what is adequate for a small company operating within the UK is often very different from realistic compliance expectations for international operators in high risk sectors, consideration should be given to separate guidance for different types or size of business. We consider there are good reasons to consider producing simplified, less onerous and more practical guidance for smaller businesses. For example, the guidance for smaller businesses could include template procedures they can use as a reference point for putting in place the recommended requirements without the need for paying for specialist legal or consultancy advice. We note that having different levels of requirement or expectation of what is reasonable depending on business size is a distinction that has been developed in the French anti-corruption law, Sapin II.

3.2 Specific points concerning the current guidance are:

3.2.1 The examples provided in the current guidance around gifts and hospitality in the introduction to the guidance and at paragraph 26 to 30 are vague. That may lead to companies adopting an overly cautious approach to gifts and hospitality in low risk settings which the Guidance notes was not the intention of the Government.

3.2.2 On the other hand, there is a bizarre and potentially dangerous example of acceptable hospitality given at paragraph 31 of a UK company paying for a public official and the official's spouse to meet in New York and attendance at a baseball match and fine dining. Many anti-corruption practitioners would disagree with it being acceptable for a UK company to pay for a foreign public official, let alone the official's wife, to meet in New York.

3.2.3 Paragraphs 44 to 49 concerning facilitation payments, the duress defence and prosecutorial discretion are also vague and little reliance can be placed upon the guidance here by businesses. Practical assurance should be given if a person feels threatened or considers that their own safety, the safety of other or even their personal property is at risk. The guidance, as currently drafted, means that individuals faced with a single demand for a payment and in-house and external lawyers who advise on these issues, often in the heat of challenging and sometimes dangerous circumstances, have to make judgement calls that could see them exposed to committing a criminal offence because the statutory guidance is vague and impractical, or, alternatively giving cautious legal advice (for example, because of the uncertain application of the duress defence and the greater uncertainty relating to prosecutorial discretion) that leads to a person or their property being harmed.

4. **Question 4: How have businesses sought to implement compliance programmes which address the six principles set out in the Ministry of Justice's guidance on the Bribery Act 2010? What challenges have businesses faced in seeking to implement**

their compliance programmes? Are there any areas which have been particularly difficult to address?

4.1 In our experience, most companies and especially small to medium size companies, struggle to meet two key principles:

4.1.1 **Risk assessment** – a common failing is to meet the recommended step of carrying out an overarching and documented risk assessment that is then monitored and kept up to date. While large companies have the resource to conduct a risk assessment exercise, they often struggle with the scale of such an exercise and to keep the assessment up to date. In reality, small to medium business often do not have the resource or skillset internally to carry out a bribery risk assessment. General guidance is given in the Ministry of Justice's Guidance on what should be covered in the risk assessment but an example of a suitable risk assessment is not given.

4.1.2 **Third party due diligence** – the guidance on the due diligence to be conducted is also vague. It refers to a "risk based approach" and gives examples of "director interrogative enquiries" and "indirect investigations". These are meaningless terms to the majority of small to medium business which are left asking: what do we actually need to do?

5. **Question 5: What impact has the Bribery Act 2010 had on small and medium enterprises (SMEs) in particular?**

5.1 Budgetary restraint is a key issue for SMEs when seeking guidance in identifying risks and taking steps to implement procedures that would be considered to be "adequate" under the Bribery Act 2010. Other issues are covered in answer to question 6.

6. **Question 6: Is the Act having unintended consequences?**

6.1 **Risk appetite** – the new offence of corporate failure to prevent bribery, along with uncertainty about the application of the adequate procedures defence, has occasionally led to UK businesses declining to proceed with transactions and business opportunities in higher risk countries, even though those transactions may have been perfectly lawful with appropriate controls being implemented (and especially if there had been a 'safe harbour provision' for investor businesses). For example, we recently advised a UK company that was looking to acquire an international business that had distributors in several high risk jurisdiction. Our client reasonably decided not to proceed with the transaction because of heightened bribery risk within those distribution operations. While controls could have been put in place going forward, the company did not wish to take the risk of inheriting a corporate bribery liability for the group in relation for past misconduct by the distributors in high risk countries without an assurance of a 'safe harbour' as an investor company. Such a situation could be avoided through policy statements by the SFO or the adoption of a transactional

opinion/clearance procedure (a 'safe harbour' facility) as exists in the US with the US Department of Justice Opinion Release system.

6.2 **Procurement gold plating** – a significant problem can sometimes arise with procurement practices of major companies effectively requiring SMEs to be able to evidence the existence of anti-bribery risk assessments, governance controls, procedures, training and monitoring when such controls may be entirely disproportionate to the anti-bribery risk profile of the SME. We have heard that some companies are considering requiring suppliers to be certified to ISO37001 (the International Anti-Bribery Management Standard). This could be a major compliance burden for SMEs, if disproportionately applied without consideration to the size and risk profiles of these businesses.

7. **Question 7: Has the introduction of Deferred Prosecution Agreements (DPAs) been a positive development in relation to offences under the Bribery Act 2010? Have DPAs been used appropriately and consistently? Has their use reduced the likelihood that culpable individuals will be prosecuted for offences under the Act?**

7.1 Yes, DPAs are a positive development because they offer a swifter resolution for a company and importantly innocent employees and stakeholders, and a more efficient and cost-effective way of proceeding for prosecutors. However, there are a number of issues that should be reviewed to enhance effectiveness and take-up:

7.1.1 **Individual liabilities** – The lack of a formal leniency policy or process for individuals, directors and business owners can act as major disincentive to self-report. Building in some degree of leniency process (with clear expectations of when it will and when it will not be triggered) to support individuals who are party to the decision to self-report would significantly increase corporate self-reporting. This would be consistent with other leniency and immunity style arrangements, for example, to tackle price fixing cartels.

7.1.2 **Discount in penalty** – since the introduction of the tool, there has been a move to increase the available discount on financial penalties so that it is higher than the equivalent afforded by an early guilty plea. This has meant however, that the first company to enter into a DPA received a lower discount than Rolls Royce (which was afforded a 50% deduction on its financial penalty). Whilst this approach could be characterised as inconsistent, we welcome the introduction of higher discounts as a means of making DPAs more attractive to companies and thus useful to prosecutors, particularly in light of the other substantial financial obligations imposed on companies under DPAs by way of compliance costs amongst others. Greater clarity on the available discounts in the Code of Practice would be welcomed.

- 7.1.3 **Company costs** – to have a realistic prospect of obtaining a DPA companies at present likely will need to carry-out extensive internal investigations with the aim of identifying and disclosing wrong-doing. In addition, the SFO, for example, may serve the company with section 2 notices to compel the production of data, which often can involve historic enquiries in to available business records. Companies find themselves needing to engage lawyers and forensic technologists to help search for the data that needs to be produced. This results in the companies' costs being very significant. As a result, most SMEs could not afford the DPA process, which may undermine fairness and the effectiveness of the DPA regime. Consideration should be given to a streamlined process for smaller companies, to assist them in cooperating with a DPA process in a way that is proportionate to their available resources.
- 7.1.4 **Inconsistency of use** – although there are not sufficient numbers of DPAs to date to draw meaningful conclusions, there is a perceived risk that DPAs could be applied inconsistently by the authorities in relation to larger corporates in comparison with smaller businesses, and more generally depending on the particular style of approach and discretion of the relevant case controller. For example, whereas Rolls Royce received a DPA due its "extraordinary cooperation" despite not making a self-report, Skansen Interiors Limited was prosecuted under section 7 of the Bribery Act 2010 in circumstances where it self-reported and subsequently cooperated with the authorities' investigations. Both cases turned on very particular facts so there are limited wider lessons that can be drawn from a direct comparison of them. However, if a differing approach does emerge more widely in future enforcement, this risks putting companies off considering self-reporting, as does uncertainty or perceived inconsistencies in the processes adopted.
- 7.2 To combat these potential inconsistencies, we suggest that more clarification is needed as to when a company may be eligible for a DPA, and the different discounts that may be applicable, depending on the level of self-reporting, cooperation and remedial measures taken by the corporate. For instance, there should be a clear written process that, if a company does not self-report, it could (with cooperation and remediation) still potentially qualify for DPA. On the other hand, if a company does self-report, the clear written process should contain a presumption that the company will get a DPA, unless a number of exceptions apply such as the self-report not being full and frank or if the company subsequently offered no cooperation following its initial self-report or disclosure. Such clarifications would help give companies the certainty they need to make a self-report and ensure they have made sufficient provision in terms of time and resources to cooperate with a subsequent DPA process. To assist with expectations on cooperation during a DPA process, more detailed written policies or codes of practice should be published that set out what a law enforcement agency or prosecutor will be entitled to expect from a company by way of

assistance and evidence gathering; and what protections will be afforded to the company e.g. in respect of its legally privileged material, how its employees will be treated as subjects or witnesses in an investigation, and with regard to the proportionate use of the SFO's "section 2" powers.

8. **Question 8: How does the Bribery Act 2010 compare with anti-corruption legislation in other countries? Are there lessons which could be learned from other countries?**

8.1 The Bribery Act 2010 is commonly acknowledged to be a gold standard in anti-corruption legislation and other countries are continuing to introduce similar provisions around corporate liability.

8.2 When comparing the Bribery Act 2010 with other legislation, the Act's six principles align closely to the hallmarks of an effective compliance programme under the US Foreign Corrupt Practices Act 1977 ("FCPA"), as well as principles now enshrined in the French Loi Sapin II. This alignment assists international businesses seeking to introduce holistic anti-bribery compliance procedures throughout their business. However, Sapin II goes further than the Bribery Act 2010 in some respects, imposing positive obligations on larger qualifying companies to take compliance steps such as regular risk mapping exercises, and to implement policies and procedures.

8.3 The US Securities and Exchange Commission has also developed a broad definition of "books, records and accounts" offences, where companies can be liable if they have "created a heightened risk" environment for bribery and are lacking in compliance procedures and controls. This has led to companies being found to violate the US FCPA where the underlying acts of bribery have been undetermined or difficult to establish. This provides US authorities with an alternative solution when investigating bribery.

9. **Question 9: What impact has the Bribery Act 2010 had on UK businesses and individuals operating abroad?**

9.1 Nothing to add to our comments above.

10. **Additional Point – the need for greater use/ awareness of civil law remedies to drive deterrence**

10.1 Given that there are issues with the levels of criminal enforcement activity and with funding law enforcement, we consider that the deterrence of bribery could be further enhanced by greater awareness and use of civil law methods of holding those involved in bribery to account. These can operate alongside the criminal regime under the Bribery Act 2010. They can also be used in circumstances where the Bribery Act 2010 may not be engaged, or where issues with resource (or, perhaps, evidence) mean that criminal enforcement is not pursued. The combined effect is to increase the overall number of wrongdoers who are brought to some form of justice, whether civil or criminal.

- 10.2 There are a wide range of civil law remedies, depending on the particular facts, available to organisations which discover that a person associated with them has engaged in acts of bribery. Bribery is recognised as a specific tort.¹⁷⁸ In addition, an organisation associated with a person who has (unbeknown to the organisation) received a bribe may have a claim based on causes of action including breach of fiduciary duty, fraudulent misrepresentation and/or unlawful means conspiracy. The organisation may both be entitled to damages and also have a proprietary claim in respect of the bribe itself (which is deemed to be held on constructive trust for the organisation and is therefore insulated from the insolvency of the bribed agent). Such an organisation may also have a claim against the person who paid the bribe or his principal, based on causes of action including conspiracy.
- 10.3 Similarly, an organisation associated with a person who has (unbeknown to the organisation) paid a bribe may have a claim for damages for, amongst other causes of action, breach of fiduciary duty and/or unlawful means conspiracy. A claim may in appropriate circumstances be brought against the person who paid the bribe and/or the recipient of the bribe.
- 10.4 There may also be potential claims against third parties who have been involved in the bribery, such as for dishonest assistance, knowing receipt of bribe monies and/or unlawful means conspiracy.
- 10.5 Moreover causes of action are supported by powerful procedural tools such as search and seize, disclosure and freezing orders. The civil law regime recognises the international character of fraud including bribery and supports the objective of holding to account culpable individuals who (or whose assets) may be outside the jurisdiction. The courts of England and Wales have shown themselves ready to accept jurisdiction in fraud matters; a recent example is the Supreme Court decision in *JSC BTA Bank v Khrapunov* [2018] UKSC 19 where a conspiratorial agreement entered into in England was enough to establish jurisdiction, even if subsequent events took place elsewhere. Measures such as worldwide freezing orders enable parties to protect against the dissipation of assets located in other jurisdictions.
- 10.6 We consider it would be helpful for the Ministry of Justice to publicise the civil remedies available to the victims of bribery and to encourage law enforcement to work more closely with solicitors to explore the use of civil remedies where there may be a lack of proof to a criminal standard or resource to take forward a criminal case.

Neil McInnes, Partner
Alan Sheeley, Partner
Tom Stocker, Partner
For Pinsent Masons LLP

¹⁷⁸ See for example the recent decision in *Motortrak Ltd v FCA Australia PTY Ltd* [2018] EWHC 1464 (Comm), at para. 15

09 August 2018

PricewaterhouseCoopers LLP – Written evidence (BRI0031)

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Call for Evidence

We are delighted to be able to support the Bribery Act 2010 Select Committee's (the Committee) important and timely review of the UK Bribery Act 2010 (UKBA). This response to the Committee's Call for Evidence is made by PricewaterhouseCoopers LLP (PwC), the UK member firm of the PwC network.

Our experience

The evidence we provide is based on our global network's multidisciplinary anti-bribery and corruption (ABC) experience across legal, risk assurance and forensic accounting. In recent years we have assisted clients globally with many of the largest and most high-profile ABC matters from compliance programmes to investigations and enforcement action, as well as targeted legal and practical advice as new risks emerge within their day-to-day operations.

Following the Committee's announcement of the Call for Evidence, to get a feel for the current business view of the UKBA we spoke with a number of clients for their input and thoughts. The comments kindly provided by our clients have been incorporated into our response below, on a confidential no-names basis.

The evidence we have provided also draws extensively on the 2018 editions of PwC's Global Economic Crime and Fraud Survey (GECS) and State of Compliance Survey and other relevant primary research that the firm has conducted.

The Committee's work

We thank the Committee for the opportunity to respond to this important Call for Evidence and look forward to hearing more about its findings and recommendations. We would be very happy to discuss further any of our own observations and findings, or support the Committee's work more generally.

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Summary of our Observations

Deterrence

Based on our GECS and day-to-day work with clients, we do believe the UKBA has had a deterrent effect, with the standard and sophistication of UK businesses' ABC efforts improving markedly since the act came into force.

Enforcement

Our clients have stressed, however, that effective deterrence needs robust enforcement and prosecution. A number of clients stressed to us the importance of enforcement activity in the news to keeping ABC compliance high on their senior decision-makers' agenda. The UKBA's impact on the level of successful prosecutions does not currently seem fully clear, pending better availability of data. This is an area in which it would be helpful for the Committee to probe and scrutinise further.

Guidance

While the statutory UKBA guidance is clear, simple and flexible, uncertainty continues to exist regarding the 'adequate procedures' standard for the defence against 'failure to prevent' liability (s7(2) UKBA), on which the document provides limited assistance. The need for improvement is made more pressing by the possibility of a Human Rights challenge based on the lack of legal certainty.

In our response we discuss two potential solutions to this problem. First, a more prescriptive approach to ABC 'adequate procedures', combined with an exemption for smaller or less well-resourced organisations: as in France under Sapin II. Second, the introduction of non-jury trials for UKBA (and possibly other) corporate criminal 'failure to prevent' offences. This would offer UK organisations the greater certainty that comes from a body of principled legal judgments on the 'adequacy' standard.

Challenges

When we assist clients in implementing or improving ABC compliance programmes, we stress the benefits of the UK regime's flexible approach, which allows businesses to determine a style and structure which suits their business needs. Significant implementation challenges include ensuring initial risk assessments and recommended actions embed fully in business operations, and achieving effective and affordable procedures in areas such as third-party ABC diligence.

Small and Medium Sized Enterprises (SMEs)

UKBA's corporate offence of failing to prevent bribery imposed a significant new legal risk on commercial organisations of all sizes, and levels of resource. Evidence suggests a majority of SMEs do not feel they have bribery prevention procedures in place that could defend them against this risk, should a prosecution proceed to court. As we explain, in our view more work may well be required from a policy perspective, to understand the economic burden that has been imposed on SMEs, before any view can be taken as to whether a different approach may be warranted.

Deferred Prosecution Agreements (DPAs)

We believe the introduction of DPAs has been a positive development. The key concern regarding DPAs we have witnessed within the business community is the desire for greater transparency regarding prosecutors' criteria in deciding whether to recommend one for approval by the courts. Particular areas of concern include the application to SMEs and other less well-resourced organisations and the approach to Legal Professional Privilege.

International Aspects

International comparisons show that, seven years after coming into force, the UKBA has retained its role as a leading, if not the pre-eminent piece of ABC legislation internationally. In our selected (non-comprehensive) international review we have provided the Committee with evidence on certain key comparison areas for the UKBA, such as jurisdictions that have made ABC compliance a compulsory requirement, rather than an optional defence.

Responses to the Select Committee

Deterrence

1) Is the Bribery Act 2010 deterring bribery in the UK and abroad?

UKBA's potential as a deterrent

1. Compared with the previous patchwork of UK ABC legislation, the UKBA marked a significant step forward. A number of major improvements in the legislation had, and continue to have, real potential to improve the deterrent effect of the UK legal and enforcement regime. A selection of the most important improvements includes:
 - *Consolidation and simplification* - the UKBA replaced the UK's previous patchwork of separate, cross-cutting bribery legislation built up particularly around distinguishing public and private sector organisations, which was unnecessarily complex and made the law difficult to interpret and apply.
 - *A clearer definition of bribery* - the outdated and confusing agent/principal definitional model was replaced, including the undefined and uncertain requirement for an offender to have acted "corruptly". Six clear 'cases' were set out across the offences of bribing (s1 UKBA) or being bribed (s2), all organised around the central concept of "improper performance" of a relevant function (s4), itself defined in terms of breach of an expectation involving good faith, impartiality or a position of trust (s3).
 - *Corporate criminal liability* - previous difficulties with the UK's restrictive 'identification principle' model of corporate criminal liability¹⁷⁹ were circumvented by a new corporate offence of 'failure to prevent' bribery (s7), which extended to a commercial organisation's 'associated persons' and was made subject to a defence of having 'adequate procedures' in place to prevent bribery.
 - *Extra-territorial reach* - previously uncertain, the international scope of UK bribery law was extended first by the Anti-terrorism, Crime and Security Act 2001, and then again through UKBA itself, in particular via

¹⁷⁹ See further paragraph 93 below.

the corporate 'failure to prevent' offence which is particularly wide in its international reach.

- *Sanctions* - the maximum penalty for an individual was increased from seven years to ten years' imprisonment, increasing the UKBA's deterrent effect and bringing bribery in line with the maximum penalty for fraud.

Impact (i) –Global Economic Crime and Fraud Survey (GECS)

2. Since the UKBA came into force, we have been following its impact on domestic and overseas bribery and corruption, in our client work, active monitoring of the market and our biennial GECS and other surveys.
3. When the UKBA came into force in July 2011, nearly two-thirds of GECS survey respondents that year said they didn't see any need to update their organisation's existing policies. By 2014 responses showed a shift in this thinking, and the UKBA appeared to be having more impact than firms initially expected. 87% of respondents in 2014 said that their organisation had made at least some changes to policies and procedures, with 37% saying that their organisation had performed a major overhaul of their anti-bribery policies. By 2018, 75% of UK respondents said their organisation had a formal ethics and compliance programme in place. Of these, 62% said that this included specific anti-bribery and corruption policies, well above the global average of 50%.
4. This marked increase in compliance programme investment appears to reflect the progress in the last ten years, in that the UK has gone from lagging behind the rest of the world in its anti-bribery laws and enforcement activities, to being at the forefront of global anti-corruption efforts. It now appears that these developments, and the greater openness they have helped to generate, are having a significant impact on our UK findings and may explain the 12% increase in incidents of bribery and corruption that were reported between 2011 and 2018.
5. Our view is that this increase can in part be explained by the investment in compliance programmes that have been made since the UKBA became effective, and the advance in reporting mechanisms that provide better insight to companies of their exposure and incidents of bribery and corruption.

Impact (ii) - observations from our work with clients

6. Working with our clients, we have seen a marked increase in the volume and quality of compliance activity since the UKBA came into force in July 2011.
7. Our clients have told us that the implementation of the UKBA has been a real milestone in developing and driving change in their ABC compliance programmes, in that it provided an underlying business driver for adequate investment into a compliance function to support their defence under the section 7 'adequate procedures' provision. Additionally, businesses now have a better awareness of the diverse forms that bribery

can take and that non-financial methods, in addition to the traditional financial payments, are in fact used. CSR / corporate philanthropy, sponsorships and political donations in particular are three areas where we have seen that the UKBA has been very beneficial in driving much smarter and more risk-aware decision-making.

Effective enforcement

8. While our view is that the deterrent effect has increased in the period following the UKBA's introduction, we believe it is important to consider the distinct contribution of the legislation itself, and the clear demonstration of effective enforcement.
9. We have still seen cases where businesses have continued offending in the period immediately after the UKBA came into effect. Some clients specifically mentioned that the delay in enforcement and the lack of high profile prosecutions has undermined the momentum from when the act became effective.
10. Although no client wants the reputational damage associated with a prosecution, they have not seen organisations become insolvent as a result of prosecution or fines under the UKBA. This provides a challenge between delivering the right messages and giving the legislation enough weight to make businesses take appropriate action. As a result, in our view, the attitudes of businesses will not change unless there is increased pressure from an enforcement perspective.

Enforcement

2) Is the Bribery Act 2010 being adequately enforced? If not, how could enforcement be improved? Do the Serious Fraud Office and the Crown Prosecution Service have the right approach and the resources they need to investigate and prosecute bribery offences effectively?

Review of the prosecution statistics

11. Statistics on the Serious Fraud Office (SFO) and Crown Prosecution Service (CPS) UKBA prosecution track record have helpfully been provided by the MoJ in its Memorandum to the Committee,¹⁸⁰ and supplemented by oral evidence given on 3 July 2018 by the Attorney General's office.¹⁸¹

¹⁸⁰ pp27-8

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/713452/bribery-act-2010-post-legislative-scrutiny-memorandum.pdf

¹⁸¹ pp1-2:

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/bribery-act-2010-committee/bribery-act-2010/oral/86574.pdf>

12. While the overall number of UKBA prosecutions is relatively low, it appears to have increased rapidly since the UKBA was introduced. If this trend continues the overall number of prosecutions may still increase to a more satisfying level.
13. If we have interpreted the MoJ's data correctly, for example, it appears that the annual total of UKBA s1 (bribing) and s2 (being bribed) cases increased from an average of 3 per year in the period 2011-2013, to 5 in 2014-2016, to a total of 16 in 2017.
14. On the other hand, oral evidence provided to the Committee suggested that the 32 UKBA cases in the period from 2014 to date (again, assuming we have interpreted the MoJ figures correctly) were supplemented by a total of 107 proceedings under the Prevention of Corruption Act (PCA), close to an 80:20 split dominated by the 'older law'. It is well understood that part of the explanation here is the time lag between offending behaviour and legal proceedings, with UKBA prosecutions only being possible for behaviour taking place after the act came into force.
15. To further aid understanding, it may would be worth considering what the annual trend is within the PCA figures: has the number of 'old law' prosecutions been on a downward trend in those same years 2014-2017? In addition, in order to truly judge the UKBA's efficacy in removing barriers to prosecution, it would be valuable to compare the total number of bribery cases in the years immediately prior to the UKBA coming into force, with the same totals in the post-UKBA years.
16. We have conducted a basic review of relevant sources that may assist with this, but there does seem to be a gap in the availability of suitably detailed data that would support a robust assessment of the UKBA's effectiveness. To give some selected examples:
 - *MoJ - Criminal Justice Statistics quarterly*¹⁸² - these reports cover criminal proceedings, and give an overview of defendants dealt with at magistrates' courts and Crown Courts by offence type. Bribery and corruption offences, however, are not specifically identified.
 - *OECD - UK country reports on the implementation of the Anti-Bribery Convention*.¹⁸³ These phased reports from 1999, 2005, 2012 and 2017 include data and analysis that is relevant, but they focus exclusively on foreign bribery and consider activity in each of the OECD's review periods, rather than annually.
 - *Anecdotal evidence from UK prosecutors* - suggests that current operational reporting of prosecutions may not be fully fit for purpose in terms of facilitating policy-level review of effectiveness. See for example the then Director of Public Prosecutions' response to the Joint Committee on the Draft Bribery Bill in June 2009.¹⁸⁴ Asked how many

¹⁸² <https://www.gov.uk/government/collections/criminal-justice-statistics-quarterly>

¹⁸³ <http://www.oecd.org/daf/anti-bribery/unitedkingdom-oecdanti-briberyconvention.htm>

¹⁸⁴ Uncorrected transcript of oral evidence, published as HC 430-v

cases over the last five years the CPS and SFO had prosecuted for bribery or corruption, the DPP provided “a cautious answer” - “We have tried to retrieve this information. [...]t comes with a health warning because we do not input the information on our system with a view to putting it out for committees such as this. We input it for the purposes of charging.” We note that similar comments about difficulties with data have been made to the Committee directly by the representative of the Attorney General’s office.

17. As the oral evidence makes clear, figures for UKBA prosecutions alone, as presented in the MoJ Memorandum, do not appear to give the full picture, given the continued dominance of ‘old law’ cases. If the UKBA is succeeding in delivering an increased number of successful prosecutions, the trend that would probably be expected is an annual reduction in the number of ‘old law’ cases, that over time is more than offset by the increase in UKBA prosecutions.

Prosecution statistics as a measure of UKBA effectiveness

18. Oral evidence provided to the Committee includes a statement on behalf of the Attorney General’s office that “the purpose of the [...UKBA] 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.” Looking at the prosecution statistics (as outlined above), therefore, “the Attorney does not have concerns that there are fewer prosecutions than he would have imagined”. Broadly similar comments are made in the Memorandum submitted to the Committee by the MoJ.
19. The annual trend in bribery and corruption prosecutions is likely to be a product of a range of factors, including underlying offending behaviour (in relation to which the UKBA may well have had a deterrent effect); prosecution resource levels, strategy (for example, focus on number versus size of cases), legal options (such as the introduction of the DPA regime) and effectiveness of approach; and changes such as the UKBA that remove previous legal uncertainties and, in principle, make successful prosecution easier. Isolation of the UKBA’s own specific contribution and effectiveness may therefore require an increased degree of analysis or interpretation.
20. It is not clear whether the Attorney General / MoJ suggestion of no significant increase in bribery and corruption prosecutions following introduction of the UKBA is based on the total range of factors outlined above, in other words that an increase based on the UKBA itself could be offset by a decrease caused by other elements. Given the widespread criticisms of the older law, however, and explicit claims from a wide range of parties that particular difficulties (lack of international reach, confusion around the agent/principal model and other aspects of the definition of bribery) were having a detrimental effect, it would be disappointing if the UKBA could not be seen to have improved prosecution effectiveness, at least to some extent. It would be a positive development if the

Committee's work allowed these questions regarding the statistical trends and proper basis for evaluating the UKBA to be examined more fully.

Guidance

3) Is the statutory guidance on the Bribery Act 2010 sufficient, clear and well-understood by the companies and individuals who have to deal with it? Should alternative approaches be considered?

Clear, simple and flexible

21. The MoJ's statutory UKBA Guidance (MOJ Guidance) has naturally become a key starting point for companies and their advisors. Its six principles form a common basis for considering ABC risk management across a wide range of organisations, sectors and jurisdictions. It is testament to its simplicity and flexibility that the same approach has been adopted with only limited modification in subsequent HMRC Guidance on the similar corporate 'failure to prevent' offences in the Criminal Finances Act 2017 (CFA 2017)¹⁸⁵.

Concerns regarding 'adequacy'

22. Whilst the Guidance is clear and easy to understand, a key question is whether its deliberately non-prescriptive approach¹⁸⁶ provides sufficient guidance to businesses regarding what constitutes 'adequate' procedures to prevent bribery for the purpose of the UKBA's defence¹⁸⁷ to the 'failure to prevent' offence (s7). As we explain further below at paragraph 45-47, in our experience and based on client feedback, this has been one of the most significant areas of challenge and frustration for businesses seeking to implement ABC compliance programmes.

23. In place of any prescriptive requirements, the approach adopted in the Guidance is to say that 'adequate' procedures to prevent bribery are ones that are proportionate to the underlying bribery and corruption risk an organisation faces (the "core"¹⁸⁸ first principle). In particular this appears to include the type of organisation under consideration: the aim has been an implementation of the UKBA that is "workable ... for small firms that have limited resources".¹⁸⁹ While the principles list elements that are likely to be necessary components of any 'adequate' compliance programme - top level commitment, risk assessment, due diligence, communication (including training), monitoring and review - there is no indication of exactly how much an organisation needs to do in any one of these areas

¹⁸⁵ <https://www.gov.uk/government/publications/corporate-offences-for-failing-to-prevent-criminal-facilitation-of-tax-evasion>

¹⁸⁶ See para 4, p6

¹⁸⁷ (s7(2))

¹⁸⁸ Foreword, p2

¹⁸⁹ *ibid*

for the defence to succeed. The one limited concession that is made is that “no bribery prevention regime will be capable of preventing bribery at all times”.¹⁹⁰ Unsurprisingly therefore ‘adequacy’ at least does not require infallibility.

24. It may well be that the legislature have already identified a challenge with the word “adequate” when describing policy procedures, given the use of the word “reasonable” in the more recent corporate offence of failure to prevent tax evasion, introduced by the CFA 2017.

Possibility of a legal challenge

25. Potentially the lack of certainty regarding ‘adequate’ procedures may be a legal issue for the UK authorities. This is due to the possibility of a successful Human Rights challenge to the UKBA s7 regime. Potential challenges arise under Articles 6 and 7 of the European Convention of Human Rights (ECHR).¹⁹¹ ECHR rights are conferred not only on natural persons but also on relevant legal entities such as the ‘commercial organisations’ affected by UKBA s7.

26. The Article 6 ECHR right to a fair trial includes the criminal law presumption of innocence until proven guilty¹⁹². The challenge to the UKBA here would be that a ‘failure to prevent’ criminal offence such as s7 violates this presumption by making a ‘commercial organisation’ guilty without any specific failing on its own part, so long as offending behaviour is demonstrated in relation to an ‘associated person’. In the courts, Article 6 has been interpreted as requiring that departures from the presumption of innocence are permitted only if they are “justified, necessary and proportionate”.¹⁹³

27. No Article 6 challenge has yet been brought against the UKBA specifically, however in *R v Davies*¹⁹⁴ the House of Lords considered Article 6 in relation to section 40 of the Health and Safety at Work Act 1974 (HSWA), under which a demonstration by the prosecution that an accident or death has occurred similarly reverses the standard criminal burden of proof by obliging an employer to show they did all that was reasonably practicable to prevent the risk arising. In *R v Davies* the court accepted that this provision departed from the presumption of innocence, but found that this was proportionate. Central to this finding was the court’s identification of health and safety as a “regulatory” rather than “truly criminal” field of law:

“[R]egulatory offences and crimes embody different concepts of fault [...] and] conviction of a regulatory offence may be thought to

¹⁹⁰ para 11, p. 8

¹⁹¹ 1953; given effect in UK law by the Human Rights Act 1998

¹⁹² Art. 6(2)

¹⁹³ *R v Davies (David Janway)* [2003] ICR 586 - para. 10. Citing the ECtHR in *Salabiaku v France* (1988) 13 EHRR 379 at para. 28

¹⁹⁴ *R v Davies (David Janway)* [2003] ICR 586

import a significantly lesser degree of culpability [...] The concept of fault in regulatory offences [...] does not imply moral blameworthiness in the same manner as criminal fault.”¹⁹⁵

28. It is not obvious that a corporate criminal conviction under s7 UKBA would be categorised in this way as “regulatory” rather than “truly criminal”. For a “truly criminal” offence, however, it will be correspondingly harder for any departure from the standard criminal burden of proof to be justified as proportionate, making it more likely that an Article 6 challenge could succeed in invalidating the relevant offence.

29. Article 7 ECHR - “no punishment without law” - has been interpreted as requiring that it must be foreseeable with reasonable certainty whether any particular behaviour is, or is not, in breach of criminal law.¹⁹⁶ The challenge here to the UKBA would be that the s7 offence does not meet this standard, applying as it does only in the absence of a valid ‘adequate procedures’ defence (s7(2)), in relation to which the required standard for ‘adequacy’ has not been spelled out, given the non-prescriptive nature of the MOJ Guidance which the UKBA itself required to be published. While the necessary level of uncertainty for a successful challenge to a criminal offence would ultimately need to be decided in court, the case law is clear that in principle such a challenge can be made: see for example the case of *SW and CR*¹⁹⁷ which involved a challenge to the UK criminal offence of rape, as a result of its changing common law application.

Applying the adequacy test in practice

30. Beyond the requirement of proportionality, the MoJ Guidance states that “whether an organisation had adequate procedures ... is a matter that can only be resolved by the courts taking into account the particular facts and circumstances of the case”¹⁹⁸. Where s7 cases do reach court prosecution and defence lawyers may well seek to reference the UKBA’s underlying objectives, insofar as these can be identified from authoritative sources.

31. In this regard, however, it may well be difficult for juries to know what to think, given that government statements regarding the UKBA have on the one hand presented it as intended not to impinge excessively on already “well run commercial organisations”¹⁹⁹ (also described by in the MOJ Guidance as “the vast majority of decent, law-abiding firms”)²⁰⁰, but at the same time stressed the UKBA’s role in incentivising improved ABC compliance standards amongst UK commercial organisations.²⁰¹

¹⁹⁵ Cory J. in the Canadian Supreme Court in *R v Wholesale Travel Group* (1991) 3 SCR 154, cited in *R v Davies*.

¹⁹⁶ *SW and CR v United Kingdom* (Applications 20166/92, 20190/92) (1995) 21 EHRR 363, para 44-45, citing *The Sunday Times v. United Kingdom* (A/30): 2 E.H.R.R. 245 at para. 49; c.f. Also *Kokkinakis* (1994) 17 E.H.R.R. 397

¹⁹⁷ *SW and CR v United Kingdom* (Applications 20166/92, 20190/92) (1995) 21 EHRR 363

¹⁹⁸ para. 4, p6

¹⁹⁹ para 11, p8

²⁰⁰ p2

²⁰¹ see e.g. para 11, p. 8

32. Earlier this year the case of *Skansen*,²⁰² was the first contested 'adequate procedures' case to reach a jury trial in court. The defendant, a small refurbishment fit-out business was found guilty of failing to prevent bribery (s7 UKBA). Following representations by Counsel for the prosecution and defence, the claim by the defendant that it had adequate procedures in place was not accepted by the jury.
33. Although it was accepted on both sides that the bribery risk faced by the company was relatively low, and that, as a small company, its resources were limited, there was no evidence of any specific steps taken based on the MoJ Guidance or of the coming into force of the UKBA more generally. No briefing or training to staff referenced the UKBA specifically so the company was forced to attempt its defence based on general pre-UKBA ethical guidance it had provided to its employees. After the offending behaviour had already taken place the company introduced a number of improvements, including an ABC policy and use of email 'voting buttons' to record employees' agreement to comply with this. Reports of the prosecution arguments show close attention to the MoJ Guidance's six principles. Attention was particularly drawn to principles - such as risk assessment (principle 3) - where there was no evidence of any actions having been undertaken at all.
34. In many ways *Skansen* represents one of the easier types of 'adequate procedures' cases that UK juries may be faced with. Given the clear structure of the MoJ Guidance it is likely to be easy for prosecutors to persuade a jury that 'adequate procedures' does not apply where any relevant principle in the Guidance has not been addressed at all.
35. As we discuss in more detail below²⁰³, businesses implementing ABC compliance programmes of all shapes and sizes will generally succeed in addressing each of the six principles in at least some form. They nevertheless all have to take practical decisions on the extent of compliance activity that will be proportionate and effective in making available the 'adequate procedures' defence.
36. In effect such decisions need to be taken regarding every type of resource that a business allocates to its ABC procedures: training, financial controls, headcount or man-hours for any compliance activities, third-party due diligence, and so on. In each case once the underlying risk has been established, businesses will be aware that the allocation of additional resource can mitigate or control this risk in an increasingly effective manner. Beyond a certain point, however, there will be a pattern of 'diminishing returns', after which further resource will have increasingly little effect. It is in this context that they will need to consider - among other factors - what level of resource must be deployed in practice in the context of their business for a successful UKBA s7(2) defence.

²⁰² *R v Skansen Interiors Limited* (unreported) - <http://pwc.blogs.com/legal/2018/04/uk-bribery-acts-adequate-procedures-guidance-for-smes.html>

²⁰³ p13

37. As hard as these questions are for Directors who know the relevant businesses first hand, and are accustomed to making risk-based investment decisions, they may be even harder for a jury to determine, especially if they are presented with the conflicting policy arguments from government public statements that are outlined above. In turn, if decisions clearly vary from jury to jury as to what is accepted as 'adequate' for the s7 defence, UK commercial organisations will be justified in feeling the law in this area lacks an acceptable level of clarity and therefore legal certainty.

Non-jury trials

38. A more radical way of addressing the legal certainty 'gap' regarding UKBA adequate procedures could be the introduction of non-jury trials for s7 failure to prevent cases, and potentially also for the CFA 2017 tax evasion Corporate Criminal Offences (CCOs) and any other corporate 'failure to prevent' offences which may be added in future.

39. In relation to the UKBA, and the CCOs generally that have an 'adequate procedures'-type of defence, a key advantage of such an approach would be the production of a reasoned judgment and resulting body of consistent case law which could provide guidance and certainty for affected organisations. While a judge's view on the appropriate UKBA standard of 'adequacy' may not be any less arbitrary than that of a jury, this system of judgements and potential appeal on points of law should at least ensure that decisions adopt a consistent and definable standard. In addition, should any such judge-made standard prove to be politically unacceptable - e.g. requiring too much, or too little, of the relevant commercial organisations - it would still be possible for parliament to intervene with further legislation.

40. Despite temporarily having been included in statute,²⁰⁴ the option of non-jury trials for complex fraud cases was never actually brought into force.²⁰⁵ Arguments against this proposal centred on the central and historical role of juries in the UK criminal justice system, and in particular on the important role of a jury in adjudicating the 'dishonesty' component which is central to many forms of fraud.

41. Contrasted with fraud cases, the UKBA and the CCOs failure to prevent offences do not involve complex questions of dishonesty or other morally-informed *mens rea* concepts on which the view of a jury might be deemed especially necessary.

42. Regarding the more general point about the centrality of jury trials within the criminal justice system, it may be observed that from 2014, the introduction of DPAs into UK criminal law has already created an important decision point in which jurors are not involved. With three of the four DPAs so-far concluded relating to corporate bribery, and all

²⁰⁴ by means of s43 of the Criminal Justice Act 2003

²⁰⁵ In admittedly exceptional circumstances, non-jury trials for certain criminal cases were, however, implemented in Ireland in 1973. During that period there do not appear to have been any major issue with them.

predicated at least in part on a s7 UKBA offence, non-jury trials for UKBA 'failure to prevent' cases may not in fact be such a major departure.

Challenges

4) How have businesses sought to implement compliance programmes which address the six principles set out in the Ministry of Justice's guidance on the Bribery Act 2010? What challenges have businesses faced in seeking to implement their compliance programmes? Are there any areas which have been particularly difficult to address?

Approach clients have taken

43. Our clients have generally followed a principles based approach in building their compliance programmes. This reflects the recognition that a set of rules is too prescriptive and would never translate perfectly across all industries, business models and companies of varying size. Some clients are therefore approaching UKBA compliance by structuring their programmes around a culture of 'doing the right thing' whilst referencing the UKBA as the legal benchmark. We have also seen clients using tools such as Transparency International UK's Corporate Anti-Corruption Benchmark to compare performance against their peers and share best practice.

44. Our GECS survey reported that 77% of respondents have a formal business ethics and compliance programmes in place, indicating that progress has been made by organisations to address the risk of bribery and corruption.

Challenges

45. As noted briefly above²⁰⁶, a key challenge experienced by PwC clients is that the MoJ Guidance is not 'black and white' and this has created ambiguity. Whilst an absence of a set standard presents an opportunity for businesses to design and shape a compliance programme that works for their business, many clients worry as to whether they are doing enough. Further, many clients anticipated that clarity would be gained through case law. However there have been very few cases that have gone to court, with many settling out of court or via DPAs, and as such there is still a lack of clarity as to what constitutes 'adequate procedures'.

46. The legal ambiguity described above has resulted in some clients passing ownership and management of UKBA compliance to their in-house legal and/or compliance teams, which creates the risk of excluding engagement from the wider business. It also places the business at risk of simply viewing compliance with the UKBA as a way of protecting their business against potential prosecution, rather than viewing it as an opportunity to improve organisational culture and do business 'the right way'.

²⁰⁶ p9

47. Some clients have also noted that the minimal enforcement actions from the SFO to date has created a further barrier to sustaining momentum and keeping their compliance programme 'live and fresh'.
48. Additionally, we often we find that revenue-generating business activities can be prioritised over compliance, and as a result, areas such as the risk assessments fail to be considered appropriately. This is supported by our GECS survey which found that less than a third of organisations said their company performed risk assessments in the critical areas of anti-bribery and corruption, anti-money laundering, or sanctions and export controls, despite this being (in relation to bribery) one of the six principles in the MoJ Guidance.
49. Where risk assessments are completed, we often find that the compliance programmes do not align clearly to the assessment results. This is largely due to the time pressures faced by organisations and their regularly changing priorities, which result in activity that can be misaligned to the business needs.
50. The risk of conflict between compliance regimes for businesses subject to multiple laws and regulation is an increasing challenge. This has resulted in the need to adopt a holistic approach to compliance across relevant legislation. For example, adequate procedures as part of the UKBA can trigger conflicts with the General Data Protection Regulation (GDPR) when undertaking third party due diligence, as a result of the level of information obtained on individuals of interest.

Keys to success

51. Our vision is that more businesses approach compliance as a business enabler.
52. Performing a robust risk assessment that addresses different risk profiles across the business is important in developing a proportionate approach to the UKBA and a compliance programme which is relevant to the business. In our experience, this has been a particularly difficult area to address: many businesses are still unsure what represents a robust and proportionate methodology to use and are therefore either not performing risk assessments at all or are not performing them in a way that balances the requirements of a dynamic and effective, risk-based anti-bribery compliance programme with the demands of the organisation and alignment with its pre-existing enterprise risk management framework or approach.
53. Increasing engagement of the first line of defence and educating the business and supply chain, both inside and outside the UK, on the implications of the UKBA is critical.
54. Additionally, a strong tone from the top and organisational culture are influential in determining how individual employees behave. This highlights the challenge of having the right incentives in place and the essential need for key management to be proactive in promoting ethical behaviours through regular communications, training and consequence management.

55. According to our GECS survey, 55% of UK frauds were committed by external perpetrators. Despite this, most organisations do not have a consolidated view of their third party relationships and find it too burdensome to review and monitor each relationship they hold, especially where an international presence exists. However, different types of third parties will mean differing focuses and spectrums of risks and if these are not considered and risk rated, the due diligence procedures an organisation applies will not be appropriately targeted.

56. Although the use of technology - in particular AI and big data analytics - has potentially transformative implications for both the prevention and detection of corruption, PwC's 2018 State of Compliance Survey shows that the 'leaders' in the industry rated their sophistication of technology to monitor third party compliance at only 41%. This shows that further progress can be made in the implementation of technology in this area.

Challenges

5) What impact has the Bribery Act 2010 had on SMEs in particular?

Background

57. As the MoJ has rightly highlighted, SMEs play a vital role in the UK economy, accounting for more than half of UK private sector employment and nearly half of turnover, with both of these contributions on a clear upward trend.²⁰⁷ Concerns around the UKBA's potential impact on SMEs have been evident from when the act was first being considered. Significant primary research has been conducted on the topic, but differing views continue to be taken.

Timeline: selected commentary and sources

58. From the beginning of the UKBA legislative process, concerns were raised that British businesses might suffer a competitive disadvantage. In 1998, for example, this point was made in response to a Law Commission consultation by (among others) the Institute of Directors, Institute of Chartered Accountants and Confederation of British Industry (CBI).²⁰⁸

59. As the corporate 'failure to prevent' offence took shape, concern shifted to the burden the 'adequate procedures' defence in particular might place on SMEs. The Federation of Small Businesses commented as follows:

"I would certainly agree with some of the comments ... about defining very clearly what is meant by 'adequate procedures' to give particularly small businesses a clearer steer.... Is it enough to merely have had a conversation with a colleague or to have factored certain proposals into a staff handbook or is there a need for a written and documented evidence trail? For small businesses, that obviously begins to get more

²⁰⁷ 59.1% and 48.8% respectively in 2012 - see <http://www.publications.parliament.uk/pa/ld201213/ldselect/ldsmall/131/131.pdf>

²⁰⁸ Law Commission, *Legislating the Criminal Code: Corruption* (3 March 1998) at para. 5.139

difficult when you have only got a handful of employees and you are very tight for time and resources.”²⁰⁹

60. After the UKBA came into force and the MOJ Guidance had been issued, an April 2013 report from the CBI recommended²¹⁰ that the government should “review the practical impact of the [UKBA] on competitiveness”, with a particular focus on SMEs. As the report explained:

“there are growing doubts ... around the practicality of the Section 7 corporate offence clause and its strict liability nature ... [UKBA] seems to place UK businesses at a competitive disadvantage [...]. Feedback from CBI members increasingly suggests that the [UKBA] is responsible for a growing administrative burden.”

61. In March 2013, SMEs were the subject of a Select Committee report which was critical of the UKBA’s approach and implementation, citing first hand evidence of competitive disadvantage provided by SME representatives, and reiterating the lack of clarity regarding ‘adequate procedures’ and other key provisions. The committee took the view that it was “not satisfactory to wait for ... case law ... to define the actual workings of the [UKBA]” and instead echoed the CBI’s recommendation that post-legislative scrutiny take place as soon as possible.²¹¹

62. In 2015, the MoJ and the then Department for Business, Innovation & Skills (BIS) commissioned specific research on the UKBA’s impact on SMEs (MOJ & BIS Survey). This concluded that SME’s generally seem to have taken a “proportionate, pragmatic” approach.²¹²

63. In March 2018, a jury trial offered further insight regarding SMEs in the first contested s7 UKBA ‘adequate procedures’ case (*Skansen*, see Paragraph 32 above).

Skansen

64. As we have recently commented in our legal blog²¹³ the *Skansen* case serves as an effective reminder of the position faced by many SMEs. Although as a jury decision it cannot be taken as a prescriptive guide to the law on ‘adequate procedures’, reports of the points raised by the prosecution give a good insight into how this aspect of the UKBA may tend to play out in court.

²⁰⁹ Uncorrected evidence from the Federation of Small Businesses to the Joint Committee on the Draft Bribery Bill, 2 June 2009

²¹⁰ *The only way is exports: Renewing the UK’s role as a trading nation* - [http://www.nass.org.uk/Publications/Publication3297/CBI%20The only way is exports April 2013.pdf](http://www.nass.org.uk/Publications/Publication3297/CBI%20The%20only%20way%20is%20exports%20April%202013.pdf)

²¹¹ *Roads to Success: SME Exports* report of 8 March 2013

²¹² <https://www.gov.uk/government/publications/impact-of-the-bribery-act-2010-on-smes>

²¹³ <http://pwc.blogs.com/legal/2018/04/uk-bribery-acts-adequate-procedures-guidance-for-smes.html>

65. As we have explained above²¹⁴, *Skansen* was a very small company whose exposure to bribery and corruption risk was low. The company did have in place some processes and procedures that were relevant to UKBA compliance, including financial controls and a general ethical policy statement that was communicated to staff by means of a large poster on the office wall. Even given the low risk and limited resources of the company, however, the jury was not convinced that these were sufficient for the 'adequate procedures' defence.
66. The 'associated person' bribery for which *Skansen* were held liable was that of rogue employees, operating at a senior level within the company. These individuals were able to manipulate financial controls, including by using their influence to make misleading accounting entries without being challenged in an effective manner. Importantly, this is a risk that any company could in principle be exposed to - SME or otherwise - including companies that may otherwise rate their exposure as low, for example if they do not operate in markets or territories perceived to have a high incidence of bribery or corruption.

Implications

67. *Skansen* is a good demonstration of the kind of low level but pervasive bribery and corruption risk that faces UK companies of every size and scale. The case also shows clearly how companies themselves are now criminally liable when they fail to prevent bribery of this kind, unless they are accepted as having done enough to prevent it from happening. It shows that "doing enough" - having adequate procedures for the purpose of the s7(2) UKBA defence - is likely to mean more than many SMEs in particular are likely to have thought about doing.
68. Based on the approach taken by the prosecution, the *Skansen* case appears to suggest that the minimum standard for 'adequate procedures', i.e. for SMEs and others like *Skansen* with the lowest levels of risk and resources, may be evidence of at least some activity targeted to each one of the six principles in the MoJ Guidance, for example a documented risk assessment, evidence of 'tone from the top' such as a ABC or wider ethical policy statement, and evidence of training and communication of policies and procedures to staff. General financial controls also likely to be required that are themselves 'adequate' to prevent bribery (e.g. not easily capable of being circumvented), as well as other specific 'adequate procedures' that are relevant, such as third party due diligence.
69. While none of these activities necessarily require large amounts of time or expense, they are not trivial, particularly in the context of SMEs that may just be starting up and focused on serving their first customers, generating revenue and attempting to cover costs and turn a profit. If these steps are not taken, however, in the event of any bribery by an 'associated person' the company itself can be exposed, with fines and other severe consequences that may threaten its very existence.

²¹⁴ paragraph 32

MoJ & BIS Survey

70. Of the comments and sources above, the 2015 MoJ & BIS Survey is the most optimistic about the impact the UKBA is having on SMEs. As the most comprehensive survey on the topic to date (that we are aware of) it is a key source to inform the Committee's work.
71. One observation we have on the survey is that the conclusions drawn may be in some respects over-optimistic. In particular, in the Foreword, an area of focus seems to have been whether SMEs have been "as result of misapprehension of [the UKBA's] impact and purpose, seek[ing] a disproportionate, burdensome and costly response to the Act and the [..G]uidance".²¹⁵ Since the survey has not revealed any evidence of large-scale, disproportionate spend on ABC compliance, the report suggests that the findings are encouraging.
72. In our view, this concern with potential disproportionate 'overspend' by SMEs may not be the most important issue. Instead, it may be more pertinent to consider what can be determined about the level of implementation of effective 'adequate procedures' to prevent bribery among UK SMEs. To the extent that any SMEs do not appear to have implemented 'adequate procedures', it will be relevant to consider what might be the economic cost of them either doing so, or of continued exposure to the underlying legal risk.
73. In relation to the first of these points, the MoJ/BIS survey reveals that, of the SMEs surveyed:
- 58% had no bribery prevention procedures - defined as anything that they thought helped prevent bribery.
 - 59% had not assessed their risk of being asked for bribes.
 - 33% had not heard of either the UKBA or the failure to prevent liability.
 - 74% of those who had heard of either of these were not aware of the MoJ Guidance on what might constitute 'adequate procedures'.

Implications

74. Looking back at the implications of *Skansen*, these findings do seem to raise concerns. In particular, while SMEs may have financial controls and other general procedures that help reduce the risk of bribery, the approach taken by the prosecution seemed to be to look for procedures specifically intended by the business to address UKBA and ABC risk. To the extent any SMEs are not aware of the UKBA, do not take themselves to have any anti-bribery procedures and have not looked at the Guidance or begun to assess their risks, it may be hard for them to sustain an 'adequate procedures' defence if challenged in court.
75. If UK SMEs are to become more ready and able to advance the 'adequate procedures' defence, it seems clear that more work will be required.

²¹⁵ see foreword, p1

Without this the only - not very attractive - option is to gamble on the risk that bribery simply will not happen to them, or that prosecutors will not find out.

76. A potentially important part of the solution could be to increase the use of technology to help deliver ABC compliance in a more cost-effective manner and at scale. In the *Skansen* case, reference was made to the company's new Managing Director having introduced, after the offending behaviour had already taken place, an ABC policy emailed to all staff with 'voting buttons' used to record their agreement to comply. Simple techniques of this kind have great potential across ABC compliance, for example electronic provision of training, or document automation for the production of risk assessments. One of the key shifts if this opportunity is to be seized will be for technology providers to more ably serve large volumes of SME clients at scale with solutions of this kind.

Challenges

6) Is the Act having unintended consequences?

77. It is essential that clients develop a strategy and business model that is relevant to their organisation, people and risk appetite. For some clients there is a lack of understanding in respect of the trade-off between compliance with the UKBA and business development efforts. This has resulted in clients taking prudent approaches to compliance rather than strategic, risk-based actions which would deliver the most benefit for the organisation.

78. This is particularly relevant to matters such as the treatment of gifts and hospitality, where the actions taken are not proportionate to the risk they pose, as per the client's risk assessment. With businesses increasingly having to prioritise their time, the more significant issues might be overlooked if time, money and resource are being spent on areas that pose less risk to the business.

79. Despite this prudence, the overall impact from such an approach has been a reduction in bribery and the emergence of cultural and risk appetite shifts. In our GECS survey, 42% of respondents said their companies had increased spending on combating fraud and economic crime over the past two years, compared to 39% in 2016. These approaches have also resulted in the development of tools and technology to assist compliance teams and to boost the topic of compliance to the board's agenda.

Deferred Prosecution Agreements

7) Has the introduction of Deferred Prosecution Agreements (DPAs) been a positive development in relation to offences under the Bribery Act 2010? Have DPAs been used appropriately and consistently? Has their use reduced the likelihood that culpable individuals will be prosecuted for offences under the Act?

Benefits of the DPA regime

80. The introduction of DPAs has certainly been a positive development. Key benefits include:

- the powerful incentive on companies to self-report;
- the resulting potential increase in prosecutions of corporates and individuals, as the authorities are made aware of additional instances of offending; and
- potential for quicker and less costly resolution of criminal cases (albeit that this point must not be over-exaggerated since in complex cases conclusion of a DPA can still require significant time and resource, particularly as the authorities seek confirmation that no further wrongdoing is likely to be uncovered).

81. In our experience businesses' awareness of DPAs and particularly the increased incentive to self-report, has been growing steadily since their introduction in February 2014. As a result, the effect of these benefits are likely to increase as the business community better understands the options that are now available.

82. We have also noted what appears to be a wider trend of increased incentives to self-report, which includes the HMRC Guidance on "reasonable procedures" for the tax evasion CCOs. This guidance states that "in order to encourage relevant bodies to disclose wrongdoing, timely self-reporting will be viewed as an indicator that a relevant body has reasonable procedures in place."

Desire for greater transparency

83. The key concern regarding DPAs we have witnessed within the business community is the desire for greater transparency regarding prosecutors' criteria in deciding whether to recommend one for approval by the courts. While the overarching requirement for cooperation is well understood, there is less clarity as to what in particular the SFO or CPS may believe to be required. Particular issues or suggestions include:

- *SMEs and other less well-resourced organisations.* The recent case of *Skansen* that involved an SME was an example where the DPA route was not taken, despite a self-report. For many commentators this has raised the question of whether the cooperation requirement is being applied in a sufficiently flexible way, so that smaller organisations are not unfairly prejudiced for not having sufficient resources to achieve a minimal level of cooperation - such as supporting additional internal investigation - that prosecutors may desire.
- *Legal Professional Privilege.* To what extent are prosecutors seeking waiver of well-founded claims to privilege, as part of the cooperation

requirement, and is this an appropriate and justifiable approach for them to take given that it is a fundamental cornerstone of our legal process, and an uncontrolled waiver of privilege may have wider implications, for example for affected third parties.

- *Explanation of DPAs that have not been progressed.* Since the *Skansen* case in particular it is clear that questions of approach arise as much when DPAs are not granted, as when they are finally approved. It may be worth considering whether prosecutors should issue guidance on the factors which lead to particular decisions being made not to progress to DPA.

International Aspects

8) How does the Bribery Act 2010 compare with anti-corruption legislation in other countries? Are there lessons which could be learned from other countries?

Strengths

84. International comparisons show that, seven years after coming into force, the UKBA has retained its role as a leading, if not the pre-eminent piece of ABC legislation internationally.
85. Evidence of the UKBA's international importance is the influence it has had on ABC legislation which has subsequently been reformed. In Kenya, for example, the Bribery Act 2016 draws extensively on UKBA formulations and drafting. The same is true in Australia with the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 currently being considered by parliament, which closely follows the UKBA 'failure to prevent' offence and 'adequate procedures' defence, plus a statutory requirement for guidance to be published.
86. Many of the UKBA's key strengths are in areas where comparable legislation remain less stringent, for example:
 - *Extra-territorial reach* - a number of international jurisdictions still do not prohibit bribery taking place outside of the country. Examples include: Chile, Italy, Montenegro and Saudi Arabia.
 - *Facilitation payments* - in addition to the United States (US) under its Foreign Corrupt Practices Act 1977 (FCPA), countries that permit facilitation payments in at least some forms and/or in given circumstances, include: Australia, Italy, Portugal and Switzerland.
 - *De minimis* - this can vary from country to country and may relate to: the size of the business caught (see France); if the degree of guilt is low (as in Serbia and Montenegro); or the value of the alleged bribe (e.g. gifts between legal entities, see Russia). Other countries with

some form of *de minimis* include: Australia, Colombia, Croatia, Indonesia, Slovenia, Switzerland and Thailand.

- *Disregard for local custom* - where under the UKBA for the assessment of impropriety "local custom practice is to be disregarded unless ... permitted or required by ... written law" (s5(2)), under Swiss law advantages are not deemed undue if "of minor value in accordance with social custom".²¹⁶

Compulsory ABC procedures

87. Under the UKBA there is no substantive requirement for commercial organisations to have ABC procedures in place. They are required only if the organisation wishes to avail itself of the s7(2) 'adequate procedures' defence, in the event it is charged with failure to prevent bribery by an associated person. In contrast to this, in some other jurisdictions a positive obligation has been imposed.
88. *France's Sapin II law* is perhaps the most closely scrutinised example of this from a UK perspective. This came into force on 1 June 2017 and establishes a strict positive obligation on French companies to "prevent corruption." Companies with over 500 employees or an annual turnover in excess of EUR 100m are expected to implement an appropriate internal ABC risk management framework, with the company and its directors held accountable by the newly created Agence Française Anticorruption (AFA). Ultimate sanctions for breach include fines for a legal person of up to EUR 1m and for individuals up to EUR 200,000 and the right for the authorities to publicise both the failure and fine.
89. There is a strong argument that implementing a positive requirement, rather than an optional defence, makes even more pressing the need for effective guidance as to what standard of ABC procedures is required in order to comply with the law. Consistently with this, the AFA's Guidance is significantly more detailed and prescriptive than that of the MoJ Guidance. The document acknowledges that organisations face different types and levels of risk, so that mapping these is a top priority, and appropriate controls will vary as a result. Procedures likely to be common across all organisations, however - such as top-level commitment, communication, training, whistleblowing processes and financial controls - are discussed in depth.
90. The required standard for compliant ABC procedures is not explicitly spelled out, however there may be an implicit guide in the form of the sample "table for assessing prevention measures" (p17, AFA Guidance), in which processes, procedures and controls are shown as being evaluated for both structure and effectiveness, and a four point scale is used for each, from "Absent" to "Effective and reliable" (anything short of the latter is at best "ineffective or inappropriate"). In the case of controls the "effective" standard is defined as having a success rate over 80%.

²¹⁶ Article 322decies para. 1, Swiss Criminal Code

91. Clearly there are questions over whether this level of effectiveness would be necessary for risks with a low level of severity, or proportionate if achieving it would have a very high economic cost. Nevertheless the AFA document is a clear example of a significantly more prescriptive and therefore certain document than its UK equivalent. A potential downside of this approach is the 'box ticking' risk that may result as a consequence of specified steps being followed but the intended outcomes still not being achieved. In addition it should be noted that while the comprehensive and detailed approach may be justified given exemption for smaller, lower turnover organisations, this does in turn raise the question of whether France has any measures in place to address bribery and corruption risk in the SME sector.

92. *Kenya's Bribery Act 2016* is another, perhaps less well-known, example in this area: both public and private entities are required to put in place appropriate ABC procedures. If this is not done an offence is committed by any private sector director or senior officer proven to have consented to, or connived in, the failure.²¹⁷ Regarding the 'appropriateness' standard for legally compliant procedures, in contrast to the UK statutory requirement for guidance, the Kenyan Act has a more open-ended obligation on the Ethics and Anti-Corruption Commission (EACC) to "assist"²¹⁸ with the putting into place of ABC procedures. Pursuant to this, to date on the EACC website's 'Codes and Guidelines' section, there is no single overarching "appropriate procedures" guidance analogous to the MoJ Guidance. Instead there are a number of more specific documents e.g. a set of "Guidelines for the development of a code of conduct and ethics for public officers", "Corruption prevention guidelines on ICT systems in the public sector", and so on.

Generalised corporate liability regimes

93. In both Spain and Italy a style of regime has been adopted where corporates can potentially be liable for any kind of criminal offence at all, if committed by persons connected to them in a defined set of ways. By way of illustration of this approach, the Spanish regime operates as follows. Liability is for offences:

- committed in the name [of the corporate] and on behalf thereof;
- for their direct or indirect benefit;
- by their legal representatives; or
- by those who, acting individually or as members of a body of the legal entity, are authorised to make decisions in the name of the legal entity or hold organisational and management powers within it.²¹⁹

94. Mirroring the UKBA 'adequate procedures' defence, there is no liability if company management adopted an "organisational and administrative model" aimed at the prevention of particular offence in question.

²¹⁷ s9

²¹⁸ s9(3)

²¹⁹ Spanish Criminal Code, Article 31 bis as amended by Organic Law 1/2015

95. The details of this defence reveal some differences to the UKBA regime. The core 'adequacy' standard is that the measures are intended to control and prevent the offence(s) or "significantly reduce the risk of ... commission". This appears to be significantly lower than the UKBA requirement for measures that are 'adequate' to preventing bribery.
96. A successful defence, however, requires that: (i) the individual perpetrators committed the offence by fraudulently evading the organisation and prevention models; and (ii) there was no omission or inadequate exercise of functions of supervision, oversight and control by the [company]. In practice therefore, companies have an incentive to implement stronger procedures than the legal requirement, if they believe this will be effective in ensuring that controls cannot be breached except by fraudulent evasion and that supervision, oversight and control cannot be deemed inadequate.
97. At a policy level, if the UK were to follow the Spanish and Italian model, it would in effect be replacing the current restrictive 'identification principle' (IP) approach to corporate criminal liability across all criminal offences (the IP approach entails that a company will only be liable for a criminal offence if the person who actually committed the offence can be accepted as representing an "embodiment" of the company,²²⁰ or its "directing mind and will".²²¹ Historically, prosecutors have struggled to prove this, for example where an offence is committed by lower level employees without the board or senior management being aware). Replacement of the IP approach with a UKBA-style 'failure to prevent' plus 'adequate procedures' model has since been introduced for the tax-evasion related 'failure to prevent' offences in the Criminal Finances Act 2017. Further extension has also been considered²²² to cover various "economic crimes", such as certain of the most serious fraud offences, false accounting and money laundering. There has not yet been consideration in the UK of an open-ended extension to all criminal offences.
98. From the point of view of bribery in particular, one advantage of a broadening in the range of UK corporate 'failure to prevent' offences is that it may encourage a more holistic, integrated, approach to financial crime compliance, with a larger number of potential offences and risks being considered together within the same programme.

Lessons from international enforcement

99. As well as the comparison of international ABC law, we have seen businesses that are exposed to many variations in approach to enforcement activity each with differing levels of effectiveness. In particular the US FCPA is often perceived as being a higher profile issue for corporates, not just because it sets relatively high legal standards, but also because the US authorities are recognised as strong investigators and enforcers of the law. In the compliance community effective enforcement

²²⁰ *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, at 170E

²²¹ *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705

²²² <https://www.gov.uk/government/consultations/corporate-liability-for-economic-crime-call-for-evidence>

is often welcome as a means to keep ABC activity high on the corporate agenda.

100. A related comment we have heard from clients is the wish for increased, and more effective global ABC efforts, both in terms of legislation (for example common standards or guidance) and enforcement. On the enforcement side increasing cooperation and collaboration between international authorities has been a clear trend in recent years as reflected, for example, in the number of US authority acknowledgments of international assistance with its investigations.

International Aspects

9) What impact has the Bribery Act 2010 had on UK businesses and individuals operating abroad?

UK businesses operating abroad

101. In our experience businesses competing against local businesses who are not subject to such stringent ABC regulations as the UKBA (or its international equivalents, such as the US FCPA) do consistently report the impact this has on their competitiveness in those local markets.
102. Fortunately with the consolidation and globalisation of international corporates, and the increasing number of countries implementing enhanced ABC regimes (which also generally include wide international scope), the scale of this problem is reducing.
103. Perhaps in light of these trends, our experience has been that UK businesses have called, not for an UKBA provisions to be disapplied or 'watered down', but instead for the remaining gaps in coverage to be plugged in order to ensure a consistent basis for business to be conducted internationally, based on a uniformly high standard of ABC protection and compliance.

Extraterritorial reach - corporate groups and shareholders

104. For international commercial organisations considering whether they may be caught by the UKBA 'failure to prevent' offence, the key UKBA test is whether they are carrying on at least part of its business in the UK (s7(5) UKBA).
105. In our experience there is often considerable uncertainty regarding this provision when it comes to non-UK corporate entities (i.e. not UK incorporated or having UK operations) that nevertheless own all or part of an UK entity. In this scenario the question arises whether (for example) the non-UK parent company itself qualifies as carrying on a business in the UK, or indeed whether any other entity in any international group structure will so qualify. The same question arises for non-UK private equity funds and others who may not own a UK company entirely, but are concerned about the implications of their shareholding in it.
106. As noted in the MoJ Memorandum there has not yet been a case on this provision of the UKBA specifically but it is reasonable to assume the courts may follow the *Akzo Nobel* case which interpreted a very similar provision in the context of competition law.²²³ In *Akzo Nobel* the finding was as follows:

²²³ *Akzo Nobel NV v Competition Commission & ors* [2014] EWCA Civ 482, see MoJ Memorandum para 129ff, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/713452/bribery-act-2010-post-legislative-scrutiny-memorandum.pdf

- If a traditional shareholder role is being performed, i.e. where management is left entirely to the company's directors, and only influenced indirectly by voting at general meetings and deciding which directors to appoint, then it is unlikely that liability from the UK entity will arise for the parent or other shareholder.
- There is, however, potential for liability if the shareholder exerts a greater degree of control over the entity.
- The case itself does not provide definitive guidance or any ultimate test for the required level of control for this purpose.
- It does however clarify the position that liability is likely to apply to many modern international corporate groups. This will be triggered, for example, where international executive boards or other structures at parent company level exercise substantial strategic and operational control over the local UK subsidiary.

107. While this is undoubtedly one of the key scenarios in practice, questions nevertheless continue to arise in relation to shareholder relationships involving less than full ownership, and/or where a lower degree of control is exercised.

108. As a relevant point of comparison here we have noted that the current bill for reform bribery law in Australia²²⁴ includes a stipulation that, under the separate but related 'associated person' test (modelled on the equivalent UKBA provision) international subsidiaries will always be caught.

109. This approach raises the possibility that the UKBA could be amended to include a similar stipulation regarding shareholder liability that would provide greater certainty for international businesses than the current position.

Disclaimer

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31 July 2018

²²⁴ Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017

Monty Raphael QC – Written evidence (BRI0016)

Question 1: Is the Bribery Act 2010 deterring bribery in the UK and abroad?

1. The deterrent effect of the Bribery Act 2010 has been felt most keenly by business entities who were, before its enactment, indifferent to, or insufficiently concerned with, the commission of bribery on their behalf. Their vociferous introduction of bribery prevention policies will have acted as a deterrent to those intending to bribe on their behalf.
2. Moreover, because there is no immunity from prosecution for individuals included in a DPA, the necessary deterrent effect for corporate bribery is being achieved.
3. As a result, the UK has moved from being a country that is characterised as ignoring its obligations under international instruments, to one that has established a new 'gold standard' for ethical business practices.

Question 2: Is the Bribery Act 2010 being adequately enforced? If not, how could enforcement be improved? Do the Serious Fraud Office and the Crown Prosecution Service have the right approach and the resources they need to investigate and prosecute bribery offences effectively?

4. The UK is now considered to be "one of the major enforcers" of the OECD Convention on Combating Bribery of Foreign Public Officials. The SFO has concluded a number of foreign bribery cases, with numerous prosecutions and pre-charge investigations also underway. In its latest Review, the OECD observed that important legislative reforms and high-level political commitments have supported these enforcement efforts. Moreover, the number of investigative agencies has increased and their powers have become more sophisticated. All of that is to be applauded.
5. However, such has become the complexity of business crime, whether business is the victim or the perpetrator, that the prosecuting agencies simply do not have the resources necessary to the task of investigating and prosecuting it all. Even where business delinquency is wholly contained within national boundaries, its confrontation competes with many other crime control priorities for a slice of a diminishing public-spending cake. The resources of crime control agencies and regulators are not equal to the task of rooting out all delinquencies.
6. It is for that reason that the encouragement and incentivisation of self-reporting is an essential aid to investigation. However, whilst the SFO has said that self-reporting is a factor that would tend towards non-prosecution, it has also said (in its Guidance on Corporate Self-reporting) that: "*if on the evidence there is a realistic prospect of prosecution, the SFO will prosecute if it is in the public interest to do so ... self-reporting is no guarantee that a prosecution will not follow.*" This

must be viewed in light of the SFO's position that, unlike the Department of Justice's Foreign Corrupt Practices Act (FCPA) Opinion Procedure, it will not provide *a priori* opinions on prospective conduct.

7. This all supports a feeling of uncertainty about the outcome of self-reporting. There is also a lack of certainty, and understanding, about what will happen to information that a corporation provides to the SFO when they self-report, and whether it will be shared with other investigatory and prosecutorial agencies around the world. The possibility that a self-report could lead to investigations in multiple jurisdictions, not least the US, and the associated costs, legal fees, fines, threats to a company's survival, and reputational damage, is a significant factor in an organisation's decision.

Question 3: Is the statutory guidance on the Bribery Act 2010 sufficient, clear and well-understood by the companies and individuals who have to deal with it? Should alternative approaches be considered?

8. Whilst there is all manner of guidance (governmental, professional and that produced by NGOs), corporates have, in reality, received little to nourish their insights into regulatory policy. The four concluded DPAs have not provided the insight that practitioners had hoped for - they contain little from which business can derive guidance - and the first contested prosecution for a section 7 offence has no value as a precedent. It remains the position that 'adequacy' will depend on prosecutorial discretion and judicial interpretation.
9. The Statutory Guidance, whilst detailed and seemingly designed to provide as much information as possible to those caught by the Act, is nonetheless explicitly non-prescriptive. It exists as a guide to 'adequate procedures' whilst recognising that the size of a business or organisation, and where and how it does business will necessarily influence its response to the Act—it cannot be, and is not, a one-size-fits-all document. The position remains that whether or not procedures are adequate to satisfy the requirements of the adequate procedures defence will be a matter for the courts to decide having regard to all of the relevant circumstances.
10. During the second reading of the Bribery Bill, Lord Henley raised a number of concerns:
 - Who is to judge what is adequate and what is not?
 - If a company has stringent rules in place, checks on its employees, has transparent accounting and so on, but a determined associate of that company still manages to bribe another, were those procedures adequate? They did not, after all, prevent the offence of bribery taking place.
 - What about a company with weak procedures in place which nevertheless managed, perhaps more by chance than anything

else, to stop an embryonic plan to commit bribery? Which of those cases should be prosecuted?

- What about the commercial organisations themselves? How will they know if they have put in place adequate procedures?

11. Those sensible and valid concerns are yet to be answered.

12. Many (including the author of this response) hoped that the UK would follow the US example by providing a Foreign Corrupt Practices Act (FCPA) lookalike Opinion Procedure, from which business could draw some *a priori* comfort. The Department of Justice (DOJ) has for many years been prepared to offer *a priori* opinions on a given set of facts. The result is a Resource Guide which is vastly lengthier than the section 9 guidance of the MOJ. Such an approach also mitigated the competing dilemmas of, on one hand, a government anxious to send a firm no bribery message, and on the other, business afraid of being rendered uncompetitive by over zealous and impractical regulation.

Question 5: What impact has the Bribery Act 2010 had on small and medium enterprises (SMEs) in particular?

13. Businesses unused to the rigours of regulation (often SMEs) have found compliance both daunting and expensive. Parliament was lobbied as early as 2013 to amend section 7, even before there had been a single prosecution, on the grounds that the Guidance was inadequate and the very existence of section 7 was a disincentive to businesses exporting goods and services.

14. It is to be noted that the US Guidelines address the size of an organisation and how that impacts upon its compliance programme. The Guidelines expressly provide that a small organisation may meet its requirements with less formality and fewer resources than would be expected of large organisations. In appropriate circumstances, reliance on existing resources and simple systems can demonstrate a degree of commitment that, for a large organisation, would only be demonstrated through more formally planned and implemented systems. Examples of the informality and use of fewer resources with which a small organisation may meet the requirements of this guideline include the following: (I) the governing authority's discharge of its responsibility for oversight of the compliance and ethics program by directly managing the organisation's compliance and ethics efforts; (II) training employees through informal staff meetings, and monitoring through regular 'walk-arounds' or continuous observation while managing the organisation; (III) using available personnel, rather than employing separate staff, to carry out the compliance and ethics programme; and (IV) modelling its own compliance and ethics programme on existing, well-regarded compliance and ethics programs and best practices of other similar organisations.

Question 7: Has the introduction of Deferred Prosecution Agreements (DPAs) been a positive development in relation to offences under the

Bribery Act 2010? Have DPAs been used appropriately and consistently? Has their use reduced the likelihood that culpable individuals will be prosecuted for offences under the Act?

15. On 19 June 2015, the UK's leading anti-corruption NGOs, Transparency International, Corruption Watch, and Global Witness, wrote to David Green in response to reports that the SFO has sent out its first invitation letters for companies to enter into DPAs. The letter noted that the UK is embarking on DPAs at a time when their use has become increasingly controversial in the US and that the UK must, and can, avoid the more controversial elements of the settlement process. The letter urged the SFO to take account of eight key principles, which included ensuring that it avoids the trend of offering DPAs to large companies which are more expensive and difficult to prosecute, while prosecuting smaller companies.
16. Nevertheless, the first contested prosecution for a section 7 offence was of a small British refurbishment company, Skansen Interiors. It was, with respect, an unnecessary prosecution against a dormant company that had employed 30 people. It resulted in an absolute discharge. Despite doing its "utmost" to bring itself within the DPA guidance – including conducting an internal investigation, establishing new compliance procedures, dismissing the individuals involved, making a suspicious activity report to the NCA and asking the City of London Police to investigate – the company was prosecuted in the "the first case enforcing 'failure to prevent bribery' legislation".

The position of individuals

17. The position of individuals within the DPA process has not been given proper consideration. At present, individuals identified (even if not by name) within a DPA have no opportunity to make representations about its content. It may be that an individual's criminality is used to found the DPA, only for that individual later to be acquitted. The consequence is a DPA which states as a fact that he is guilty (with his guilt giving rise to liability for the corporate) on the one hand, and a not guilty verdict on the other.

Question 8: How does the Bribery Act 2010 compare with anti-corruption legislation in other countries? Are there lessons which could be learned from other countries?

18. The DOJ's opinion procedure is a valuable mechanism for companies and individuals to determine whether proposed conduct would be prosecuted by the DOJ under the FCPA. Generally speaking, under the opinion procedure process, parties submit information to the DOJ, after which the DOJ issues an opinion about whether the proposed conduct falls within its enforcement policy. The DOJ's FCPA opinions state whether, for purposes of the DOJ's present enforcement policy, the prospective conduct would violate either the issuer or domestic concern anti-bribery provisions of the

FCPA. To the extent that the opinion concludes that the proposed conduct would not violate the FCPA, a rebuttable presumption is created that the requestor's conduct that was the basis of the opinion is in compliance with the FCPA. In order to provide non-binding guidance to the business community, the DOJ makes versions of its opinions publicly available on its website.

19. The DOJ's opinion procedure is in stark contrast to the SFO's position: *"I don't think the sign downstairs says 'free advice given on serious fraud and corruption'. They can bloody well go and get their own advice from their very expensive ritzy experts ... I am not here to give advice. I am here in the same way that the Revenue is, to enforce the law. I don't think the public would be very impressed by cosy deals."* (David Green CB QC). While it may be true that large corporations have ready and timely access to reliable advice and can afford to pay for it, many SMEs would doubtless value the creation of a state resource by which they could, if need be and for a modest fixed fee, receive an opinion they could rely on. This might remove the constant lobbying by SMEs' representative bodies.

Monty Raphael QC (Honoris Causa)

31 July 2018

These answers are provided with the assistance of Rachna Gokani (QEB Hollis Whiteman), a co-author with me of 'Bribery: Law and Practice', OUP, 2016.

Professor Jonathan J. Rusch – Written evidence (BRI0017)

To the Chairman and Members of the Committee:

I. Background

(1) This submission is based on my experience and knowledge as (1) a former Deputy Chief for Strategy and Policy in the Fraud Section of the Criminal Division of the United States Department of Justice (DOJ) (retired 2015); (2) a recently retired Senior Vice President and Head of Anti-Bribery & Corruption Governance with Wells Fargo & Company (2015-2018); and (3) Adjunct Professor at Georgetown University Law Center in Washington, DC. The views herein are solely my own, and do not necessarily reflect those of the DOJ, Wells Fargo, or Georgetown University. Further details regarding my background and experience, including links to my [article](#) and [blog post](#) on section 7 of the Bribery Act 2010, are available on [LinkedIn](#).

II. Questions 1-4 and 6-7 and Responses

Deterrence

1. Is the Bribery Act 2010 deterring bribery in the UK and abroad?

(2) From my experience in my former company and frequent interactions with anti-corruption compliance leaders in U.S. and UK corporate entities, I am confident – with one qualification -- that the Act is deterring bribery. In general, anti-corruption compliance officers in large companies here and in the United Kingdom are well aware of the severity of the Act's sanctions for violations of sections 1, 2, 6, 7, and 14, and have taken significant steps to establish and maintain effective global anti-corruption programs.

(3) The qualification is simply that it would be difficult to establish the extent to which that deterrence can be ascribed solely to the Bribery Act 2010. In recent years, as the Committee undoubtedly has seen already, the SFO, the DOJ, and the U.S. Securities and Exchange Commission (SEC) have provided extensive cooperation to each other, and received cooperation from still more nations, in bribery and corruption investigations. That cooperation has achieved notable results in corporate resolutions such as [Standard Bank](#) (2015, US\$36.6 million in penalties, compensation, disgorgement, and costs), [Rolls-Royce](#) (2017, US \$800 million in penalties), [Société Générale S.A.](#) (2018, US \$585 million in penalties), [Legg Mason Inc.](#) (2018, \$64.2 million in penalties), and in individual prosecutions for corruption-related offenses. But as general and trade media report on more countries actively enforcing their own anti-corruption offenses and cooperating with other countries in anti-corruption investigations, the more difficult it is to ascribe specific deterrent effects to the efforts of any single jurisdiction.

Enforcement

2. Is the Bribery Act 2010 being adequately enforced? If not, how could enforcement be improved? Do the Serious Fraud Office and the Crown Prosecution Service have the right approach and the resources they need to investigate and prosecute bribery offences effectively?

- (4) The first question as worded is difficult to answer, for there is no *ex ante* definition of “adequacy” against which the accomplishments of the Serious Fraud Office (SFO) and the Crown Prosecution Service can be fairly measured. As a former federal prosecutor in the United States who was lead counsel in significant fraud and public corruption prosecutions, I recommend that performance of a prosecutor’s office with regard to enforcement of a particular category of criminal offense should first be measured with reference to the available number of prosecutors, agents, and support staff for investigations of that criminal offense. The SFO has recently reported that it has more than 500 lawyers, investigators, forensic accountants, digital specialists, and others on its staff. That aggregate total, however, does not identify what proportion of staff are specifically devoted to enforcement of the Bribery Act 2010 and cooperation with other countries’ anti-corruption enforcement efforts.
- (5) Moreover, every Bribery Act 2010 investigation will likely differ in duration from every other investigation, depending on a host of factors such as (1) the nature and duration of the alleged corrupt conduct, (2) the complexity of the corrupt scheme (e.g., the number of intracorporate layers, lines of business, and geographic locations involved in establishing and maintaining the scheme); (3) the number and seniority of corporate officials allegedly involved in the relevant Act offenses; and (4) the time needed to obtain admissible evidence from jurisdictions outside the United Kingdom. In other words, some investigations can be timely pursued with fairly lean staffing, while others may require larger teams of lawyers, forensic accountants, and others with relevant skill sets. The fact that some cases can only be resolved after one, two, or more years does not mean that the staffing for those cases was necessarily “adequate” or “inadequate.” If the Committee is to pursue these questions, it may be more relevant to see whether SFO leaders believe that certain cases might have been successfully investigated and resolved sooner had more human, fiscal, or information resources been available at the time.
- (6) With regard to the third question, I note with concern public reports that the SFO’s budget had been dramatically reduced over multiple years, from £52 million in 2008 to £35.7 million in 2016. Although the SFO undoubtedly has benefited from the availability of special funding from HM Treasury for so-called “blockbuster” cases, continuation of overall budget reductions for the SFO would be harmful to the SFO’s ability to plan for the sustained pursuit of investigations that may take more than one or two years to bring to fruition. Unless the SFO knows early on that a particular investigation is likely to meet the criteria for “blockbuster” funding, it may be deterred from pursuing that investigation if it cannot be reasonably assured of having the necessary funding to support it.
- (7) In addition, the current funding structure may have a further unintended knock-on effect. If executives at companies that can be considered small and medium enterprises (SMEs) perceive that the SFO’s funding and public support limit it to concentrating on only “blockbuster” cases, those executives may come to believe, absent an improvement in the SFO’s funding structure and levels, that the SFO is unlikely to pay attention to

bribery and corruption allegations at smaller companies and that the risk of detection and enforcement action, should they engage in bribery to further their companies' interests, has become vanishingly low. While the SFO's and CPS's recent history of Bribery Act 2010 enforcement include a very few instances of prosecuting SMEs and SME executives and managers, the threat of enforcement under the Act is likely to lose credibility if those agencies lack the resources to pursue any cases other than "blockbuster" cases.

Guidance

3. *Is the statutory guidance on the Bribery Act 2010 sufficient, clear and well-understood by the companies and individuals who have to deal with it? Should alternative approaches be considered?*

- (8) My answer to the first question is no. As I argue at greater length in the article I mentioned above, the text of the section 7 offense and the "adequate procedures" defense, even if read *in pari materia* with the Ministry of Justice Guidance that the Act requires, are so vague and amorphous that they fail to give fair warning and therefore pose a risk of arbitrary enforcement by prosecutors.
- (9) One step that the Committee may wish to consider is replacing the words "adequate procedures" in subsection 7(2) of the Act with language that refers to "reasonable procedures", as Parliament has already chose to do in establishing an affirmative defense for the "failure to prevent facilitation of tax-evasion offenses" in subsections 45(2) and 46(3) of the Criminal Finances Act. The word "adequate" in this context has a defect comparable to the one discussed above: i.e., that there is no *ex ante* or objective standard by which "adequacy" of compliance procedures can be determined by triers of fact.
- (10) Even if the Committee is disinclined to revise the text of section 7 to reduce that inherent vagueness, it should at least urge the Ministry of Justice to amend its Guidance to state more specifically the importance of a company's providing sufficient resources to make its anti-bribery compliance program effective. It is not enough to say, as did the Secretary of State for Justice stated in the Guidance (p. 2), that the Government want "to ensure the [Bribery] Act is implemented in a workable way – especially for small firms that have limited resources." As a point of comparison, the DOJ-SEC FCPA Resource Guide (p. 58) states that senior compliance executives must have "sufficient resources to ensure that the company's compliance program is implemented effectively," and that "[i]n assessing whether a company has reasonable internal controls, DOJ and SEC typically consider whether the company devoted adequate staffing and resources to the compliance program given the size, structure, and risk profile of the business."

Challenges

4. *How have businesses sought to implement compliance programmes which address the six principles set out in the Ministry of Justice's guidance on the Bribery Act 2010? What challenges have businesses faced in seeking to implement their compliance programmes? Are there any areas which have been particularly difficult to address?*

- (11) In my experience, companies with both U.S. and UK operations devise and implement the structure and content of their anti-bribery and corruption policies and programs with reference not only to the Bribery Act 2010's text and Guidance, but also to the text of the Foreign Corrupt Practices Act (FCPA) and the DOJ and SEC FCPA Resource Guide. In some cases, companies also will seek to benchmark their policies and procedures against more detailed non-governmental guidance, such as the Transparency International UK Adequate Procedures Guidance, ISO 37001, and the Wolfsberg Group Anti-Bribery and Corruption (ABC) Compliance Programme Guidance.
- (12) The most specific challenge that companies face in anti-bribery and corruption compliance is that the "failure to prevent" language of section 7 continues to create uncertainty about whether their procedures will be considered "adequate" in the eyes of a judge or jury if, despite their best efforts, an executive or manager engages in a single act of bribery. The Ministry of Justice Guidance does state (p. 15) that "the commercial organisation will have a full defence if it can show that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing." The fact remains, as the Standard Bank resolution shows, that even a single case of bribery is sufficient to lay the ground for a section 7 prosecution. Companies therefore remain concerned that if a single act of bribery slips through their compliance procedures, no matter how elaborate and well-supported by senior management they may be, a jury will conclude that by definition the procedures were "inadequate" and reject the company's affirmative defense.
- (13) A further challenge that some companies face in anti-bribery and corruption compliance is that there is an unintentional tension between official and non-governmental sources of guidance. While government agencies are reluctant to provide more specific guidance on key compliance-program elements, companies have no assurance that the more detailed guidance from non-governmental organizations, even if apparently reasonable on its face, will be acceptable to government agencies reviewing the effectiveness of corporate compliance programs.

Deferred Prosecution Agreements

6. Has the introduction of Deferred Prosecution Agreements (DPAs) been a positive development in relation to offences under the Bribery Act 2010? Have DPAs been used appropriately and consistently? Has their use reduced the likelihood that culpable individuals will be prosecuted for offences under the Act?

- (14) My answer to the first and second questions is yes. While I believe that DPAs can be satisfactorily concluded without prior judicial approval, as is the case in the United States, the UK prior-judicial-approval process to date has provided a high degree of transparency in the terms and conditions of bribery-related DPAs, as well as an additional measure of confidence that judicial supervision appears to be providing.

- (15) As for the third question, I have seen no evidence that culpable individuals are less likely to be prosecuted for Bribery Act 2010 offenses merely because the SFO has concluded DPAs with corporate entities.

International aspects

7. How does the Bribery Act 2010 compare with anti-corruption legislation in other countries? Are there lessons which could be learned from other countries?

- (16) One specific aspect of the DOJ's administration of the FCPA that might be considered is the FCPA Opinion procedure. Under this procedure, companies may formally request from the DOJ an opinion about "whether certain specified, prospective--not hypothetical--conduct conforms with the Department's present enforcement policy regarding the antibribery provisions of the [FCPA]" Although the preparation and approval of specific FCPA opinions may take some time, depending on the complexity of the proposed action and the underlying facts, companies that do receive FCPA opinions can have greater confidence that their proposed course of action is lawful.

31 July 2018

Dr Nicholas Ryder- Written evidence (BRI0010)

Introduction

The submission provides a summary of the research conducted by Professor Nicholas Ryder on the Bribery Act 2010. The submission presents a summary of the key findings in the hope that they will support the House of Lords Select Committee's inquiry into the Bribery Act 2010.

Questions

2. Is the Bribery Act 2010 being adequately enforced? If not, how could enforcement be improved? Do the Serious Fraud Office and the Crown Prosecution Service have the right approach and the resources they need to investigate and prosecute bribery offences effectively?

Background

The United Kingdom's (UK) reform of its bribery laws began with the publication of a Law Commission Report in 1998.²²⁵ The Law Commission recommended that 'the common law offence of bribery and the statutory offences of corruption should be replaced by a modern statute'.²²⁶ The then Labour government responded by publishing the Corruption Bill, which after being subjected to pre-legislative scrutiny by the Joint Committee, was rejected, resulting in a revised version which was published in 2005.²²⁷ This was followed by another consultation exercise by the Law Commission in 2007,²²⁸ which subsequently led to the publication of its 2008 Report.²²⁹ In response to this Report, and to emphasise the impetus to address the threat posed by bribery, the then Justice Secretary, Jack Straw MP stated "a new law will provide our investigators and prosecutors with the tools they need to deal with bribery much more effectively."²³⁰ The Report was followed by the publication of a White Paper in 2009 that finally resulted in the enactment of the Bribery Act 2010.²³¹ Prior to its introduction, Kenneth Clarke MP, the then Secretary of State for Justice, stated that the Act would "reinforce its [the UK's] reputation as a leader in the global fight against corruption . . . The Act will ensure that the UK is at the forefront of the battle against bribery allowing the country to clamp down on corruption without being burdensome to business".²³² However, the provisions of the Bribery Act 2010 have received a mixture of responses from

²²⁵ Law Commission, *Legislating the Criminal Code: Corruption No. 248* (Law Commission 1998).

²²⁶ S. Sheikh, 'The Bribery Act 2010: commercial organisations beware!' (2011) *International Company and Commercial Law Review*, 22(1), 1-16, 4.

²²⁷ Home Office *Reform of the Prevention of Corruption Acts and SFO Powers in Cases of Bribery Against Foreign Officials* (Home Office 2005).

²²⁸ Law Commission *Reforming Bribery: A Consultation* (Law Commission 2007).

²²⁹ Law Commission *Reforming Bribery: A Consultation* (Law Commission 2007).

²³⁰ Ministry of Justice 'Government Welcomes New Bribery Law Recommendations' (November 20 2008)

<<http://www.wired-gov.net/wg/wg-news-1.nsf/0/329BD09E4E75E8138025750700478C2E?OpenDocument>> accessed 25 November 2011.

²³¹ The Ministry of Justice *Bribery: Draft Legislation* (The Stationery Office 2009).

²³² Ministry of Justice press release 'UK clamps down on corruption with new Bribery Act', <<http://www.justice.gov.uk/news/press-release-300311a.htm>> accessed 29 November 2011.

commentators. For example, some have suggested that the provisions 'go too far and fear [that] the new 'gold standard' legislation poses a threat to UK competitiveness'.²³³ Conversely, it has also been described as a 'major piece of legislation, of immense practical importance to the conduct of business, whether in the public or private sphere'.²³⁴

Enforcement – pre Bribery Act 2010

The enforcement response to the criminal offences under the Bribery Act 2010 has failed to achieve the political aspirations outlined above. A person found guilty of any of the offences contained in sections 1, 2 and 6 of the Bribery Act 2010 is liable to a maximum custodial sentence of 10 years imprisonment and/or an unlimited fine. For the offence found in section 7, the maximum penalty is an unlimited fine.²³⁵ Although the Serious Fraud Office (SFO) is arguably the lead agency in prosecuting cases of bribery and corruption, proceedings under the Act require the personal consent of not just the Director of the SFO but also, either the Director of Public Prosecutions or the Director of Revenue and Customs Prosecutions.²³⁶ The Crown Prosecution Service (CPS) has stated that not only is bribery a serious offence, but that 'there is an inherent public interest in bribery being prosecuted'.²³⁷ In determining whether or not to prosecute, the CPS will take into account both aggravating and mitigating factors. These might include the amount of money involved; whether there has been a breach of a position of trust; whether it involved a vulnerable or elderly victim; the period over which the offence was carried out; whether any voluntary repayments had been made and whether there were any personal factors such as disability, illness or family difficulties.²³⁸

Historically, however, and particularly with reference to the situation prior to the Bribery Act 2010, there have been few criminal cases taken to trial (see below); with this situation continuing even after the *de Grazia* Review in 2008.²³⁹ The few examples which do exist include one case from September 2009, where a British construction company, Mabey and Johnson, were held liable for bribing foreign officials in order to win business contracts. The company pleaded guilty to overseas corruption charges, for paying €1m million in bribes through middlemen with reference to £60-£70m contracts, and to the breaching of United Nations Iraq sanctions relating to Saddam Hussein's 'Oil for Food Programme'. The case concluded with a plea bargain, which led to a financial penalty of £3.5m, in addition to compensation payable to the countries of Ghana, Jamaica and Iraq and legal costs totalling £3.1m. Interestingly, this was the first conviction in the UK of a company for such offences with the SFO

²³³ T. Pope, and T. Webb. 'Legislative Comment – the Bribery Act 2010' (2010) *Journal of International Banking Law and Regulation*, 25(10), 480-483, 480.

²³⁴ Editorial 'The Bribery Act 2010' (2010) *Criminal Law Review*, 6, 439-440, 439.

²³⁵ Bribery Act 2010, s. 11(3).

²³⁶ Bribery Act 2010, s. 10.

²³⁷ The Crown Prosecution Service 'Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions', <http://www.cps.gov.uk/legal/a_to_c/bribery_act_2010/> accessed 9 February 2016.

²³⁸ The Crown Prosecution Service 'Bribery', *Legal Guidance* (Crown Prosecution Service 2008).

²³⁹ J. de Grazia, *Review of the Serious Fraud Office – Final Report* (Serious Fraud Office 2008).

deciding to prosecute the company rather than the actual individuals involved.²⁴⁰ However, the number of convictions has begun to increase and perhaps due to this there are now sentencing guidelines to help judges determine the most appropriate sentence. Initially the only available aid came in the form of two Court of Appeal cases; both of which were decided prior to 2010. The first *R v Anderson (Malcolm John)*,²⁴¹ involved the appeal of a sentence of 12 months imprisonment for accepting a bribe in return for contracts which were beneficial to the appellant's business. On the basis that the appellant was of previous good character and that the financial gain was relatively small, a sentence of six months was held to be more appropriate. The second is that of *R v Francis Hurrell*.²⁴² The sentence in question was again for 12 months, but this time was for attempting to bribe a police officer, through the offering of £2,000 so that the officer would not carry out a breath test. Even though the Court held that any attempt to bribe a police officer in the execution of his duty was serious, it nevertheless substituted the sentence for one of three months.

Such guidance may have been useful in the case of Mark Jessop, who in April 2011 was sentenced to a two-year custodial sentence and ordered to pay £150,000 in compensation and £25,000 in prosecution costs. The orders were in relation to ten counts of engaging in activities which made funds available to the Iraqi government in contravention of UN Iraq sanctions, again in relation to the 'Oil for Food Programme'.²⁴³ Other criminal prosecutions include Dennis Kerrison, Paul Jennings, Miliadiades Papachristos and David Turner, all former executives of Innospec Ltd, who in October 2011 were charged with corruption in relation to making and conspiring to make corrupt payments to public officials in Indonesia and Iraq in order to secure contracts for the business.²⁴⁴ In January 2012 Turner pleaded guilty to three counts of conspiracy to corrupt and in June and July 2012 Jennings also pleaded guilty to three counts of conspiracy. Both Kerrison and Papachristos were convicted of one count of conspiracy each in June 2014.²⁴⁵ Turner was sentenced to 16 months in custody, suspended for two years with 300 hours of unpaid work. Kerrison, Jennings and Papachristos were sentenced to four years, two years and 18 months in custody respectively, although Kerrison's sentence was later reduced to three years by the Court of Appeal. Innospec Ltd pleaded guilty to bribing state officials in Indonesia and was fined \$12.7m.²⁴⁶ The first criminal conviction of a corporate for offences involving the bribery of foreign public officials took place in December 2014. Smith & Ouzman Ltd, a company which specialised in printing security documents, was convicted of

²⁴⁰ Case Comment 'First UK company convicted for overseas corruption' (2010) *Company Lawyer*, 31(1), 16.

²⁴¹ [2003] 2 Cr. App. R. (S.) 28.

²⁴² [2004] 2 Cr. App. R. (S.) 23.

²⁴³ Serious Fraud Office, 'Medical goods to Iraq supplier jailed for paying kick-backs' (Press release 13 April 2011), <<http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/medical-goods-to-iraq-supplier-jailed-for-paying-kick-backs.aspx>> accessed 29 November 2011.

²⁴⁴ Serious Fraud Office 'Innospec Ltd: Two more executives charged with corruption', (Press Release 27 October 2011), <<http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/innospec-ltd-two-more-executives-charged-with-corruption.aspx>> accessed 29 November 2011.

²⁴⁵ It is worth noting that these were not offences under the Bribery Act 2010 but under section 1 of the Criminal Law Act 1977.

²⁴⁶ Serious Fraud Office 'Innospec Ltd', (Case Information), available at <https://www.sfo.gov.uk/cases/innospec-ltd/>, accessed 10 February 2016.

offences of corruptly agreeing to make payments totalling nearly £500,000.²⁴⁷ The payments were used to influence who was awarded business contracts in both Mauritania and Kenya. Nicholas Smith (Sales and Marketing Manager) and Christopher Smith (Chairman) were also convicted. Smith and Ouzman Ltd was ordered to pay £2.2 million; Nicholas Smith received a custodial sentence of three years and Christopher Smith a sentenced of 18 months, suspended for two years, 250 hours of unpaid work and a three month curfew.²⁴⁸

Enforcement – Bribery Act 2010

The convictions covered so far in this report have been for offences under the old pieces of legislation, namely the Prevention of Corruption Act 1906 and the Criminal Law Act 1977. In December 2014, however, the SFO secured its first convictions under the Bribery Act 2010 against Gary West and Stuart Stone. Both men were executives of Sustainable Growth Group and/or its subsidiary companies. The men, with James Whale, were involved in a fraud to induce people to invest via a pension plan in green bio fuel products. West received bribes for his role in producing false invoices to facilitate the fraud submitted by Stone.²⁴⁹ For the bribery offences, West received four years imprisonment and Stone six years.²⁵⁰ Since the implementation of the Bribery Act 2010, there have also been a very small number of successful prosecutions brought by the Crown Prosecution Service. For example, in *R v Patel*, the defendant was a clerk at a magistrate's court clerk, who was bribed £500 for not inputting information about a traffic violation onto a court database. Patel later pleaded guilty and was sentenced to a total of nine years imprisonment for bribery and misconduct offences although this was reduced to four years on appeal. The next successful prosecution under the Bribery Act was *R v Mushtaq*. The defendant offered a bribe to a licensing officer from Oldman Council to pass him on a driving test that he had failed. In December 2012 Mushtaq was given a two month custodial sentence, suspended for 12 months and a two month curfew order.²⁵¹ Finally, in April 2013 Li Yang, a postgraduate student was convicted of attempting to bribe his university professor after he had failed his dissertation. The defendant pleaded guilty to bribery and possessing an imitation firearm and was sentenced to a custodial sentence of 12 months.²⁵²

Financial Regulation

In addition, and perhaps instead of, criminal liability, the Financial Conduct Authority also has the power to impose civil fines under section 206(1) of the

²⁴⁷ The offences were contrary to section 1 of the Prevention of Corruption Act 1906.

²⁴⁸ Serious Fraud Office 'Smith and Ouzman Ltd', (Case information), available at: <https://www.sfo.gov.uk/cases/smith-ouzman-ltd/>, accessed 10 February 2016.

²⁴⁹ Serious Fraud Office 'City directors convicted in £23m 'Green bio fuel' trial' (News Release 5 December 2014) available at: <https://www.sfo.gov.uk/2014/12/05/city-directors-convicted-23m-green-biofuel-trial/>, accessed 10 February 2016.

²⁵⁰ Serious Fraud Office 'City directors sentenced to 28 years in total for £23 million green bio fuel fraud', (News Release 8 December 2014) available at: <https://www.sfo.gov.uk/2014/12/08/city-directors-sentenced-28-years-total-23m-green-biofuel-fraud/>, accessed 10 February 2016.

²⁵¹ <http://www.thelawpages.com/court-cases/Mawia-Mushtaq-11023-1.law>

²⁵² <http://www.thelawpages.com/court-cases/Yang-Li-10957-1.law>

Financial Services and Markets Act 2000.²⁵³ The use of this was seen in July 2011, when the FSA (as it was then) fined Willis Limited £6.895 million for weaknesses in its anti-bribery and corruption systems and controls.²⁵⁴ The FSA, in 2011, also fined Aon Limited £5.25 million for 'failing to take reasonable care to establish and maintain effective systems and controls to counter the risks of bribery and corruption associated with making payments to overseas firms and individuals'²⁵⁵. Here, the FSA determined that Aon Ltd had 'failed to properly assess the risks involved in its dealings with overseas firms and individuals who helped it win business and failed to implement effective controls to mitigate those risks'.²⁵⁶ More recently, the FCA fined JLT Speciality Limited £1.8 million for an 'unacceptable approach to bribery and corruption risks from overseas payments'.²⁵⁷ The FCA concluded that the company 'was found to have failed to conduct proper due diligence before entering into a relationship with partners in other countries who helped JLT Speciality Limited secure new business, known as overseas introducers. JLT Speciality Limited also did not adequately assess the potential risk of new insurance business secured through its existing overseas introducers'.²⁵⁸ Furthermore, in 2014, the FCA fined Besso Limited £315,000 for 'failing to take reasonable care to establish and maintain effective systems and controls for countering the risks of bribery and corruption'.²⁵⁹ The FCA concluded 'Besso failed to ensure that they had proper systems and controls in place to counter the risks of bribery and corruption in their business activities'.²⁶⁰

An important development in has been the creation of the Senior Management Certification Regime (SMCR) following the enactment of the Financial Services Act 2012. This could provide the FCA with an opportunity to overcome the

²⁵³ J. Horder, 'Bribery as a form of criminal wrongdoing' (2011) *Law Quarterly Review*, 127(Jan), 37-54, 43.

²⁵⁴ Financial Services Authority 'FSA fines Willis Limited 6.895m for anti-bribery and corruption systems and controls failings', (21 July 2011), <<http://www.fsa.gov.uk/pages/Library/Communication/PR/2011/066.shtml>> accessed 24 November 2011.

²⁵⁵ Financial Services Authority 'FSA fines Willis Limited 6.895m for anti-bribery and corruption systems and controls failings', (21 July 2011), <<http://www.fsa.gov.uk/pages/Library/Communication/PR/2011/066.shtml>> accessed 24 November 2011.

²⁵⁶ Financial Services Authority 'FSA fines Willis Limited 6.895m for anti-bribery and corruption systems and controls failings', (21 July 2011), <<http://www.fsa.gov.uk/pages/Library/Communication/PR/2011/066.shtml>> accessed 24 November 2011.

²⁵⁷ **Financial Conduct Authority 'Firm fined £1.8million for 'unacceptable' approach to bribery & corruption risks from overseas payments', December 19 2013, available from <https://www.fca.org.uk/news/firm-fined-18million-for-unacceptable-approach-to-bribery-corruption-risks-from-overseas-payments>, accessed February 8 2016.**

²⁵⁸ Financial Conduct Authority 'Firm fined £1.8million for 'unacceptable' approach to bribery & corruption risks from overseas payments', December 19 2013, available from <https://www.fca.org.uk/news/firm-fined-18million-for-unacceptable-approach-to-bribery-corruption-risks-from-overseas-payments>, accessed February 8 2016.

²⁵⁹ **Financial Conduct Authority 'Besso Limited fined for anti-bribery and corruption systems failings', March 19 2014, available from <https://www.fca.org.uk/news/besso-limited-fined-for-antibribery-and-corruption-systems-failings>, accessed February 8 2016.**

²⁶⁰ Financial Conduct Authority 'Besso Limited fined for anti-bribery and corruption systems failings', March 19 2014, available from <https://www.fca.org.uk/news/besso-limited-fined-for-antibribery-and-corruption-systems-failings>, accessed February 8 2016.

problems associated with the identification doctrine, and assist in tackling corporate economic crime.²⁶¹ The SMCR has two objectives: to encourage all staff within the financial services sector to take responsibility for their actions and that authorised firms and employees can clearly illustrate where the responsibility lies. The SMCR provides that a corporation's senior management is responsible for the policies, systems and controls that are designed to reduce the threat posed by financial crime. Therefore, the SMCR places the obligation of the regulated corporations to limit the risk posed by financial crime on its senior management. The FCA is attempting to improve the culture within firms and is clearly placing the burden on senior managers to limit the risk posed by financial crime. Such efforts are to be welcomed, yet the extension to make senior managers accountable for a firm's financial crime obligations are from innovative and this 'new' initiative duplicates the existing obligations under the FCA. Nonetheless, financial crime related breaches of the SMCR by senior managers would enable the FCA and potentially prosecutors to identify a corporation's senior management who could meet requirements of the identification doctrine. This form of combined financial regulatory and criminal law response to financial crime breaches by corporations can be classified as a 'hybrid' approach and it would go some way to resolving the problems associated with the identification doctrine. This would be a novel step in the UK's efforts to tackle corporate financial crime, but it would require a more joined-up approach between the FCA and prosecutorial agencies.

7. Has the introduction of Deferred Prosecution Agreements (DPAs) been a positive development in relation to offences under the Bribery Act 2010? Have DPAs been used appropriately and consistently? Has their use reduced the likelihood that culpable individuals will be prosecuted for offences under the Act?

In addition to the usual criminal options, the Crime and Courts Act 2013 provides the SFO with an important weapon in its armoury against those companies who fail to prevent bribery under s. of the Bribery Act 2010. Under s. 45 of the 2013 Act,²⁶² the SFO or the Director of Public Prosecutions (DPP) is permitted to use a Deferred Prosecution Agreement or DPA.²⁶³ The Crime and Courts Act 2013 states that 'persons who may enter into a DPA with a prosecutor' can be divided into three categories including a company, a partnership or an unregistered organisation.²⁶⁴ It is important to note, that DPAs are *not* available to individuals. A DPA is a contractual agreement between a financial regulatory agency or government agency and a corporation, who is under investigation for breaching the law. The main purpose of a DPA is to permit the offending corporation to illustrate good conduct, to cooperate with the investigating agencies, pay a fine and improve its internal corporate governance procedures. The first DPA used was seen in *Serious Fraud Office v Standard Bank Plc* in November 2015. Here, Standard Bank Plc was accused of breaching s. 7 of the Bribery Act 2010 and the proceedings were stopped once the use of the DPA was approved by the courts. As a result of this decision,

²⁶¹ The leading authority on the doctrine of criminal liability of corporations is the House of Lords decision in *Tesco Supermarkets v Nattrass* [1972] AC 153.

²⁶² Crime and Courts Act 2013, s. 45

²⁶³ Crime and Courts Act 2013, s. 45 Schedule, 17. 3.

²⁶⁴ Crime and Courts Act 2013, s. 45, schedule 4(1).

Standard Bank agreed to pay financial orders totalling \$25.2m, an additional \$7m to the Tanzanian government and SFOs costs totalling £330,000.²⁶⁵ It is worth noting that Standard Bank Plc was not criminally convicted of bribery or corruption offences. This was followed by a second DPA against XYX Ltd who agreed to 'pay financial orders of £6.5m, comprised of a £6.2m disgorgement of gross profits and a £352,000 financial penalty'.²⁶⁶ In 2017, Rolls-Royce agreed to enter into a DPA that 'involve[d] payments of £497m. . . [and] Rolls-Royce [were] also reimbursing the SFO's costs in full'.²⁶⁷ In April 2017, the SFO announced that it had entered into a DPA with Tesco which was required to pay a fine of £129 million for overstating its profits.²⁶⁸ Interestingly, in each of the four DPAs obtained by the SFO, no criminal prosecutions have been brought against any of the offending corporation's employees or agents, thus drawing similar comparisons with the recent use of DPAs in the United States of America (US). This is not surprising given the initial lack of enthusiasm shown by the SFO and Crown Prosecution Service towards prosecuting individuals under the Bribery Act 2010. It is somewhat disappointing that no prosecutions have been brought in each of the four DPAs agreed between the corporations and the SFO, thus similarities exist between the approach in the US and the UK. If prosecutions were pursued against the employees or agents by the SFO for breaches of the Bribery Act 2010, it would represent an additional form of deterrent and would go some way to avoid any more 'profound apologies' from offending corporations.²⁶⁹

Conclusions

- The UK's efforts to tackle financial crime concentrated on targeting individuals as opposed to corporations. The unsatisfactory nature of this stance, led to the introduction of the failure to prevent bribery corporate offence. This has secured several DPAs against corporations, but there have been no bribery related prosecutions pursued in conjunction. This position is unsatisfactory.
- DPAs must be used in conjunction with criminal proceedings against employees and/or agents of corporations if they are to have a deterrent effect to reduce future misconduct.
- The introduction of the SMCR by the FCA is the most significant mechanism that could be used to overcome the restrictive interpretation of the doctrine of corporate criminal.

²⁶⁵ Serious Fraud Office 'SFO agrees first UK DPA with Standard Bank' November 30 2015, available from <https://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank/>, accessed February 26 2016.

²⁶⁶ Serious Fraud Office, SFO secures second DPA (8 July 2016). Available at: <https://www.sfo.gov.uk/2016/07/08/sfo-securessecond-dpa/> (accessed 5 August 2017).

²⁶⁷ Serious Fraud Office, Rolls-Royce PLC (11 September 2014). Available at: <https://www.sfo.gov.uk/cases/rolls-royce-plc/> (accessed 5 August 2017).

²⁶⁸ Serious Fraud Office, SFO agrees Deferred Prosecution Agreement with Tesco (April 2017). Available at: <https://www.sfo.gov.uk/2017/04/10/sfo-agrees-deferred-prosecution-agreement-with-tesco/> (accessed 18 January 2018).

²⁶⁹ See Ryder, N. 'Too scared to prosecute and too scared to jail? A critical and comparative analysis of enforcement of financial crime legislation against corporations in the United States of America and the United Kingdom (2018) *Journal of Criminal Law*, 82(3), 215-233.

- By placing the management of financial crime control within the remit of a corporation's 'senior management', this will allow the courts to identify the person who within a corporate structure meets the controlling mind test. The ability to recognise the person who has the controlling mind could go some way to redress this problem.
- In order for this approach to be adopted, it would require the FCA to liaise with the SFO and other prosecutors to implement this innovative mechanism. The ability of the FCA to instigate financial penalties draws unfavourable comparisons with the provisions in the USA.
- The UK should introduce legislation based on the Financial Institutions Reform, Recovery and Enforcement Act 1989. Such above would provide the FCA and other related enforcement agencies with the ability to pursue a series of civil actions against corporations for financial crime.

In addition to these suggestions, the Select Committee may be interested some of these research publications that provide a more in-depth commentary on the Bribery Act 2010:

- Ryder, N. *The Law Relating to Financial Crime in the United Kingdom* (Routledge, 2016, 288 pp), 2nd Ed., with Harrison, K, chapter 7.
- Ryder, N. 'Too scared to prosecute and too scared to jail? A critical and comparative analysis of enforcement of financial crime legislation against corporations in the United States of America and the United Kingdom (2018) *Journal of Criminal Law*, 82(3), 215-233.
- Ryder, N. 'The Financial Crisis and Financial Crime in the United Kingdom: a critical analysis of the response by Financial Regulatory Agencies', (2017) *Company Lawyer*, 38(1), 4-14.
- Ryder, N. 'The Legal Mechanisms to control Bribery and Corruption'. In: Rider, B. (eds) *Research Handbook on International Financial Crimes*, Edward Elgar: Cheltenham, forthcoming, 2015, 381-393.
- Ryder, N. *White Collar Crime and Risk: Financial Crime, Corruption and the Financial Crisis*. (Palgrave: 2018), chapters 2 and 3.

31 July 2018

Serious Fraud Office - Written evidence (BRI0018)

Background

1. The Serious Fraud Office (SFO) is a small independent non-ministerial Government department under the superintendence of the Attorney General. The SFO's purpose is to investigate and, where appropriate, prosecute cases of serious or complex fraud, bribery and corruption. In addition, the SFO recovers the proceeds of those crimes it investigates and assists overseas jurisdictions in their investigations into serious or complex fraud, bribery and corruption.
2. The SFO will investigate those cases which call for the legal powers and multi-disciplinary approach available to the SFO. In considering whether to take on an investigation, the Director applies a Statement of Principle, which includes consideration of:
 - whether the apparent criminality undermines UK PLC's commercial or financial interests in general and the City of London in particular;
 - whether the actual or potential financial loss involved is high;
 - whether actual or potential economic harm is significant;
 - whether there is a significant public interest element, and;
 - whether there is a new type of fraud.
3. The SFO has multi-disciplinary case teams of lawyers, investigators, forensic accountants, external counsel and other experts, such as forensic analysts, working together throughout the life of a case, led by a case controller, in order to address the particular demands and challenges of serious and complex economic crime. This joint investigatory prosecutorial case-team structure is known as the 'Roskill' model. Crucially, it is more than just joint working – it involves professionals embedded and co-located together, each contributing to progressing investigations at pace and, where appropriate, building robust prosecutions.
4. The structure of the Roskill model means that legal advice and, where necessary, challenge is available throughout the life cycle of an investigation. This is so even before the point at which the Director accepts a case for investigation. The Roskill model offers significant advantages over a traditional police / prosecutor model and is uniquely suited to the specific challenges and complexities of top-tier economic crime such as cases involving corporate bribery and corruption.
5. The SFO will take the lead on investigations into bribery where they involve a degree of complexity or seriousness that requires the use of the 'Roskill model' to investigate and where appropriate prosecute. The SFO is the UK's lead agency in relation to the investigation and prosecution of overseas bribery.

Deterrence

Is the Bribery Act 2010 deterring bribery in the UK and abroad?

6. The NCA has oversight of the law enforcement response to bribery and corruption, working with police forces, the SFO, ROCUs, CPS and regulators such as the FCA. The SFO deals with only the most serious and complex cases which call for the Roskill model.
7. It is not a straightforward task to assess whether the Act has deterred bribery, and the SFO is not best placed to make this assessment given the relatively small number of cases with which we deal. However, the high profile nature of SFO investigations into and prosecutions of allegations under the Bribery Act is certainly capable of having a deterrent effect.
8. Nonetheless, it does seem evident that the powers contained in section 7 of the Act, alongside the introduction of Deferred Prosecution Agreements (DPA), appear to have prompted positive changes within the business sector. In particular, we have seen an increased emphasis on better corporate governance, efforts to engender a greater awareness of what constitutes corporate bribery within organisations, and an increased willingness to self-report. The introduction of ISO37001 in 2016, *Anti-bribery management systems*, which specifies a series of measures to help organisations prevent, detect and address bribery is indicative of efforts to ensure companies implement an anti-bribery management system, or enhance their controls to reduce the risk of bribery occurring.
9. Indeed, the availability of DPAs, together with the failure to prevent offence, provides a welcome incentive for companies to self-report. Together these developments mean that UK investigators and prosecutors now have more effective tools available to tackle corporate bribery.
10. From an SFO perspective the introduction of section 7 of the Bribery Act has meant that we are now able to hold companies to account for bribery undertaken by their staff and associates in circumstances where formerly the company would have been able to avoid responsibility while retaining the benefit of the bribery. Accordingly it is now easier, where appropriate, to prosecute the company as well as individuals.
11. Crucially, section 7 means prosecutors no longer need to rely exclusively on the doctrine of the Identification Principle to prosecute a corporate associated with bribery (see below for more information). This change in the law makes good sense as it is the corporate which usually gains from the business benefits achieved through bribery offences, a fact which has been reflected in the financial penalties associated with the three DPA agreements between the SFO and corporates for bribery related offending.
12. This is not to say that bribery was not being effectively prosecuted prior to the Act coming into force. Under the previous legislation (the Prevention of Corruption Acts 1906 and 1916 and the Public Bodies Corrupt Practices Act 1889) the SFO has successfully prosecuted bribery cases and continues to do so where such legislation applies. However, it is correct to say that since the introduction of the Act prosecutors now have a wider range of tools available. Currently the SFO's 35 live bribery cases involve a mixture of offences under both the old legislation and the bribery Act 2010.

Enforcement

Is the Bribery Act 2010 being adequately enforced? If not, how could enforcement be improved? Do the Serious Fraud Office and the Crown Prosecution Service have the right approach and the resources they need to investigate and prosecute bribery offences effectively?

13. The introduction of the failure to prevent offence has been a welcome development, and the SFO cases to date demonstrate its effectiveness in tackling corporate bribery. That said, it remains extremely difficult to prosecute large corporates for the substantive offences of bribery under sections 1 or 6 of the Act.
14. To do so, prosecutors must rely on the Identification Principle. Under the Identification Principle, a company can be fixed with criminal liability by proving the guilty acts and state of mind of a person who represented the "directing mind and will" of the company at the relevant time. On this definition, it can often be uncertain who represents the directing mind and will of a company.
15. It has generally been accepted that directors and senior officers of the company are likely to be capable of being directing minds in most cases. However, in large, multi-national companies, the day to day management of the business will typically be delegated to managers or subsidiary companies and there is currently a lack of clarity as to what level, and under what circumstances, a person can genuinely represent the directing mind and will of the company. As a result, it may be impossible to prosecute the company, notwithstanding the fact that it is the main beneficiary of the wrongdoing. From a prosecutor's point of view this lack of clarity is a significant disadvantage in attributing corporate liability. This can lead to criticism of UK enforcement action when contrasted with US counterparts where the clear principle of vicarious liability for criminal acts by employees acting for a company creates a much stronger enforcement regime.
16. Furthermore, the Identification Principle leads to the inequitable position that it is far easier to fix small, owner-managed companies with the requisite knowledge and intent than large, multi-national corporations. The practical reality is that in a multi-national company, the few people who could embody the "directing will and mind" of the company will not necessarily involve themselves in the company's operations in the same way as a director of a smaller, family-run enterprise. Therefore and perversely, larger companies, which have the potential to cause greater harm, are less likely to be found criminally liable for their wrongful acts.
17. Whilst section 7 addressed the problems with the Identification Principle to some extent, it does not deal with cases where the company as an entity was so actively and thoroughly involved in the bribery, that to prosecute it for failing to prevent the bribery would simply fail to encapsulate the full nature of the offending.
18. The official guidance on the Act makes it clear that section 7 is in addition to, and does not displace, liability which might arise under sections 1 or 6 of the

Act where the commercial organisation itself commits an offence by virtue of the Identification Principle (para 14).

19. Turning to resourcing, the SFO's former Director, Sir David Green, whilst in office stated that he would never turned down a case which was in the public interest to pursue because the organisation could not afford to take it on. This position was endorsed by past Attorney Generals and HM Treasury has supported the SFO's case work with access to funding from the Reserve where necessary.
20. In March 2018 HM Treasury agreed to an amended funding model resulting in an increase to the core budget for 2018-19 and 2019-20, as shown in the table below. The revisions to the funding model mean that the SFO retains access to additional funding from the Reserve (often referred to as "blockbuster funding") but it will now apply to expenditure on individual cases in excess of 5% of the core budget rather than the full cost of such cases. Accordingly the SFO will no longer have "blockbuster cases" as such and will be not be required to maintain a separate budget for these. This will lead to a more efficient allocation of resources.
21. SFO case expenditure is a mix of spending on permanent staff, temporary staff, counsel fees and other case investigation expenditure such as expert witnesses or translation costs, depending on the particulars of each case.
22. The SFO's net funding has on average been around £50m per annum (2008-09 to 2017-18), with a high of £62m in 2015-16 and a low of £33m in 2011-12.

Spending Review Settlement as amended March 2018	2016-17 £000	2017-18 £000	2018-19 £000	2019-20 £000
Non-ring fenced DEL	32,800	32,900	50,000	48,600
Ring fenced DEL	2,900	2,800	2,700	2,700
Resource DEL	35,700	35,700	52,700	51,300
Capital DEL	5,200	1,500	2,300	2,800

23. It is worth noting the series of measures announced by the then Home Secretary in December 2017 to ensure the UK is a hostile environment for cases of economic crime, including bribery and corruption. This included the establishment of a multi-agency National Economic Crime Centre (NECC). The SFO is directly involved in the design and development of the NECC, which will lead to enhanced information sharing and more effective tasking within the criminal justice sphere to better tackle serious economic crime. Alongside this the SFO continues to work closely with partners, including the NCA, to ensure that the right agency is investigating any allegations of bribery.

Is the statutory guidance on the Bribery Act 2010 sufficient, clear and well-understood by the companies and individuals who have to deal with it? Should alternative approaches be considered?

24. Representatives from industry will be better placed to answer this question.

25. When this guidance was published there was a certain amount of anxiety in some sectors as to how the Act would be enforced. Now that there have been a number of prosecutions, consideration should be given to refreshing the guidance, reflecting current case law, DPA outcomes and concerns of the business community.

Challenges

How have businesses sought to implement compliance programmes which address the six principles set out in the Ministry of Justice's guidance on the Bribery Act 2010? What challenges have businesses faced in seeking to implement their compliance programmes? Are there any areas which have been particularly difficult to address?

What impact has the Bribery Act 2010 had on small and medium enterprises (SMEs) in particular?

26. The SFO's function is restricted to investigating and prosecuting criminal offences and we do not have any direct role in advising or educating businesses on the Bribery Act. However, we are not aware of any major problems being identified with understanding the principles contained in the Act or implementing them. This is more a question for business organisations, and bodies involved in advising them, to comment upon.

27. The Ministry of Justice have already commented on the financial impact for SME's in complying with the Act in a recent Command Paper, and we have nothing further to add to their comments on this issue. The MOJ data showed that:

- i. The mean cost to SMEs of professional advice was around £3,740.
- ii. Around four in ten SMEs said that they had put bribery prevention procedures in place; defined as anything that they thought helped prevent bribery. Of those that had bribery prevention procedures in place the mean spend to date was around £2,730.

Is the Act having unintended consequences?

28. One unintended consequence has been the inequity between the ability of law enforcement to hold companies to account for bribery (as well as the recently introduced failure to prevent facilitation of tax evasion offence) compared with other economic crimes, such as fraud, false accounting and money laundering. In such other economic crime cases prosecutors are forced to rely on the Identification Principle. As set out above, for large corporations it can be impossible to fix the company with criminal liability under that doctrine.

29. In relation to economic crimes other than bribery, the law actively incentivises poor corporate governance and accountability such as:

- devolution of decision-making;
- a "don't raise that with me" attitude;
- a deliberate lack of record keeping;
- important documents being spread over a number of entities and jurisdictions

Deferred Prosecution Agreements

Has the introduction of Deferred Prosecution Agreements (DPAs) been a positive development in relation to offences under the Bribery Act 2010? Have DPAs been used appropriately and consistently? Has their use reduced the likelihood that culpable individuals will be prosecuted for offences under the Act?

30. DPAs provide a welcome addition to the prosecutor's tool kit for use in appropriate circumstances and has been effective in tackling corporate bribery. Whilst we accept that it is not the correct outcome for every case, and it is certainly not something the SFO seeks to initiate from the outset of an investigation, it is most likely to be suitable for a company that has proactively self-reported wrongdoing, fully co-operated with an investigation and made necessary amendments to its governance. Furthermore, it remains the fact that where a company does receive a DPA, any individuals who have participated in the offence will be prosecuted if there is jurisdiction over them, the evidence is available and if it is in the public interest to do so.

31. In essence the key benefits of a DPA are that:

32. They enable a corporate body to make full reparation for criminal behaviour without the collateral damage of a conviction (for example sanctions or reputational damage that could put the company out of business and destroy the jobs and investments of innocent people).

33. They are concluded under the supervision of a judge, who must be convinced that the DPA is 'in the interests of justice'

34. They avoid lengthy and costly trials

35. Once agreed, the terms of the DPA and the court's reasons for finding it in the public interest, and its reasons for finding the terms fair, reasonable and proportionate are published.

36. The DPA makes it clear that the corporate is being heavily sanctioned for engaging in criminal behaviour

37. In respect of the first point, it is important to note that the bar is set very high for DPAs and a company would only ever be invited by the prosecutor to enter DPA negotiations if there was full cooperation with our investigations, and the test in the DPA Code was fully met. The SFO would also only ever offer a DPA after completing a full independent investigation. Additionally, if the negotiations do go ahead, the company agrees to a number of terms, such as paying a financial penalty or compensation, implementing anti-bribery controls

and co-operating with the future prosecutions of any individuals linked to the offending. If the company does not honour the conditions of the DPA, the prosecution of the company may resume.

38. Any arrangements for monitoring compliance with the conditions are set out in the terms of the DPA.
39. To date the SFO has agreed three DPAs with UK companies for offences connected to Bribery, as follows:
 40. With Standard Bank in November 2015 for alleged failure to prevent bribery contrary to section 7 of the Bribery Act 2010. The agreement included a financial penalty of £16.792m (\$25m).
 41. With a UK business in July 2016 (which can't be named for legal reasons) for alleged conspiracy to corrupt, contrary to section 1 of the Criminal Law Act 1977, conspiracy to bribe, contrary to section 1 of the same Act, and failure to prevent bribery, contrary to section 7 of the Bribery Act 2010. The agreement included the payment of financial orders of £6.6m.
 42. With Rolls-Royce PLC in January 2017, for alleged criminal conduct spanning three decades in seven jurisdictions and involving three business sectors. The DPA involves payments of £497,252,645 (comprising disgorgement of profits of £258,170,000 and a financial penalty of £239,082,645) plus interest. Rolls-Royce are also reimbursing the SFO's costs in full (c£13m). Investigations continue into individuals connected to the case.
43. In summary, the SFO view is that DPAs represent an outcome which ensures that justice can be done, whilst protecting the interests of innocent employees and shareholders as far as possible. A DPA is not a soft option and the penalties involved in a DPA are carefully balanced to punish the company involved appropriately without discouraging them from entering into a DPA. It also needs to be remembered that companies will not agree to enter into a DPA if there is no prospect of prosecution.

International aspects

How does the Bribery Act 2010 compare with anti-corruption legislation in other countries? Are there lessons which could be learned from other countries?

44. The UK is leading the world with its anticorruption legislation, and other countries have consulted with the UK when refreshing their own anticorruption legislation. For example, Argentina paid particular attention to the UK's approach when devising its recently introduced anti-corruption laws, which establish for the first time corporate liability for companies that engage in corrupt acts. In recent years Lithuania, Latvia, Japan and South Korea have consulted with the SFO when preparing to update their own anticorruption laws.
45. In addition, the strength of the DPA regime has been recognised internationally. Before introducing their own DPA-style legislation, France, Canada and Australia consulted with the SFO during their preparations, and drew on the SFO's

experience and expertise, demonstrating the high regard with which both the UK's DPA regime and the SFO are held.

46. Furthermore, the OECD's Phase 4 report on implementing the OECD Anti-Bribery Convention recognised that the SFO had demonstrated expertise in foreign bribery cases, and stated that the SFO is clearly the UK's lead agency for foreign bribery enforcement.
47. Unlike in the US, facilitation payments were illegal before the Bribery Act 2010 came into force and continue to be so under the Act. The absence of any criminal exemption for facilitation payments has not led to any difficulties or controversies in SFO cases, indicating that the principled approach of the Act is the correct one, and does not require watering down to allow such payments. Likewise, the hospitality and promotional expenditure by businesses has not caused any problem or controversy for the SFO.
48. Whilst the number of prosecutions under the Bribery Act 2010 is relatively small so far, it is worth noting that the number of enforcement actions in the US of the Foreign Corrupt Practices Act in 1977 by both the Department of Justice and Securities Exchange Commission numbered in single figures for the first 20 or so years after that Act was passed.

31 July 2018

Serious Fraud Office - Supplementary written evidence (BRI0051)

I am writing in response to the additional request for information which the Committee made on 22nd November, concerning evidence provided by other witnesses to the Select committee on the Bribery Act 2010 relating to the work of the Serious Fraud Office (SFO).

I am also providing some data on the Department of Justice (DOJ) usage of the opinion procedure which I promised during the oral evidence session on the 13th November.

The information requested is outlined below.

Length of SFO cases and interaction with clients of legal firms

We do of course understand the frustrations that lengthy investigations can cause to both victims, witnesses and suspects in our cases. There are, of course, good reasons why complex fraud investigations can take such a long time and why the information we can impart to others on a case might not change for some time. The type of serious and complex cases that the SFO investigates and prosecutes are often transnational, with all the challenges that brings in terms of gathering evidence from a range of different jurisdictions. This is particularly true of bribery and corruption cases. In addition, the last decade or so has seen an exponential increase in the volume of digital data that our case teams are acquiring during the course of their investigations. There are also some things, such as court listings, over which we have relatively little influence.

Nonetheless, against this background we do recognise the importance of progressing our cases swiftly and I have therefore made a public commitment to ensure that SFO cases are moved along at pace in the future, especially at the investigative or pre-charge stage. This will require using the full range of investigative tools that are available to us and being innovative and flexible in our use of modern technology to assist us with both the investigation and presentation of cases.

As a final point, I would also like to stress that the SFO has made it a key business objective in recent years to improve the support we provide to victims and witnesses, both during the life of an investigation and at trial. As part of this we have enhanced our internal processes, delivered training to case teams and have published on our website a clear commitment of what victims and witnesses can expect from the SFO and the standards we will apply.

Further information on this can be found on our website at:

<https://www.sfo.aov.uk/aublications/information-victims-witnesses-whistleblowers/>

Staff turnover on casework

The fact that there will be a number of staff changes during the life of a typical SFO investigation is not unique to our organisation. However, I do not accept that the SFO's casework has ever been significantly reduced or adversely affected by turnover of staff. It is a simple reality in a long running investigation that staff will move on and this is a factor of our work which we take into account as part of our case planning. Our turnover since 2012 has consistently

been around 14% of permanent staff and current projections suggest this will be the same in 2018/19. This rate compares well with many central government departments and other criminal justice partners. Furthermore, with the added stability provided by our new funding model I believe we are in a good position to ensure our investigations are properly resourced and we have a well-developed trainee investigator programme in place that consistently attracts a large number of applicants.

Data requested in Q159 - DOJ use of the opinion procedure.

As promised on 13th November I have made some inquiries with the DOJ about their use of the opinion procedure in recent years. They have confirmed that they made a total of 61 opinion releases between 1980 and 2014.

However, there have not been any since 2014 which endorses the position I stated during the evidence session, that the US authorities are largely moving away from such direct interaction with businesses.

They do nonetheless provide an extensive range of compliance guidance to corporates in various open-source materials which are available on their website, and always make a thorough assessment of a company's specific compliance program, at the time of the misconduct and at the time of the resolution, when determining the resolution in any given case. In this respect their position is similar to the Serious Fraud Office's approach when we assess potential bribery cases for corporate liability or when considering inviting a company to negotiate a deferred prosecution agreement.

I can also confirm that the DOJ have now officially moved on from their previous practice of having a single specialist compliance counsel covering this issue, which is why the previous post-holder has not been replaced, and they have adopted a model of building up greater expertise of compliance parameters amongst prosecutors and supervisors in order to provide greater organisational resilience. The United States Assistant Attorney General for the Criminal Division gave a detailed summary of their current approach in a recent speech which can be accessed on the DOJ website at:

<https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowskidelivers-remarks-nvu-school-law-program>.

Lisa Osofsky, DIRECTOR

3 December 2018

Stewarts' Law LLP – Written evidence (BRI0043)

About Stewarts Law LLP

Stewarts specialises in high-value and complex disputes. Our pioneering approach and track record of success for our clients has helped us become the UK's leading litigation-only law firm. Each of our departments has an international reputation for excellence acting for corporate and individual clients. To enable our clients to take a global approach to litigation, we have strategic partnerships in place with law firms around the world.

Our Financial Crime team are experts in defending allegations of white collar and financial crime. Our lawyers advise and represent individuals and corporates being investigated or prosecuted for fraud, corruption, money laundering, market manipulation and tax evasion.

Civil fraud, regulatory obligations and criminal investigations increasingly overlap. Our lawyer's expertise in employment law, fraud, asset recovery and tax litigation enables us to provide our clients with advice on a range of interconnected issues.

Deterrence

1 Is the Bribery Act 2010 deterring bribery in the UK and abroad?

The broad answer to the question is "yes". Prior to the enactment and implementation of the Bribery Act, those corporates trading in the UK who had an exposure to the FCPA and thereby to the enforcement jurisdiction of the DoJ and SEC in the United States were familiar with the risks. The Bribery Act, with its long jurisdictional reach, highlighted and amplified those issues. The Bribery Act has acted to reinforce this awareness within that pre-existing group.

In our view, the largest change brought about by the Bribery Act has been in the SME sector. We have found that SMEs have broadly been engaged with drawing up and implementing anti-bribery and corruption policies and have, to varying degrees, sought to ensure the implementation of those policies. The awareness within SMEs of the duty to ask questions and check that processes are being followed has, in our view, had a deterrent effect.

That said, it is clear that there are difficulties as the cultural change in the UK brought about by the Bribery Act and its gradual enforcement through prosecutions by the SFO has not been reciprocated in many high-risk jurisdictions around the world. Undoubtedly, this leads to practical issues in doing business as in some markets it is difficult to trade without encountering serious problems. Having said that, if one were to look at the history of the enforcement activity undertaken by the USA of the FCPA and accept that this brought about a cultural change in the way that business was and is conducted by corporates exposed to the FCPA, it is clear that it took many years to gain significant traction.

If it is recalled that in 2012 the regular criticism of the Bribery Act in the media was that the SFO “have a Rolls Royce in the garage but are driving around in a Mini” it is worth standing back to review the position in 2018. Things have developed considerably and the SFO are actively pursuing those involved in corruption, and are generally regarded as a credible investigative and prosecutorial body. The broad answer “yes” is therefore to be set in its proper context: cultural change takes time to effect. The direction of travel is towards deterrence. That effect is assisted by the investigative and prosecutorial activity of the SFO and will be amplified as more cases are brought. Those that are no longer concern the 1906 Act and fall instead within the date range of the Bribery Act 2010.

Enforcement

2 Is the Bribery Act 2010 being adequately enforced? If not, how could enforcement be improved? Do the Serious Fraud Office and the Crown Prosecution Service have the right approach and the resources they need to investigate and prosecute bribery offences effectively?

We think that the concept of “adequate enforcement” is a difficult one to address. The history of enforcement following the coming into force of the Act is known. A fair characterisation would, in our view, be that enforcement was initially slow and the use by the SFO of Part V of the Proceeds of Crime Act 2002 in certain cases led to confusion.

Under the last Director, the policy of the SFO as ‘prosecutor’ was clearly identified and pursued. The CPS have similarly been slow to bring cases but, of course, as recognised in the Roskill Report in 1986, the prosecution of complex issues, often with an international dimension, is best dealt with by a specialist prosecutor. The political hiatus concerning the potential incorporation of the SFO into the NCA did nothing to assist.

On the question of the “right approach”, there is a marked difference as between the SFO and the CPS as prosecutor. The SFO operate with the ability to engage in a constructive dialogue with those under investigation. This practice is not restricted to companies who self-report. By having a “Case Controller” assigned and identified to the parties and by allowing and encouraging meaningful interaction during the investigation phase of a matter, useful contact can be achieved and maintained. This we believe is the correct approach and in our experience has been beneficial to all parties.

No such effective mechanisms exist presently with cases handled by the CPS and this is something that ought to be addressed. The recent case of Skansen Interiors may serve as a direct illustration. A self-report by the new management of the company following their discovery of historic corruption resulted in the prosecution of not only the individuals responsible for the corrupt acts but also of Skansen’s itself. The offence was failure to have adequate policies in place to prevent bribery (s7 Bribery Act), notwithstanding the fact that the company had self-reported, had new management, was by then

dormant and was unable to pay a fine. Dialogue and a mechanism to ensure such an exchange with the CPS may avoid a similar curious outcome in future. Whilst it is accepted that dialogue must always be restricted within certain defined bounds, where one is dealing with a prosecuting authority charged with protecting the public interest, we are of the view that such dialogue is essential and should be further developed and encouraged.

As to “right approach” generally, we are of the view that the SFO, having reviewed its practices under the leadership of Sir David Green QC, has firmly established itself as a prosecuting authority. This, in our view, was necessary. The approach going forward ought to build on these foundations rather than change tack. Broadly the balance of investigation, dialogue and prosecution has been struck; over time this should be perfected.

Guidance

3 Is the statutory guidance on the Bribery Act 2010 sufficient, clear and well-understood by the companies and individuals who have to deal with it? Should alternative approaches be considered?

The six principles identified in the guidance are, of course, clear principles. The difficulty comes in the application of those principles to the myriad of differing circumstances that occur. It is interesting to note the usage of The FCPA Opinion Procedure in the USA, whereby those faced with a problematic question, having applied the well-known anti-bribery policies, can ask the DoJ for an indication as to whether they may take action if the proposed agreement were executed.

Notwithstanding protections incorporated within the procedure for those seeking an opinion, the system has never been widely used and recently it has been debated as to whether it will survive as an avenue that is used. Whilst clearly any guidance should be as clearly stated as is possible, as should the fact that the measures taken should be proportionate to the risks, we wonder whether the guidance could ever satisfy the wish for certainty. We would suggest that the guidance include relevant examples, so that those reading it can draw informed conclusions from those examples as to the likely approach of a prosecuting authority to the individual facts faced by the company or individual.

Challenges

4 How have businesses sought to implement compliance programmes which address the six principles set out in the Ministry of Justice’s guidance on the Bribery Act 2010? What challenges have businesses faced in seeking to implement their compliance programmes? Are there any areas which have been particularly difficult to address?

Whilst we have experience of individual corporate implementation and specific “challenges” encountered, we defer to the businesses themselves, should they chose to respond in answering this question.

5. What impact has the Bribery Act 2010 had on small and medium enterprises (SMEs) in particular?

In our experience, SMEs have reacted to the Bribery Act by seeking to engage with it and design and implement appropriate policies. It is common to encounter informed expressions of concern within companies who are endeavouring to comply with the Act. In general terms, recognising that the parties best placed to answer this question are the companies themselves, we have found that the majority are keen to comply with the Act and implement policies and procedures to enable them to do so.

6. Is the Act having unintended consequences?

The implementation of the Act is having unintended consequences, as opposed to the Act itself. An example of such consequence in relation to a prosecution brought by the CPS in relation to a breach of section 7 of the Act is the case of Skansen Interiors, referred to above. Another is the lack of sufficient discount of financial penalty flowing from a DPA as distinct from that following a plea of guilty.

The latest move to increase the discount to one of 50% as a maximum available, from the 33% recommended by the Sentencing Council in the relevant Guideline, is insufficient. In the USA the comparable figure of 50% is used as a discount, but that is applied to the lowest range of financial penalty available. In the UK, that is not the case. The result is that the distinction in the UK is not sufficient and may well therefore deter initial self-reporting. No doubt this was not the intention but it requires urgent adjustment.

Deferred Prosecution Agreements

7. Has the introduction of Deferred Prosecution Agreements (DPAs) been a positive development in relation to offences under the Bribery Act 2010? Have DPAs been used appropriately and consistently? Has their use reduced the likelihood that culpable individuals will be prosecuted for offences under the Act?

In our opinion, DPAs were both a necessary and positive step. They have, thus far, been “used” consistently if one assesses that question by the practices of the USA. The DPA with Rolls Royce was agreed despite the fact that there was no self-report. In the USA the use of DPAs is widespread and is not reliant upon a self-report. Whilst the above two facts are true, there is currently some difficulty experienced by prosecutors in the UK with the application of those facts to current cases under investigation. DPAs are, in our view, being very tightly restricted as to their availability and unnecessarily so. By that we mean that the SFO is failing to offer DPAs as a result of the application of unnecessarily stringent entry requirements. As seen with Rolls Royce, such stringency is

capable of relaxation; the requirements should be adjusted with greater frequency.

DPA's are not available to individuals. In the USA, the 'Yeats Memorandum' of 2015 was issued in recognition of the fact that FCPA enforcement action was predominantly against the corporate defendant and did not carry through to the individuals responsible for the underlying behaviour. In the UK, this has not historically been the case; individuals have regularly been the target of prosecutions in relation to corrupt activity. As DPA agreements can only be achieved by making full and frank disclosure, and as the DPA agreement itself incorporates a condition that the corporate is to continue its co-operation with the SFO should it choose to pursue individual defendants, there is no reason to think that they have caused a reduction. Indeed, we believe that we have experience of the reverse occurring.

International aspects

8. How does the Bribery Act 2010 compare with anti-corruption legislation in other countries? Are there lessons which could be learned from other countries?

It is in our view essential that the 'NPA' addition in the USA be added to the resolutions available to companies. In the USA, where a self-report is accompanied by full co-operation throughout, it is to be presumed, absent identified features, that an NPA will follow. This additional disposal, added to that of the DPA, is clearly necessary as rather than having to rely upon the non-specific "public interest" considerations of Part 2 of the Full Code Test, there would be an accompanying rebuttable presumption that, in defined circumstances, an NPA would follow. In our view, this would be appropriate as only those qualifying could obtain it. Those who do qualify should neither be subject to a DPA nor have to endure the uncertainty, with all its commercial impacts, of waiting for a decision on the public interest at the end of the long investigative process.

9. What impact has the Bribery Act 2010 had on UK businesses and individuals operating abroad?

In general, the Bribery Act has for many added to the requirement of the FCPA. For those not before subject to such requirements, it has caused the journey towards addressing the risks of corruption infecting their companies to begin in earnest. We are of the opinion that ethical business practice is essential and see the Bribery Act as significantly contributing to this goal.

Stewarts

31 July 2018

Tom Stocker - Written evidence (BRI0055)

I am writing to provide my perspective of the Scottish self-reporting and civil settlement process for corporate bribery offences. I am a solicitor and a partner of Pinsent Masons LLP based in Edinburgh. I have experience in advising companies on self-reporting suspicions of bribery to both the Crown Office and Procurator Fiscal Service ("**COPFS**") in Scotland and the Serious Fraud Office ("**SFO**").

1. The Scottish civil settlement regime is not a "soft option" (Lord Advocate, Question 144)

Lord Advocate (Lord Wolffe QC) (Question 144) sought to explain why civil settlements are not a "soft option".

In my experience of advising companies on self-reporting in Scotland and also in England, I would agree with Lord Wolffe that the Scottish regime is not a soft option.

Under the Scottish procedure for a company to be considered for a civil settlement it must submit a "self-report". In Scotland, corporate self-reporting entails the company's solicitors submitting a fulsome written report which should set out the investigations undertaken, the factual findings, and, importantly, an admission that those facts amount to bribery. In this regard, Scotland's self-reporting regime is more onerous than the DPA regime of England & Wales which does not require a self-report (although I appreciate it is a factor) and which does not require an admission.

When the self-report and the requisite admission are made there is no guarantee given that the case will be dealt with by way of a civil settlement. The self-reporting company is therefore taking a major risk and any company that reports to COPFS has, in my view, acted both ethically and bravely. In return, the company receives the opportunity to be considered for a civil settlement but only if it makes a full disclosure and satisfies a long list of other public interest factors.

The primary objective of the Scottish regime is to reduce bribery in Scotland and by Scottish companies through encouraging self-policing and self-reporting. Scotland is a considerably smaller jurisdiction than England. We also only have a few companies that are of the size and international reach of many of England's largest companies. As such, concluding five corporate self-reports is, I would suggest, a comparably high level of enforcement with the rest of the UK. As matters stand the evidence points to Scotland's civil settlement fulfilling the primary objective of encouraging self-policing and self-reporting.

Another important point is that the companies which have self-reported in Scotland include small and medium size businesses as well as larger companies. A potential downside of the DPA regime, applicable to England & Wales, is that it risks being viewed as the exclusive domain of the mammoth company. As such, I cannot see a DPA regime being effective in Scotland.

While there are lessons that COPFS may take from the DPA regime, I would respectfully submit that Scotland's corporate-self-reporting regime has many attributes.

2. Forum shopping (Gillian Mawdsley, Question 90/ Lord Advocate, Question 145)

It was suggested by Gillian Mawdsley (Question 90) that there may be forum shopping between Scotland and England & Wales. The Lord Advocate (Question

145) explained that there was a Memorandum of Understanding ("**MOU**") between the Serious Fraud Office and COPFS which dealt with the jurisdictional position.

In my experience, forum shopping in its true sense is not possible. Jurisdiction is determined primarily by a territorial nexus and the decision on primacy rests with COPFS and the SFO.

When I advise a Scottish company on self-reporting (or a company that is potentially subject to the jurisdiction of the Scottish courts as well as potentially the courts of England & Wales), I think carefully about which law enforcement agency to report to but I cannot move outside the parameters of the jurisdictional provisions of the Bribery Act 2010 and the MOU, and ultimately the decision rests entirely with COPFS and the SFO whose decision should be based on the parameters set out in the MOU.

Tom Stocker, Partner, Head of White Collar Crime & Investigations, Pinsent
Masons LLP

13 December 2018

Transparency International UK – Written evidence (BRI0003)

EXECUTIVE SUMMARY

Transparency International UK (TI-UK) welcomes the Committee’s consideration of the Bribery Act (“*Bribery Act*”). In the seven years since its commencement **the Bribery Act has provided a sound legal basis for prosecuting foreign bribery** by both natural and legal persons, and the corporate offence of failure to prevent bribery under Section 7 of the Bribery Act has proved **an effective incentive for businesses to adopt adequate corporate compliance measures and internal controls**.

TI-UK recognises the leadership the UK has demonstrated in passing and enforcing the Bribery Act, the strength of the Bribery Act itself, and the quality of the Government’s corresponding Guidance. It is good news that some companies have improved in this area while those **companies that do pay bribes, however large, are more likely than ever before to be identified and prosecuted**. A welcome development, and in some cases a consequence of, the Bribery Act is that other countries have also updated their anti-bribery legislation, so that there is now a global framework of broadly equivalent legislation in line with the OECD Anti-Bribery Convention.

However, even without the pressure of post-Brexit trading, **British companies have too often paid bribes overseas**. TI-UK is concerned that some companies will return to the days when they lobbied against strong anti-bribery provisions instead of tightening up standards, and that the UK Government may renege on its commitment to consult on **extending existing corporate liability legislation** to other economic crimes, including money laundering. We also believe there is a danger that the use of discounted DPA settlements will encourage corrupt acts if companies come to see the fines as a calculable cost of doing business.

TI-UK engages constructively with UK companies as well as with foreign companies that have a presence in the UK, and we believe that the majority of these companies wish to conduct their business ethically. The Bribery Act protects such companies because it makes it **easier to resist demands for bribes including facilitation payments** when operating in high risk environments. It also **strengthens their hand in requiring their business partners to observe high ethical standards**. Through its extraterritorial application to foreign companies that have or conduct a part of their business in the UK, the Bribery Act helps to create a **level playing field for companies that are committed to zero tolerance of bribery**. In light of this, we look to the Committee to set a firm stance on the following issues in its review.

KEY RECOMMENDATIONS

1. The Government should **under no circumstance water down the Bribery Act** or its corresponding Guidance which form a central part of the UK’s leadership in the global fight against corruption.

2. The Government should prioritise **awareness-raising and support for Small and Medium Enterprises** (SMEs) to enable them to do business in a way that does not break anti-bribery laws in the UK or other countries.
3. The Government should **prioritise enforcement** of the Bribery Act in order to ensure that bribery does not go unpunished. This includes both increasing the volume of cases, and ensuring that individuals, not only companies, are properly held to account for their crimes.
4. The Government should provide **clarification as to when use of section 13**, which provides a wide exemption for UK intelligence services and armed forces, would or would not be appropriate, in order to ensure that the exemption is used properly.
5. **Prosecutors need to make better use of the Bribery Act** to prosecute and track UK-based bribery crimes. This will provide the Government with a more accurate view of bribe-paying, as outlined in the UK Government anti-corruption strategy.
6. The Government should **extend the 'failure to prevent' approach** to corporate offending outlined in Section 7 of the Bribery Act to other economic crimes, including money laundering.
7. The Government should **support business** by continuing to collate and promote the most effective anti-bribery guidance and initiatives and should repeat its 2015 study into awareness of, and response to, the Bribery Act among SMEs in order to update the evidence base in this area.

RESPONSES

1. Is the Bribery Act 2010 deterring bribery in the UK and abroad?
 - 1.1. In general, the Bribery Act is a **well-designed piece of legislation** which has been effective in improving corporate behaviour.
 - 1.2. The introduction of the Section 7 'failure to prevent' offence has been invaluable as a tool to incentivise improvements in corporate behaviour and for prosecutors to hold companies to account within a criminal law framework.
 - 1.2.1. TI-UK has not conducted research comparing rates of bribery before and after the introduction of the Bribery Act, as actual bribery rates – including bribery which has not been detected by law enforcement – are not measured and so are not possible to use in a comparison.
 - 1.2.2. However, the UK's ranking in Transparency International's Corruption Perceptions Index has improved considerably since 2010, from ranking 20th in 2010 to 8th in 2017 – we believe this is in part, as a result of the positive global perceptions caused by the Bribery Act.
 - 1.2.3. We quote Professor Dan Hough, Director of the Sussex Centre for the Study of Corruption (SCSC):

“The UK Bribery Act might sound like a relatively obscure piece of legislation, but in many ways it is ground-breaking, placing Britain in the vanguard of states that are trying to stamp out bribery as a way of doing business... The Act has made business leaders think

and quite possibly change at least some aspects of business practice in ways that aren't immediately quantifiable."²⁷⁰

- 1.3. **The Bribery Act has set a new higher standard for business and governments globally** which helps to deter bribery both in the UK and abroad. It is common for global businesses irrespective of the jurisdiction of their headquarters to implement anti-bribery programmes which set their policies and procedures at the high watermark set by the act. They are typically motivated to do so because they either conduct some business in the UK or work with British companies. Additionally, **governments around the world look to the Bribery Act when considering their own legislative reforms**. For example, in Australia, through the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (Cth), the government plans to introduce a new offence of "failure to prevent bribery of foreign officials" along the same lines as Bribery Act.
- 1.4. **The Bribery Act is now part of a collection of post-2010 related OECD-compliant legislation**, including but not limited to Loi Sapin II 2017 (France), Law no. 12.846/2013 "Clean Companies Act" 2014 (Brazil) and the 2015 Amendment 3 to the Organic Act on Counter Corruption B.E. 2542 1999 (Thailand), and the Criminal Code of the Kingdom of Netherlands 1881, amended 2012 (Netherlands). This legislation collectively has a greater deterrent effect. In the context of Brexit, it is important not to hold up the Bribery Act as unique gold-plated legislation, as there is a risk that arguments will be made that 'Brexit is about taking back control from red tape and bureaucrats, not gold-plating legislation so as to 'free up businesses'. Such an argument fails to recognise that UK businesses who are exporting are now increasingly subject to this collection of OECD-compliant legislation, of which the Bribery Act is now just one piece.
- 1.5. Since the introduction of the Bribery Act, UK companies have testified to its efficacy in deterring bribery, as the following statements illustrate:
 - 1.5.1. **FTI Consulting**: "The hype surrounding the introduction of the UK Bribery Act has had a tangible effect – many companies have thought long and hard about compliance – and perhaps to a lesser extent business ethics generally – and our figures show that many believe that they have implemented the necessary compliance measures."²⁷¹
 - 1.5.2. **Deloitte**: "Companies have generally accepted that they need to take positive and tangible action to assure themselves of their ability to comply with the Act. Typically, organisations have embraced the requirement to conduct a bribery and corruption risk assessment."²⁷²
 - 1.5.3. **Peter Lloyd, CEO Mabey Group**: "I do not believe that the new Bribery Act will prevent anyone from entering new markets and I also do not believe that the Bribery Act is draconian. Bribery has

²⁷⁰ www.sussex.ac.uk/broadcast/read/19639

²⁷¹ www.fticonsulting.com/~media/Files/us-files/insights/featured-perspectives/the-realities-of-the-uk-bribery-act.pdf

²⁷² www.uk.practicallaw.com/2-520-4185?q=&qp=&qo=&qe=#

been illegal for many years in almost all countries worldwide and whilst I am advised that UK law was poorly defined, it was still illegal to bribe people in the UK and overseas. The Bribery Act does introduce new challenges, especially the need to have and enforce adequate procedures, but I would have advised any Board to implement such controls anyhow."²⁷³

- 1.6. The trends in PwC's *Global Economic Crime Survey*²⁷⁴ show that until 2018 the overall level of bribery and corruption reported by UK companies had fallen over time, **with companies reporting more concern about other forms of economic crime.** However, in the 2018 Global Economic Crime survey, PwC found that, after steadily falling for the past few years, reports of corruption and bribery have increased. Significantly, 23% of organisations surveyed said that they had experienced bribery and corruption. This is an increase of 17% from the 2016 survey in which only 6% of companies reported that they have experienced bribery and corruption.²⁷⁵ This does not necessarily indicate that bribery is increasing. An increased commitment to tackling corruption by UK business and the implementation of more formal ethics and compliance programmes across their organisations may have made businesses far better informed and more aware of potential instances of bribery and corruption in their global operations.

Defence and security services – section 13

- 1.7. Section 13 of the Bribery Act provides a broad defence for any person charged with bribery if they can prove their "conduct was necessary for the proper exercise of any function of an intelligence service or of the armed forces when engaged on active service." **Section 13 is not required, and its current drafting is too broad and open to abuse.**
- 1.7.1. Other mechanisms exist to protect intelligence or military personnel in those exceptional circumstances whereby bribery may be argued to be justifiable (for example circumstances in which it would avert a far more severe harm, such as serious human rights abuses). The Attorney General has prosecutorial discretion and in such cases would inevitably not bring a prosecution because such instances would likely fail the public interest test.
- 1.7.2. If section 13 is not removed **it should be narrowed in scope, as currently it is open to abuse,** and plausibly could be used as a defence in cases of bribery used to secure defence equipment exports, or to protect defence companies. Once narrowed, there should be clarification from the Government as to the circumstances in which reliance on section 13 is and is not be appropriate.
- 1.7.3. A key risk of abuse relates to the duties of the intelligence services. Under section 1(2) of the Intelligence Services Act 1994, the intelligence services have a statutory duty to further 'the economic well-being' of the UK. When this duty is combined with the section 13 exemption in the Bribery Act, this creates a risk of bribery being

²⁷³ www.thebriberyact.com/2012/02/01/will-the-bribery-act-prevent-us-from-entering-new-markets-your-questions-answered-by-peter-lloyd-ceo-mabey-group/

²⁷⁴ www.pwc.com/gx/en/economic-crime-survey/pdf/GlobalEconomicCrimeSurvey2016.pdf

²⁷⁵ www.pwc.co.uk/forensic-services/assets/pwc-global-economic-crime-survey-2018-uk.pdf

used by intelligence services to further the economic well-being of the UK, behaviour which we argue would be counter to the fundamental purpose of the Bribery Act.

- 1.7.4. There have been serious incidences of major UK defence contractors engaging in bribery abroad, For example, in the SFO's current investigation into GPT Special Project Management (a subsidiary of Airbus) and its former investigation into BAE Systems, both companies acted as prime contractors for government-to-government contracts signed between the Saudi Arabian and British governments – both defence companies were performing the contracts on behalf of the British government. Under such circumstances there is a significant risk that defence company personnel might avail themselves of the section 13 legal defence.
- 1.7.5. There are a **large number of secondees that occur between the UK defence and arms export departments and defence companies** exporting to high corruption risk countries. In a Freedom of Information request, received in April 2018, the Department for International Trade informed us that in the last year they have had 22 inward secondees from the private sector, twelve of whom were from major UK Government defence contractors.²⁷⁶ This again creates a significant risk of secondees from either Government or defence companies engaging in bribery but under the protection of section 13.
- 1.7.6. Section 13 states that: 'It is a defence for a person charged with a relevant bribery offence to prove that the person's conduct was necessary for (a)the proper exercise of any function of an intelligence service, or (b)the proper exercise of any function of the armed forces when engaged on active service.' The risk of section 13 being abused is heightened when we consider there are no safeguards placed around the vague definition of "a person", and whether this could include secondees from defence companies.
- 1.7.7. To highlight the risks: 53 UK Ministry of Defence (MoD) staff are employed by the GPT-Airbus SANGCOM project, the export contract signed between the UK MoD and Saudi Arabia and which is currently under investigation by the SFO. Several of these MoD staff have been questioned by the SFO in connection with their probe – and could arguably avail themselves of the section 13 defence.²⁷⁷ An even higher number of MoD and military staff, more than 200, are employed by MODSAP, which oversees the Al-Yamamah sale of Tornado, Hawk and PC-9 aircraft to Saudi Arabia

²⁷⁶ Secondees have been from companies including AgustaWestland, Lockheed Martin, Rolls Royce, BAE, Babcock, AMEC and NCC Group.

²⁷⁷ These allegations were brought to the SFO and the US Dept. of Defense from a whistle-blower, formerly employed by GPT, who says that while he raised the issues with Airbus and the UK MoD, neither wanted to investigate. The Saudi Arabian government reimburses the UK MOD for these staff costs, confusing their reporting line and possibly discouraging UK staff from robustly and independently overseeing contracts, or feeling sufficiently empowered to raise issues.

and was investigated by the SFO and the UK Department of Defense.²⁷⁸

- I.8. Section 13 mandates that the head of each intelligence service and the Defence Council have in place “arrangements designed to ensure that any conduct of a member of the service which would otherwise be a relevant bribery offence is necessary”. However, in response to Parliamentary Questions, the Government stated it had no recorded instances bribery being necessary under section 13.²⁷⁹ This suggests either that there is no bribery taking place or that neither service have safeguards and monitoring around section 13.
- I.9. The current drafting is too wide and open to abuse. Indeed, the breadth of protection in section 13 is, quite probably, the only piece of written law in the world that expressly justifies bribery by agents of the state. The section 13 exemption was widely criticised at the time of the Bribery Bill, including by the OECD, whose Legal Director, Nicola Bonucci noted that these provisions may represent the only anti-bribery law in the world permitting bribery.²⁸⁰ In a context in which there are high risks of corruption in forms of export business such as arms trading, it should not be acceptable that it is open to the military forces or intelligence services to use bribery or related offences to further such business interests on behalf of the UK.
- I.10. In 2009, the Joint Committee on the Draft Bribery Bill recommended the removal of these exceptions, citing the following reasons:
- “We heard no persuasive evidence of a need for the domestic intelligence agencies to be granted an authorisation to bribe. Neither are we persuaded that this draft Bill is the appropriate vehicle to extend the security services' powers to contravene the criminal law. Finally, we note continuing doubt about whether clause 13 complies with the United Kingdom's international obligations, despite the fact that this issue was raised as long ago as 2003.”²⁸¹
- I.11. More broadly, the breadth of section 13 illustrates the moral ambivalence of the UK when it comes to bribery overseas. This is in spite of the strengthening of the law more generally through the Bribery Act, in its application to overseas trade.²⁸²
- I.12. TI-UK re-states its concerns at these clauses. We believe they should not be in the Bribery Act, but for so long as they remain in the legislation, there should be public accountability for the proper adherence to the legislation, and clarification from the Government as to when its use

²⁷⁸ BAE paid \$400m to US authorities in order to settle the bribery allegations.

²⁷⁹ [www.theyworkforyou.com/wrans/?id=2018-02-](http://www.theyworkforyou.com/wrans/?id=2018-02-27.130012.h&s=section%3Awrans+speaker%3A10231#g130012.q0)

[27.130012.h&s=section%3Awrans+speaker%3A10231#g130012.q0](http://www.theyworkforyou.com/wrans/?id=2018-02-27.130012.h&s=section%3Awrans+speaker%3A10231#g130012.q0)

²⁸⁰ www.publications.parliament.uk/pa/jt200809/jtselect/jtbribe/115/11515.htm

²⁸¹ www.publications.parliament.uk/pa/jt200809/jtselect/jtbribe/115/11515.htm

²⁸² These arguments have also been put forward by Professor Jeremy Hoarder, former Law Commissioner for England and Wales whose article, ‘On Her Majesty’s Commercial Service: Bribery, Public Officials and the UK Intelligence Services’, provides a fuller background to this controversial extension.

would or would not be appropriate. **We strongly recommend that the Select Committee should investigate this aspect of the Bribery Act.**

RECOMMENDATIONS

- 1.13. **Section 13 is not required to protect military and intelligence service personnel in the course of properly conducting their work and so it should be removed as it is open to abuse.** If it is not removed, it should be narrowed in scope, and the Government should provide clarification as to when use of section 13 would or would not be appropriate.
2. Is the Bribery Act 2010 being adequately enforced? If not, how could enforcement be improved? Do the Serious Fraud Office and the Crown Prosecution Service have the right approach and the resources they need to investigate and prosecute bribery offences effectively?
 - 2.1. In its 2015 *Exporting Corruption* report,²⁸³ Transparency International assessed the UK to be an **'active enforcer'** of anti-bribery legislation.²⁸⁴
 - 2.1.1. From 2014 to 2017, the UK commenced 16 investigations, opened nine cases and concluded 11 cases. Among those concluded by the Serious Fraud Office (SFO)²⁸⁵ were five major cases with substantial sanctions against five legal persons (Rolls-Royce, Standard Bank, Sweett Group, Smith & Ouzman and one unnamed company – XYZ) and seven natural persons.
 - 2.1.2. The SFO used deferred prosecution agreements (DPAs) to resolve three of the five cases: the first with Standard Bank Plc in 2015 over a payment made to obtain business in Tanzania²⁸⁶; the second with an SME anonymised as XYZ Limited ("XYZ") in 2016²⁸⁷; and the third (and largest) with Rolls-Royce²⁸⁸ in 2017 in relation to alleged corrupt payments and failure to prevent bribery in connection with its operations in China, India, Malaysia, Nigeria, Russia and Thailand.
 - 2.1.3. The SFO also convicted F.H. Bertling and six current and former employees in 2017 of conspiracy to make corrupt payments to an agent of the Angolan state oil company, Sonangol, although they have yet to be sentenced.²⁸⁹

²⁸³ An updated report is due to be published in September 2018.

²⁸⁴ Transparency International, *Exporting Corruption: Progress Report 2015: Assessing Enforcement of the OECD Convention on Combatting Foreign Bribery*: www.transparency.org/whatwedo/publication/exporting_corruption_progress_report_2015_assessing_enforcement_of_the_oecd

²⁸⁵ The SFO is a specialist prosecuting authority tackling the top level of serious or complex fraud, bribery and corruption.

²⁸⁶ www.sfo.gov.uk/cases/standard-bank-plc/

²⁸⁷ www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/

²⁸⁸ Specifically Rolls-Royce plc and Rolls-Royce Energy Systems Inc.

²⁸⁹ www.sfo.gov.uk/2017/09/26/sfo-secures-7-convictions-20m-f-h-bertling-corruption-case/

- 2.1.4. In addition, the SFO charged four individuals with conspiracy to make corrupt payments to obtain contracts in Iraq for Unaoil's client SBM Offshore.²⁹⁰ As of March 2016, according to various news sources, the SFO had charged seven people and two companies in connection with alleged offences concerning the supply of trains to the Budapest Metro between 2003 and 2008. The current position of this investigation is unclear.
- 2.1.5. The SFO and other responsible agencies²⁹¹ have a number of ongoing foreign bribery investigations at the pre-charge stage.
- 2.2. Not all of the enforcement activity identified above is enforcement of the Bribery Act as some cases have involved conduct which predated the act, so the figures relate to enforcement of anti-bribery legislation more widely. Whilst many companies have done much to implement anti-bribery programmes in response to the Bribery Act, enforcement of the act itself has only been observed from 2015 onwards. As such, it has lagged behind companies' efforts to implement contemporary anti-bribery programmes. Whilst we commend the UK's efforts to enforce the legislation, **there remains a relatively small number of prosecutions which have only recently reached a sufficiently high profile** for them to resonate with business. Unless the UK increases its level of enforcement, there is a real risk that businesses will cease to regard the Bribery Act as a serious piece of legislation. 'Compliance fatigue' is a phrase that is frequently used in businesses and if the Bribery Act is not adequately enforced, many businesses will take a commercial decision to reduce their investment in efforts to prevent bribery. This will undo the good that the act has achieved.
- 2.3. **We welcome the recent increase in core funding to the SFO, although we believe it remains under-resourced** compared to its main international peer, the Foreign Corrupt Practices Act Unit in the Criminal Division of the US Department of Justice. We are also concerned about the 'blockbuster' funding model for large and complex cases, which is approved at political level, and thus opens the door for decisions about which cases to be pursued being made on the basis of political considerations. This allows a perceived scope for political interference which could compromise the SFO's discretion in undertaking investigations.
- 2.3.1. Uncertainty regarding the SFO's future has long been a concern. For now, fears that it may be subsumed into the National Crime Agency have been abated by the announcement of a new National Economic Crime Centre as part of the 2017-2022 Strategy – although **the Crime Centre will be able to task the SFO to carry out investigations and may thus compromise its role as an independent prosecutor.**
- 2.3.2. Further barriers to effective SFO enforcement include the **lack of dedicated crown courts** to try serious economic crime cases,

²⁹⁰ www.sfo.gov.uk/2017/11/16/two-charged-sfos-unaoil-investigation/;

sfo.gov.uk/2017/11/30/two-individuals-charged-sfos-unaoil-investigation/

²⁹¹ These include the NCA ICU, The Crown Office and Procurator Fiscal Service (COPFS) and the Financial Conduct Authority.

which, coupled with **underfunding of the court system**, results in long delays. There is also a lack of tools for ensuring that courts can impose a review of compliance procedures within sentencing.

- 2.3.3. A lack of resources for Britain’s police and prosecutors has led the number of white-collar crime prosecutions to fall by almost a third since 2011. Ministry of Justice figures show the number of individuals prosecuted for white-collar crimes has fallen every year since 2011 - from 11,261 in 2011 to 7,786 last year, a drop of 31 per cent. The SFOs remit is to focus on large, complex cases typically involving multinationals, and so funding must be restored to police and CPS to address these lower-level, but still serious, crimes.²⁹²
- 2.3.4. Bribery investigations are expensive. **The SFO needs more prosecutors and a bigger budget**, so that the agency, through the successful resolution of cases, can also pay for itself – Rolls-Royce are also reimbursing the SFO’s costs in full (c. £13m).
- 2.4. Some of the Bribery Act prosecutions, including the first three, have been for non-corporate bribes paid within the UK. We believe this is an important and appropriate use of the act. Our own research (Global Corruption Barometer 2016 and Corruption in the UK 2011) indicates that bribe-paying does occur within the UK, although the scale, prevalence and type is broadly unknown. Prosecutions of this nature under the Bribery Act give greater visibility to the UK-based crimes, which helps the Government to design appropriate responses, as outlined in the UK Anti-Corruption Strategy (Section 4.1). Conversely, when UK bribery is not prosecuted (for example, when it is one of a number of offences, and the others are considered easier to prosecute) or is prosecuted using other routes with which law enforcement agencies are more familiar (such as the Fraud Act), this contributes to the Government having an incomplete picture of UK bribe-paying.

RECOMMENDATIONS

- 2.5. **Strong enforcement is critical to the UK’s reputation internationally as a fair place to do business**, and the SFO is essential for maintaining the country’s renowned global reputation as a leader in business and in the fight against corruption. TI-UK therefore recommends the continued independence of the SFO, and the continuance of sufficient core funding that enables the SFO to conduct its investigations. It is worthwhile noting that the additional annual funding required of up to £50 million is a fraction of the fines remitted to HMG as a result of SFO-led prosecutions and DPAs.
- 2.6. TI-UK recommends that, in respect of any enforcement action taken under the Bribery Act:²⁹³

²⁹² Financial Times (citing MoJ figures) ‘Fall in fraud prosecutions linked to police and CPS cuts: soaring cyber crime slips through net as SFO and FCA focus on biggest cases’, 12 June 2018, www.ft.com/content/4e2bdc4c-6ca2-11e8-852d-d8b934ff5ffa

²⁹³ See multi-stakeholder letter to the Director of the SFO, 11 June 2018: www.docs.wixstatic.com/ugd/54261c_07e69bf713e14298a8fe92b8e599b910.pdf

- 2.6.1. **Full respect is given to Article 5 of the OECD Convention**, namely that national economic interest, the impact of relations with a foreign state, and the identity of the legal person involved will not influence investigations or prosecutions of any wrongdoing.
- 2.6.2. **Individuals responsible for any wrongdoing, including intermediaries, are actively prosecuted** irrespective of any settlement that may be reached with a company.
- 2.6.3. No formal or informal immunity prosecution is given as part of any enforcement action either to individuals or to a company and its subsidiaries for any wrongdoing outside of the terms of any enforcement action.
- 2.6.4. **A settlement is only given where there has been full and extensive cooperation** and where prosecutors have a high degree of certainty that full disclosure of all wrongdoing uncovered by the company and of individuals responsible has been made.
- 2.6.5. Any decision takes into account how widespread and egregious the nature of the conduct has been, and prosecutors consider the full scale of offending when reaching their decision, including that outside their jurisdictions, to ensure any penalty imposed truly reflects the company's conduct as a whole.
- 2.6.6. A settlement is given only if the company has committed to full and appropriate remediation, including the appropriate discipline of employees, and genuine change of corporate culture, to ensure that any future reoffending is highly unlikely, with any settlement requiring extensive monitorship to ensure this outcome.
- 2.6.7. **Any monetary penalty imposed upon the company ensures that the company is deprived of the full benefit of its wrongdoing.**
- 2.6.8. Compensation is given to countries and communities affected by any wrongdoing, and such **compensation is based on an analysis of the full harm of that wrongdoing** and not just the amount of any bribe payment made. (Such analysis should be subjected to in-depth analysis by the prosecutors and the courts with expert witness sought where appropriate.)
- 2.6.9. If applicable, affected countries are advised of legal avenues available to them to participate in investigations, and a comprehensive public statement of facts, covering the full range of illegality uncovered, is accompanied by any admission of wrongdoing.
- 2.6.10. **A greater number of individual prosecutions are necessary, as this works as the most effective form of deterrent.** Companies are able to write off even the largest fines as a 'cost of doing business', the incarceration of individuals can substantially alter the risk-reward ratio for individuals who may pay or condone bribes.

3. Is the statutory guidance on the Bribery Act 2010 sufficient, clear and well-understood by the companies and individuals who have to deal with it? Should alternative approaches be considered?
 - 3.1. **The existing statutory guidance (“Guidance”) on the Bribery Act is generally adequate.** When it was first published, TI-UK held misgivings about the Guidance which it made known²⁹⁴ – particularly as we perceived there to be potential loopholes created by the Guidance. Some of those concerns remain, in particular in relation to the risk of UK companies being able to outsource bribery by building a chain of subcontractors sufficiently long to distance itself from bribe paying. We discuss this particular risk further in our response question 6.
 - 3.2. TI-UK shares the Government’s view that, whether an organisation had adequate procedures in place to prevent bribery in the context of a particular prosecution is a matter that can only be resolved by the courts, based on the particular facts and circumstances of the case. However, at present there is insufficient case law to shed light on what constitutes adequate procedures and in the absence of that case law, the Government should provide more guidance to organisations.
 - 3.3. Some of the ways in which the Guidance could be improved are:
 - 3.3.1. In places, the **Guidance assumes a level of understanding of the law which is rarely held by those outside the legal profession.** For example, paragraph 37 of the Ministry of Justice Guidance describes an associated person as “one who ‘performs services’ for or on behalf of the organisation”. Similarly in paragraph 48 of the Guidance states “the common law defence of duress is very likely to be available”. These are both legal terms which will require legal advice and explanation to a lay person. We recommend that any clarifications or amendments to the Guidance are drafted in plain English.
 - 3.3.2. On the topic of **‘facilitation’ payments**, the Guidance rather unhelpfully cross references other guidance from the SFO without clearly signposting where that advice can be found. Today, most jurisdictions prohibit facilitation payments. Only a small number of active enforcement jurisdictions permit such payments, principally the United States. It is our view that the Guidance should do more than acknowledge that they can be an issue. It should provide clear and implementable guidance on how organisations should handle facilitation payments, while maintaining the clear stance that these payments are bribes and are treated as such within the Bribery Act.
 - 3.4. In addition to the statutory guidance, the Government should provide further guidance to organisations on how to mitigate bribery risk:
 - 3.4.1. There is a wide range of guidance on the Bribery Act available from various sources. The Government is currently engaging in some projects to consolidate anti-bribery guidance from various sources and this is a valuable initiative. However, in doing so it risks increasing the number of sources of guidance - further confusing

²⁹⁴ www.transparency.org/news/pressrelease/20110330_guidance_weakens_bribery_act

organisations, rather than consolidating and simplifying the process. Accordingly, it is important that the **Government's work in this space focuses clearly on consolidation, pragmatic signposting and simplification**. Additionally, multiple departments are working on anti-bribery and it is not always clear that these departments are working collaboratively or, in fact, with a clear picture of the others' work in the space.

- 3.4.2. It would be helpful to provide a range of **case studies that were relevant to various businesses, in particular for small to medium enterprises (SMEs)** which typically operate their businesses with less formal and structured policies and procedures and often will be less well set up to manage bribery and corruption risk.
- 3.4.3. Under the most recent leadership of the SFO, the organisation took a view that its role was to act purely as a prosecutor and not to provide guidance on how the legislation would be enforced or how companies and individuals could act in way that would be deemed acceptable. This approach was a source of considerable frustration for the business community. It remains to be seen what approach the new Director the SFO wishes to take during her tenure. However, the absence of commentary and guidance from the SFO has been a significant gap in helping companies make the right decision about how to behave. We recognise that if the SFO were to release guidance under its own banner, this would risk leading to two sets of guidance existing in parallel - at best leading to confusion and at worst with conflicting messaging. Accordingly, **we do not recommend that the SFO release its own guidance. However, we do recommend that the SFO provide significant input into guidance put out but the Ministry of Justice**. We further recommend that this input be updated periodically to draw on the experience of recent investigations and cases the SFO has undertaken.

RECOMMENDATIONS

- 3.5. In the absence of case law, **the Government should provide clear and concrete examples in the Guidance for companies to measure themselves against**.
- 3.6. The Government should provide clear and implementable guidance on how organisations should handle **facilitation payments**, while maintaining the clear stance that these payments are bribes and are treated as such within the Bribery Act.
- 3.7. In addition to the statutory guidance, the Government should provide further guidance to organisations on how to mitigate bribery risk. Both sets of guidance should be drafted in plain English.

4. How have businesses sought to implement compliance programmes which address the six principles set out in the Ministry of Justice’s guidance on the Bribery Act 2010? What challenges have businesses faced in seeking to implement their compliance programmes? Are there any areas which have been particularly difficult to address?

- 1.1. **The Bribery Act has worked well to encourage companies to address the risk of bribery within their operations** and it is clear that many companies have taken steps to improve their corporate governance and risk procedures to minimise bribery risk.
- 1.2. The 2016 PwC Global Economic Crime Survey²⁹⁵ presents a positive view of how UK companies are approaching bribery and corruption risk, with **98% of respondents stating their company’s management were clear in their condemnation of bribery**, and 94% stating that management at their company would rather a business transaction fail than resort to bribery to secure it.
- 1.3. The 2018 PwC Global Economic Crime Survey found that **three-quarters of UK respondents said that their organisations had a formal ethics and compliance programme in place** supporting the view of the previous surveys that business have actively been implementing compliance programmes. It should be noted however, that typically the majority of respondents to these surveys are multinationals, with more than 1000 employees. **A repeat of the 2015 UK Government’s study into awareness of, and response to, the Bribery Act among SMEs would be a valuable** exercise in order to update the evidence base in this area.²⁹⁶
- 1.4. Since the Bribery Act came into force, we have seen the development of industry norms and codified standards including the ISO37001 anti-bribery standard, which has its origins in British standards²⁹⁷ and benchmarking tools, including TI-UK’s Corporate Anti-Corruption Benchmark.²⁹⁸ Many companies participate in a variety of fora to share best practice and to discuss developments, challenges and trends. TI-UK’s Business Integrity Forum is one of these fora.²⁹⁹ Increasingly, companies are now looking for ways to engage in collective action to further minimise their exposure to bribery risk and to reduce any unnecessary areas of compliance burden - for example through the Maritime Anti-Corruption Network which aims to address demands for bribes within ports and throughout the maritime industry.³⁰⁰
- 1.5. **Norms have developed within the business community as to what kind of a compliance programme addresses the MOJ’s guidance.** These norms have been informed by guidance from professional services

²⁹⁵ www.pwc.com/gx/en/economic-crime-survey/pdf/GlobalEconomicCrimeSurvey2016.pdf

²⁹⁶

www.assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/440661/insight-into-awareness-and-impact-of-the-bribery-act-2010.pdf

²⁹⁷ www.iso.org/standard/65034.html

²⁹⁸ www.transparency.org.uk/our-work/business-integrity/corporate-anti-corruption-benchmark/

²⁹⁹ www.transparency.org.uk/our-work/business-integrity/business-integrity-forum/#.Wz87Y9UIPX4

³⁰⁰ www.maritime-acn.org/

consultancies and other available guidance such as that provided by the OECD and TI-UK. Other factors, such the risks that the company is facing and industry and peer behaviour, also influence the development of the individual company's compliance programme.

- 1.6. TI-UK has extensive engagement with the UK businesses on anti-corruption matters, including through our Business Integrity Forum and other meetings. Through our Corporate Anti-Corruption Benchmark participating companies provide comprehensive information about how they seek to implement compliance programmes which address the six principles in the Ministry of Justice Guidance. Some of the ways businesses are seeking to ensure they prevent bribery, by reference to the Guidance are:

- 4.1.1. Top Level Commitment: Companies are demonstrating their top level commitment through various approaches; firstly by extensive internal and external communication on the company's approach to ethics and anti-corruption by executive management. This may be in the form of written statements, in-person presentations from the CEO, or videos to the wider corporate group. Secondly companies have developed organisational structures which ensure anti-corruption is not side-lined within the business, for example by ensuring that the individual or team responsible for the Anti-Corruption Programme have a direct reporting line to a member of the Board. Thirdly, governance arrangements are put in place so that the board is accountable both for the content of the anti-corruption programme but also for oversight of the programme.

- 4.1.2. Risk Assessment: Companies are conducting formal and detailed international corruption risk assessments, on a recurring basis, drawing on both qualitative and quantitative data to build a picture of their risk profile. Sources will include desktop research, interviews with key staff from the board and across a wide range of departments. External perspectives from NGOs, intergovernmental organisations, UK Government and law enforcement are often used to provide additional context. Some companies with extensive bribery risks seek assistance from external risk consultants or legal advisers. The assessments cover key areas of risk for the company including: procurement, sales and marketing, interactions with public officials, political donations and lobbying, sponsorship, donations and community investments, third party and jurisdiction-specific risks.

- 4.1.3. Training & Communications: Companies are ensuring that once an anti-corruption programme is in place, staff are receiving regular communication and training on it. Sophisticated compliance programmes involve a range of communication media and messages are issued on a regular basis throughout the year. With respect to training, companies are putting in place mandatory training for all relevant employees. In order to ensure training is treated with due seriousness, companies monitor the completion of anti-corruption training. Some companies extend training beyond staff to high risk third parties.

- 4.1.4. Due Diligence: Companies are putting in place a wide range of due diligence measures on third parties, including due diligence of agents, intermediaries, contractors and suppliers. Sophisticated companies see this as an opportunity to fully understand who they are working with and evaluate their standards on more areas than simply bribery risk – including modern slavery and human rights, financial reliability and litigation risk. Technology is increasingly playing a significant role in due diligence, with companies being able to conduct due diligence research via centralised risk intelligence databases, global public records research and where necessary companies use investigative due diligence techniques, often provided by specialised consultancy firms.
- 1.7. It is our observation that the area of the Guidance which **businesses find the most challenging to address with confidence is the Principle Six, Monitoring & Review**. This principle advises companies to monitor and evaluate the effectiveness of their bribery prevention procedures and adapt them where necessary. However, there is a lack of strong understanding among companies on how to effectively monitor and review the efficacy of their programmes.
- 1.7.1. The Government should provide further guidance to all companies on what effective monitoring and review of an anti-corruption programme looks like. For example, companies that participate in TI-UK’s Corporate Anti-Corruption Benchmark consider that participation as activity within monitoring and review.

RECOMMENDATIONS

- 1.8. The Government should continue to **collate and promote the most effective initiatives, online guidance and fora** which allow companies to understand and share anti-corruption best practice, as it is currently doing as part of DfID’s Business Integrity Initiative. The Initiative should particularly highlight **resources aimed at SMEs** who are less likely to be able to afford external advice. If no suitable guidance is available it should be created.
- 1.9. The Government should repeat its 2015 study into awareness of, and response to, the Bribery Act among SMEs in order to update the evidence base in this area.³⁰¹
- 1.10. The Government should provide further guidance to all companies on what they can do to effectively monitor and review their anti-corruption programme.

5. What impact has the Bribery Act 2010 had on small and medium enterprises (SMEs) in particular?

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www.assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/440661/insight-into-awareness-and-impact-of-the-bribery-act-2010.pdf

- 5.1. SMEs may be disadvantaged under the Bribery Act as the underlying doctrine of corporate liability which it relies on theoretically allows **SMEs to be prosecuted more easily than large corporations**. We argue, as the SFO itself has done, that the 'identification doctrine' should be abandoned as the guiding principle of corporate liability.
 - 5.1.1. The identification doctrine holds that for a company to be guilty of bribery it must be established that someone who can be described as its "directing mind and will" was involved in committing the bribery.
 - 5.1.2. The doctrine makes it very difficult to prosecute large companies for bribery (as opposed to the lesser crime of failure to prevent bribery), as it requires evidence that a very senior person was complicit in the illegal activity. The principle can incentivise senior members of a corporation to turn a blind eye to criminal acts committed by its representatives, insulating the company (and themselves) from liability. The result is an unfair situation in which the 'low-hanging fruit' of small companies, with simpler corporate structures, are more easily targeted.
 - 5.1.3. Problems with the identification doctrine have been highlighted extensively, and for several decades, by multiple authorities including the Law Commission, OECD, SFO, and the Government itself.
 - 5.1.4. We argue that the UK ought to follow the US approach to corporate liability, in which a corporation is liable for the acts or omissions of an employee which take place in the course of that employee's employment (vicarious liability). In our view, this new statutory form of vicarious liability should retain the 'adequate procedures' defence in order to incentivise prevention of bribery as part of corporate good governance.
- 5.2. There is evidence that **levels of awareness and understanding of the Bribery Act among SMEs may be low**.
 - 5.2.1. The single most important issue to emerge from both a 2015 informal consultation with business and a survey published by the Government in July 2015 is the need to raise awareness on the Bribery Act among SMEs.
 - 5.2.2. The 2015 survey indicated that a third of SMEs had not heard of the Bribery Act. Of those that had heard of it, 74% were not aware of the Ministry of Justice Guidance to help corporations understand the procedures they need in place to prevent persons associated with them committing an offence.³⁰²
- 5.3. **Multinationals and governments should also be doing more to support SMEs in their implementation of programmes by providing support and guidance**. There is also a role for multinationals and governments to address the demands for bribes that SMEs may face, through collective action, an approach which SMEs themselves are

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www.assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/440661/insight-into-awareness-and-impact-of-the-bribery-act-2010.pdf

typically not well placed to attempt due to their relative lack of influence.

RECOMMENDATIONS

- 5.4. The Government should devote more time, energy and resources on **awareness-raising of the Bribery Act with SMEs**.
- 5.5. The Government should engage in **collective action** with multinationals to address the demand side of corruption that SMEs face.

6. Is the Act having unintended consequences?

- 6.1. Whilst on the whole we are of the view that the Bribery Act is having an impact in the way it was intended, there are two areas in which some companies are taking a legalistic approach to the act rather than embracing its spirit:

Tick-box compliance

- 6.2. The Bribery Act was intended to minimise bribery by deterring and punishing bribery and encouraging strong anti-corruption programmes within the UK private sector. The 'adequate procedures' defence was intended to ensure that companies put in place an anti-corruption programme appropriate for their level of risk. The Bribery Act has however had the unintended consequence of **some companies taking a 'tick-box' approach to compliance**; whereby procedures put in place are minimal, perfunctory and not tailored to the company's risks. In this way some companies hope that, should a bribery incident occur, they will be covered under the 'adequate procedures' defence. Such an approach follows the letter of the law but not the spirit.³⁰³ The prevalence of such an approach is unknown, particularly among SMEs, and as stated in question 4, it is advisable the Government repeat its 2015 study into awareness of, and response to, the Bribery Act among SMEs in order to update the evidence base in this area.³⁰⁴
- 6.3. A corporate culture in which it is clearly understood by all employees that there is a zero tolerance policy towards bribery is fundamental to an effective anti-bribery programme. Many companies that have been investigated and prosecuted for bribery have had in place tick-box systems, but these were inadequate and their systems not supported by a culture and tone from the top or values embedded in the company. It is important that in any future communications on the Bribery Act the Government emphasises the insufficiency of anything other than **a comprehensive, risk-based anti-corruption programme which demonstrates genuine intent from the top level downwards** to operate a zero tolerance policy to bribery.

Pushing bribery down the supply chain

- 6.4. The Guidance makes it clear that the definition of 'associated person' in the Bribery Act is considered only to apply to 'first generation' associated persons, that is, those who are performing services for or on behalf of the company. There is, therefore, a **risk of companies setting up structures where they can distance themselves from criminal behaviour** by working with a first layer of associated persons who then use a second or further layer of other third parties to pay or receive bribes. Indeed, the Guidance as it is worded almost seems to make

³⁰³ Such an approach would anyway be seen through by a sophisticated prosecutor, as happened in the SFO's prosecution of Skansen Interiors:

www.dlapiper.com/en/uk/insights/publications/2018/03/taking-a-hard-line/

³⁰⁴ www.assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/440661/insight-into-awareness-and-impact-of-the-bribery-act-2010.pdf

allowances for companies to set up such structure stating that "*an organisation is likely only to exercise control over its relationship with its contractual counterparty [and] may only know the identity of its contractual counterparty.*" This is an irresponsible way for an organisation to manage its supply chain from an ethical, and in many cases commercial, standpoint.

- 6.5. The situation is **analogous to modern slavery in supply chains** where global trends towards outsourcing and complex procurement processes are pushing risk further down supply chains, making it easy for human rights abuses to remain hidden, and easier for companies at the top of the chain to avoid accountability.³⁰⁵ The Government should monitor this 'distancing' behaviour as it relates to bribery, as a potential unintended consequence.

RECOMMENDATIONS

- 1.11. **The Government should conduct research into the prevalence of companies using a 'tick-box' approach to bribery** for example by following our recommendation (made at 4.9) to repeat, and further develop, its 2015 study into awareness of, and response to, the Bribery Act among SMEs. In any future communications the Government should also emphasise the insufficiency of a tick-box approach.
- 1.12. The Government should monitor company behaviour to **ensure that companies are not engaging in bribery indirectly through third parties beyond those 'first generation' associated persons** already identified in the Bribery Act who are performing services for or on behalf of the company.
7. Has the introduction of Deferred Prosecution Agreements (DPAs) been a positive development in relation to offences under the Bribery Act 2010? Have DPAs been used appropriately and consistently? Has their use reduced the likelihood that culpable individuals will be prosecuted for offences under the Act?
- 7.1. TI-UK **supports the principle of DPAs** on the basis that they are a useful additional tool for UK prosecutors provided that they do not become a soft option for those guilty of corruption. However, we have concerns about some aspects of how DPAs are currently being used and how settlement amounts are being calculated.

Calculation of settlement amounts

- 7.2. There is **a very real danger that a discounted DPA settlement will, perversely, encourage corrupt acts if companies come to see the fines as a calculable cost of doing business** that can be factored into a risk-reward analysis. We are concerned by the fact that the DPA discounting threshold has been unilaterally reduced from 30% to 50%

³⁰⁵ Building A Fairer System: Tackling Modern Slavery In Construction Supply Chains, Chartered Institute of Building, 2016

without any clear rationale and have further concerns that there will be ever-increasing discounting.

- 7.2.1. While we understand that there needs to be some sense for a company that there is a net advantage to proceeding with a DPA, there is also a danger that introducing both certainty and leniency pushes companies into the territory of a risk-reward calculation.
- 7.2.2. Ever-increasing discounting would pitch the DPA as a tool for transgressing – but cooperative – corporates to achieve easy and relatively painless closure on difficult issues, rather than fulfilling the intentions of the legislation.
- 7.3. The calculation of harm and benefit for DPAs are key to the size of the settlement and therefore the effectiveness of the deterrent. The size of the fine – which is the DPA’s principle means of punishment and deterrent – flows from the calculations of the advantage gained. **Without transparency over how the advantage has been calculated, it is not possible to assess whether a sufficient fine has been applied.**
- 7.4. We perceive a **weakness in the calculation of harm and benefit** when it comes to assessing the impact of debarment or exclusion from public contracting. It is important that prosecuting bodies understand and properly scrutinise the financial impact of prosecution to a company. If they do not do so, there is a risk that companies may exaggerate the potential harm of debarment or exclusion from public contracting in order to minimise the size of the financial penalty and to substantiate the public interest in a DPA over a prosecution. For example, in the recent Rolls-Royce DPA, the financial ‘impact of prosecution’ submissions were not scrutinised. This opens up the possibility that other companies who find themselves the subject of an investigation could simply present a ‘best-guess’ estimate of future trade losses in order to avoid prosecution. There needs to be more transparency around how the anticipated financial consequences to a company are assessed in order to provide public confidence that they have been properly assessed.³⁰⁶
- 7.5. An additional question to be asked is: should the SFO and the UK Courts actively be helping a company which has engaged in corruption avoid debarment? After all, the purpose of debarment systems is to protect public spending from companies with a track record of corrupt activity. Indeed the UK Government has been at the front of efforts during the UK Anti-Corruption Summit to encourage other governments to implement debarment systems.³⁰⁷

Procedural Concerns

- 7.6. It is our view that the **DPA process is unnecessarily and unhelpfully opaque.**

³⁰⁶ SFO Settlement: Did Rolls Royce exaggerate the impact of debarment to avoid a criminal prosecution? www.transparency.org.uk/our-work/business-integrity/rolls-royce-case-dpas/#.WzoB39JKhRY and A Failure of Nerve: the SFO’s Settlement with Rolls Royce, www.cw-uk.org/single-post/2017/01/19/A-Failure-of-Nerve-The-SFO%E2%80%99s-Settlement-with-Rolls-Royce

³⁰⁷ The Lawyer, ‘Is the risk of debarment a legitimate defence?’ Eva Anderson, Senior Legal Officer Transparency International

7.6.1. We do not agree with the SFO's previous argument that revealing certain details within the DPA documents – whether individuals are being investigated, the approximate number of individuals, whether they are company employees and/or external parties and the level of seniority – would compromise investigations.

Clearly some details would compromise an investigation and should not be revealed. However it is not uncommon during other types of criminal investigations for certain details to be revealed. For example, the number of suspects under investigation to be published along with their sex, age and location.

7.7. We are concerned that the use of DPAs as a 'disposal decision', whereby the case is resolved without prosecution, will reduce the likelihood of individual accountability (and therefore deterrence). **The concern is that DPAs will be used as an almost automatic way of getting cases resolved off the books, which will lead to a fine for the company but will not result in individual prosecutions.**

7.7.1. Taking the corruption offences as a whole, it is only possible to assess whether the interests of justice have been served when both companies and individuals have been punished.

7.7.2. It is clear that if corruption has occurred, individuals must be involved, both actively and complicity. Punishing senior individuals is the best possible deterrent to others.

7.8. We have **concerns surrounding the independence of the investigative and prosecutorial decision-making process** of the SFO. For example, the NCA has the ability to task the SFO to investigate cases, which seems to undermine its statutory independence from any other agency, and which is vital to its work. There are also concerns about reported instances of political interference with charging decisions.³⁰⁸ It is central to the continuing importance of the SFO's work that it operates with maximum independence.

RECOMMENDATIONS

7.9. **Individual prosecutions must be pursued** irrespective of any decision to award a DPA.

7.10. **Victim impact should be a core consideration** in the decision to award a DPA both for the prosecutor and the court.

7.11. **Transparency and independence in investigative and prosecutorial decision-making must be enhanced** when a DPA is under consideration to ensure confidence in the administration of justice.

7.12. The calculations in several areas, which affect the assessments of both the seriousness of the crime and the penalty, should be significantly more **transparent**.

³⁰⁸ www.independent.co.uk/news/uk/politics/court-condemns-blair-for-halting-saudi-arms-inquiry-807793.html

7.13. To maintain public confidence in the independence of investigative/prosecutorial decision-making, **greater transparency is needed during the investigative phase.**

8. How does the Bribery Act 2010 compare with anti-corruption legislation in other countries? Are there lessons which could be learned from other countries?

8.1. Transparency International does not have current comparative data on the relative merits of new anti-corruption legislation. Two broad points can however be made:

8.1.1. **Since the introduction of the Bribery Act, a raft of international laws have been put in place broadly modelled on the act.** This has effectively established an *international norm* which companies cannot now easily evade. Accordingly, any attempt to water down the Bribery Act, would not only be regressive, but would not be effective in lessening the requirements placed on companies operating or exporting abroad, as legislation and enforcement is already tightening across the globe. The UK has led the way, and the rest of the world has followed, and it is now too late to attempt to lower standards in a bid to lessen compliance requirements on companies.

8.1.2. Among those countries with comparable legislation, it is **enforcement that is the key differentiator of countries' approaches to bribery and corruption.** Without an effective and well-resourced enforcement agency, legislation in itself will not create change.

8.2. The Bribery Act is a robust piece of anti-bribery legislation and a strong model for the 'failure to prevent' approach to corporate offending. It does not however cover the spate of corruption-related wrongdoing, and is not a substitute for legislation that enshrines such wrongdoing into criminal law. Such wrongdoing includes other economic crimes, including money laundering, and the UK should take the opportunity to **broaden its 'failure to prevent' approach** to cover these crimes, as it has done with tax evasion, and to bring it in line with developments in Europe:

8.2.1. The European Parliament has proposed a directive on countering money laundering by criminal law, which lays out corporate liability standards ensuring legal persons can be held accountable for "lack of supervision or control".³⁰⁹

8.2.2. Although the UK has committed to opening a consultation on corporate liability for economic crime³¹⁰, it has yet to do so, having only opened a call for evidence.³¹¹ This call for evidence closed on the 31 March 2017 and has yet to publish its results.

8.2.3. The UK has never prosecuted any company or bank for money laundering despite the NCA estimating that “many hundreds of billions of pounds” are laundered through UK banks each year.³¹²

RECOMMENDATIONS

8.3. The Government should **extend the ‘failure to prevent’ approach to corporate offending** outlined in Section 7 of the Bribery Act to other **economic crimes, including money laundering.**

9. What impact has the Bribery Act 2010 had on UK businesses and individuals operating abroad?

9.1. Parts of the private sector have argued that UK business is disadvantaged by the Bribery Act. In July 2015, the National Security Council and the Export Implementation Framework ordered an informal consultation with business groups as to whether the Bribery Act was considered ‘a problem’ and whether it could be made ‘simpler’ and ‘less costly’ to follow. **The message that the Government received from large parts of the business community was that there was no perceived problem with the Bribery Act.**

9.2. It is possible that with **Brexit**, concerns may be raised again and gain traction as to whether the Bribery Act disadvantages UK business. The UK will lose automatic access to EU databases and joint investigations with Brexit and this could be seriously catastrophic for the fight against corruption and economic crime.³¹³

9.3. The UK Government needs to send a strong signal that the Bribery Act is not up for negotiation in a post-Brexit world and that the UK intends to meet its international commitments with regard to having the right legal instruments to fight corruption. With other countries putting in place new anti-corruption legislation, such as France, Germany and Ireland, **any move to weaken the Bribery Act would also undermine the emerging global process of levelling up anti-corruption standards.** A weakened Bribery Act in fact would put the UK behind emerging global standards for anti-corruption, effectively giving UK companies a competitive disadvantage compared to companies in those countries that have enhanced their legislation.

9.4. TI-UK consults widely in order to inform our advocacy positions with heads of compliance and general counsel at multinational UK companies. Larger companies recognise that compliance requirements will not go backwards or be reduced. On the question of whether the Bribery Act makes companies less competitive, a General Counsel from a multinational oil company stated that:

“The Bribery Act has worked well; it has encouraged companies to review their systems and make sure staff aren’t paying bribes. It has had the benefit that companies have really raised their game to

³¹³ www.europa.eu/rapid/press-release_SPEECH-18-4213_en.htm

combat bribery. It is a very poor argument to say ‘if we weren’t allowed to commit these crimes, we’d have to limit ourselves.’”

- 9.5. **Reputable and ethical companies do not propose the argument that the Bribery Act is limiting their business abroad since ultimately complying with the law protects corporate reputation and supports a sustainable business model.** Ultimately reputable companies believe that they should be acting responsibly and the Bribery Act helps to encourage this. There are concerns around whether the Bribery Act is deterring **SMEs** from exporting to higher risk countries. The 2015 Government study in to insight and awareness of the act among SMEs emphasised, however, that the Bribery Act was not generally deterring export activities:

“The majority of SMEs aware of the Bribery Act (89%) felt that the Act had had no impact at all on their ability or plans to export. Furthermore, when prompted as to whether they had any other concerns or problems related to the Bribery Act, nine in ten (90%) reported they had no specific concerns or problems.”³¹⁴

- 9.6. The report summarised that ‘SMEs are generally taking a proportionate, pragmatic and low-cost approach to winning business without bribery.’ The 2015 study is now three years old, but it is likely that with increases resources aimed at SMEs and general embedding of the Bribery Act, SMEs are likely to be more familiar than ever with the legislation and understand how to export alongside it.

RECOMMENDATIONS

- 9.7. The Government **should under no circumstance water down the Bribery Act or its corresponding Guidance.** A weakened Bribery Act in fact would put the UK behind emerging global standards for anti-corruption, effectively giving UK companies a competitive disadvantage compared to companies in those countries that have enhanced their legislation.

ABOUT TRANSPARENCY INTERNATIONAL UK

Transparency International (TI) is the world’s leading non-governmental anti-corruption organisation. With more than 100 chapters worldwide, TI has extensive global expertise and understanding of corruption.

Transparency International UK (TI-UK) is the UK chapter of TI. We raise awareness about corruption; advocate legal and regulatory reform at national and international levels; design practical tools for institutions, individuals and

³¹⁴www.assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/440661/insight-into-awareness-and-impact-of-the-bribery-act-2010.pdf

companies wishing to combat corruption; and act as a leading centre of anti-corruption expertise in the UK.

We work in the UK and overseas, challenging corruption within politics, public institutions, and the private sector, and campaign to prevent the UK acting as a safe haven for corrupt capital. On behalf of the global Transparency International movement, we work to reduce corruption in the high risk areas of Defence & Security and Pharmaceuticals & Healthcare.

We are independent, non-political, and base our advocacy on robust research.

11 July 2018

The UK Anti-Corruption Forum – Written evidence (BRI0009)

The UK Anti-Corruption Forum (the Forum) was established in 2004 and is an alliance of UK business associations, professional institutions and companies with interests in UK and international construction. The purpose of the Forum is to promote effective and co-ordinated industry-led actions in order to reduce corruption, on both a domestic and international basis, and on both the supply and demand sides.

Introduction

The UK Bribery Act 2010 is one of the most stringent and wide-ranging pieces of anti-corruption legislation in the world. It has very real potential not only to drive improvements in corporate policies and procedures but also to result in a reduction in corruption and corrupt practices and to lead to increased self-reporting of related crimes. Nonetheless without clear and transparent evidence of compliance with the Act, through investigations and related enforcement, the potential power of the Act will decline. It is essential, therefore, that there is adequate resourcing and political will to investigate suspected breaches of the Act and, where necessary, to carry through with enforcement action.

Questions and Answers

Deterrence

1. Is the Bribery Act 2010 deterring bribery in the UK and abroad?

1.1 Answer The Act, and in particular the failure to prevent bribery offence, which makes companies criminally liable if they fail to prevent bribery by having inadequate procedures in place to detect it, has a very real impact upon companies creating and enforcing anti-bribery and corruption policies and procedures. As such the Act is likely to be deterring bribery in the UK and abroad. However such deterrence may be limited to those companies and individuals who are aware of, and understand the implications of, the Act. Those companies are usually ones that have an international presence or who already have knowledge of or exposure to the US Foreign & Corrupt Practices Act.

Small and Medium-size Enterprises (SMEs) are often unaware of the legislation and are thus unaware of the risks that they face. If they are aware, they underestimate them, as can be seen in the recent Skansen Interiors case, where the company failed to appreciate the risks of bribery when operating within the UK. In addition, the concept of an "associated person" is giving the Act more traction.

Enforcement

2. Is the Bribery Act 2010 being adequately enforced? If not, how could enforcement be improved? Do the Serious Fraud Office and the Crown

Prosecution Service have the right approach and the resources they need to investigate and prosecute bribery offences effectively?

2.1 Answer No, it is not. The impact assessment in relation to the Act stated that there were approximately 10 bribery cases per year, and that the Act would create one more case per year than under the old legislation. It is clear that these figures have not been met, while the perception of some of our members is that there are many tens of corruption events active in UK at any time, with most perpetrators at little risk of being prosecuted. Furthermore, in comparison with other active jurisdictions such as the United States, it is clear that enforcement by the UK authorities is limited. In fact in the UK enforcement is predominantly undertaken by one agency alone, the Serious Fraud Office (SFO). Prosecutions by the Crown Prosecution Service (CPS) have been very limited both in number and in seriousness. Other agencies appear to place a significantly lesser priority on bribery enforcement. This situation could be improved by dedicating sufficient resource to both the SFO and CPS, and anti-corruption enforcement generally. Greater strategic cooperation needs to take place between intelligence, investigative and prosecutorial agencies in the UK and it is hoped that the Economic Crime Command will take the lead in marshalling these disparate agencies.

Guidance

3. Is the statutory guidance on the Bribery Act 2010 sufficient, clear and well-understood by the companies and individuals who have to deal with it? Should alternative approaches be considered?

3.1 Answer The guidance on the Act is clear and alternative guidance need not be considered. However it should be noted that many SMEs are neither aware of the legislation nor the guidance, and are thus putting themselves at risk of criminal prosecution. As such it is essential that government maintain efforts to inform the wider business community of the requirements under the legislation and the available guidance.

Challenges

4. How have businesses sought to implement compliance programmes which address the six principles set out in the Ministry of Justice's guidance on the Bribery Act 2010? What challenges have businesses faced in seeking to implement their compliance programmes? Are there any areas which have been particularly difficult to address?

4.1 Answer Although many businesses operating in the US or having US FCPA exposure will already have had strong compliance programmes, many other businesses have significantly developed or strengthened their compliance programmes in light of the guidance on the Act. A number of challenges exist in relation to programme implementation, including the jurisdiction, the business sector, education and training and often the high cost of developing and rolling out programmes, especially for businesses with large numbers of employees outside the UK.

A key challenge is in controlling the behaviours of "associated persons" at the early stages of winning contracts. Whilst a UK company may have no intention of malpractice, if its local partner has "used traditional ways" to start a dialogue on a prospect it can be very difficult to know what has actually happened. Clearly, the defence for this is to know one's partners, but that is difficult to do if one is looking to grow business in new markets.

5. What impact has the Bribery Act 2010 had on small and medium enterprises (SMEs) in particular?

5.1 Answer As mentioned above in answer to question 3, some SMEs are not even aware of the legislation, the guidance, or the risks of not complying. Further, for those that are aware of the legislation, there is a perception that the cost of compliance is significant. There is little appreciation that compliance programmes (and costs) can be proportionate to the size of the business and the markets in which that business is working. UK and international chambers of commerce potentially have a greater role to play here. Finally it is also of note that smaller businesses operating overseas are likely to have less gravitas or force when attempting to rebuff requests for bribes by corrupt officials than large, multi-national organisations.

6. Is the Act having unintended consequences?

6.1 Answer There is a risk that some businesses will withdraw from or not enter particular markets on the basis that they are generally perceived to be too corrupt or too risky to do business in. This then leaves the field open for other corrupt businesses to continue paying bribes and for the corrupt status quo to be maintained or to worsen. Government should therefore seek to increase efforts to not only assist British business when entering new markets but also to level the international playing field by putting pressure on other governments to deal with their own corrupt officials.

Many companies that developed or strengthened their anti-bribery policies or programmes in the wake of the introduction of the Act may not have fully appreciated the ongoing costs of maintaining those programmes in particular the costs of staff training/retraining or undertaking effective and demonstrable due diligence.

If anti-bribery was the only issue it would not be a challenge, but with the other extra-territorial elements of UK legislation the burden is increasing significantly. It would be good if the Government could provide support by developing good quality and current training material or intelligence to support client/supplier due diligence, using commercial contacts operated by FCO posts overseas.

Deferred Prosecution Agreements

7. Has the introduction of Deferred Prosecution Agreements (DPAs) been a positive development in relation to offences under the Bribery Act 2010? Have DPAs been used appropriately and consistently? Has their use reduced the likelihood that culpable individuals will be prosecuted for offences under the Act?

7.1 Answer DPAs have the potential to be a very positive development when dealing with corporate entities. Although there have been a limited number used to date, the incentives that they offer companies have potentially increased the interest of companies in investigating red flags, identifying potential criminality and in making self-reports of criminality to the authorities. As such they also offer the prospect of an increase in enforcement action, not only against companies, but also against individuals identified as being the wrong-doers in these company internal investigations.

However DPAs have increased the perception that larger or wealthier companies can repeatedly avoid prosecution, albeit at the cost of significant fines. If they are not to be widely regarded as a means to avoiding prosecution for repeated malpractice, the conditions of their issue need to be transparent.

Also, the fact that currently individuals cannot be a party to a DPA should be scrutinised. An issue to be considered relates to whether this produces negative behaviours by the organisation to which a DPA is available, and behaviours by an individual(s) within that organisation to which the DPA is not available. There is the potential for an adversarial interaction between these two parties which may not produce the most effective outcome that the Act seeks. Understanding that it may very well be that the individual(s) has not acted at the behest of the organisation, and therefore should not have a DPA as an option, there will be times where such an option should be available.

The negative side is that members of the public may have an erroneous perception that DPAs have allowed corrupt companies to "get away with it".

International aspects

8. How does the Bribery Act 2010 compare with anti-corruption legislation in other countries? Are there lessons which could be learned from other countries?

8.1 Answer The Act is tougher than in many other countries so it is unlikely that there are any lessons to be learnt as to the terms of the legislation or guidance. However it is important to note that other active enforcers, such as the US, tend to place a significant amount of resource into anti-corruption enforcement. The US also tends to consider DPAs as the default mechanism for dealing with corporate wrongdoing, meaning that enforcement levels are higher and significant amounts of penalties and compensation are obtained through this mechanism. The US also provides significant incentives for companies to report matters to the authorities, such as by offering discounts of up to 50% and by offering incentives to whistle-blowers to come forward and report crime also. Such proactive and aggressive measures should also be considered in the UK.

9. What impact has the Bribery Act 2010 had on UK businesses and individuals operating abroad?

9.1 Answer It has had a major impact as many companies are creating specific policies and procedures in order to provide them with an adequate procedures defence if an employee or agent has paid a bribe. Currently some UK businesses are avoiding trading in countries that are known to be corrupt. Whether this is a positive impact is questionable. Please see answer to question 6 above.

One advantage of the Act is that it does give credibility to the statement “We’re from the UK, we don’t...” Being able to make the statement clearly and with confidence is one of the best ways of avoiding the pressure of facilitation payments.

10. In conclusion, representatives of the UK Anti-Corruption Forum would be happy to appear in person to respond to any questions that the Select Committee may have.

11. Declaration

This submission has been made by Robert A. McKittrick, co-ordinator of the UK Anti-Corruption Forum, on behalf of the members of the Forum, several of whom have contributed to this response.

30 July 2018

UK Finance – Written evidence (BRI0015)

Executive summary of response

1. Statutory guidance issued by the Government in 2011 drew heavily from existing good practice at the time, including general principles underlying the US Department of Justice and then-new OECD Good Practice Guide for Internal Controls, Ethics and Compliance. There seems little net value to redrafting the general principles, and a risk of imposing unnecessary cost and upheaval on companies through having to redraft their existing policies and contractual arrangements.
 - HMG could add value by supplementing the existing statutory guidance with some alternative approaches to address specific implementation challenges; e.g.
 - Revisiting aspects of the Government’s 2011 Quick Start Guide to clarify the expectations of small and micro-enterprises;
 - Revising other aspects of the Government’s guidance to provide greater consistency with HMRC guidance on the Criminal Finances Act’s corporate criminal offence of failure to prevent facilitation of tax evasion;
 - Considering providing for HMT-approval of industry guidance on UKBA.
 - There is a risk that guidance will become too prescriptive. Banks need more guidance from the Financial Conduct Authority, particularly expectations on the systems and controls regime.
2. The deterrence of bribery in international business transactions is increasingly a function of cooperation between countries, with the largest fines typically from multi-jurisdictional settlements and with many smaller settlements also being facilitated by cooperation between national authorities. Deferred Prosecution Agreements (DPA) can help support more efficient and timely resolution of multi-jurisdictional investigations, and that new OECD standards in this area could further support greater efficiency and effectiveness.

Deterrence

Question 1: Is the Bribery Act 2010 deterring bribery in the UK and abroad?

3. The UK Bribery Act 2010 (UKBA) will be one among many factors contributing to deterrence of bribery, including other criminal and civil prohibitions, the approach to investigations and settlements, the effectiveness of administrative procedures and sanctions, the chances of detection through various means including audit and whistleblowing, the risk of significant civil law consequences including contractual disputes and litigation for damages, and the impact of guidance and awareness raising from Government and other channels.

4. International deterrence is increasingly a function of international cooperation (reference to question 7, below).
5. For context, prior to UKBA, UK regulators also held financial services companies to account through regulatory enforcement for failings in anti-bribery systems and controls and relating to third parties acting on their behalf and for periods, including fines against large and multinational firms. The UKBA has driven compliance in the area of anti-bribery and corruption in the UK, particularly for those who did not have a US Foreign Corrupt Practices Act focus. Notwithstanding the existing regulatory oversight, the corporate offence has definitely driven the compliance focus forward in the financial services firms.
6. The current approach to UKBA enforcement may be undermining deterrence through sending mixed messages on what is required for 'adequate procedures', risking confusing smaller companies in particular (reference to question 2, paragraph 13 below).

Enforcement

Question 2. Is the Bribery Act 2010 being adequately enforced? If not, how could enforcement be improved? Do the Serious Fraud Office and the Crown Prosecution Service have the right approach and the resources they need to investigate and prosecute bribery offences effectively?

7. Investigations into corrupt activity may settled under non-UKBA or Prevention of Corruption Act offences for pragmatic reasons, complicating the assessment of enforcement action.
8. An assessment of the corruption threat is required in order to assess whether enforcement is adequate or deterring bribery. The Ministry of Justice's March 2017 call for evidence on corporate liability for economic crime included a short discussion of the impact of the Bribery Act's 'failure to prevent' offence, but this did not include any updated cost / benefit analysis and focused on a 2014 Government survey of exporting small and medium enterprises. Formal post-legislative scrutiny seemed to be due in 2016 but was deferred on the basis of the then-lack of corporate settlements under the 'failure to prevent' offence.
9. Only one 'failure to prevent bribery' settlement to date included a contested prosecution, and this was without detailed jurisprudence on what constitutes 'adequate procedures' under the corporate offence. The initial DPA settlement with a regulated financial services firm does not allow detailed examination of the interaction with financial services regulation. Against this background and prior to formal post-legislative scrutiny of the UKBA, it is premature to conclude that the current operation of the 'failure to prevent' model is fully effective. Further uncertainties arising from different approach taken use of the 'failure to prevent' model in relation to tax evasion (reference to question 3).

10. The NCA's 2018 National Strategic Assessment of Organised Crime references corruption as an enabler of UK vulnerabilities at the border, within the police and prison system, and within the professional gatekeepers to the legitimate economy. The same NCA assessment judges that post-Brexit UK businesses may look to increase their trade with non-EU markets and will therefore be more likely to come into contact with relatively more corrupt markets, raising the risk of these UK businesses may be drawn into corrupt activities.
11. The volume of enforcement actions does not seem to have increased overall except in relation to the sub-sets of bribery in international business transactions and of corporate bribery. Public OECD enforcement statistics and the latest monitoring report by Transparency International indicate that UK enforcement action against bribery in international business transactions is robust and that the latest evaluation by the OECD Working Group on Bribery described the UK as 'one of the major enforcers among the Working Group countries' (reference to question 7, below). This includes DPAs as well as civil asset recovery by Scottish authorities (there is no DPA regime in Scotland).
12. Prior to the UKBA, UK criminal investigations into allegations of corporate bribery were frequently settled on the grounds of false accounting through civil asset recovery, and that under UKBA similar corporate investigations are now resolved through prosecution or DPA. All the UKBA corporate bribery convictions are for small companies, both under the identification doctrine (sections 1 and 6) and under the 'failure to prevent' model (section 7).
13. The current approach to enforcement may be undermining deterrence through sending mixed messages on what is required for 'adequate procedures', risking confusing smaller companies in particular (reference to question 3, below).
14. Some UK Finance members commented that the pace of investigations is clearly an issue which appears to be hampered by resourcing. Whilst more cross border economic crime co-operation is now taking place (such as with the US Securities and Exchange Commission and the Department of Justice). There does need to be more home resource to deal with the number of investigations underway. There has been limited prosecutions, for case studies, to understand if it has been fully enforced.

Guidance

Question 3. Is the statutory guidance on the Bribery Act 2010 sufficient, clear and well-understood by the companies and individuals who have to deal with it? Should alternative approaches be considered?

15. Statutory guidance issued by the Government in 2011 drew heavily from existing good practice at the time, including general principles underlying the US Department of Justice and the 2010 OECD Good Practice Guide for Internal Controls, Ethics and Compliance. These general principles remain

relevant and a useful summary of key considerations, developed further and built on by subsequent guidance including the BSI and ISO standards for anti-bribery management systems. There seems little net value to redrafting the general principles per se, and a risk of imposing unnecessary cost and upheaval on companies through having to redraft their existing policies and contractual arrangements.

16. The Government could add value by supplementing the existing principles with some alternative approaches to specific implementation challenges (e.g. small firms and proportionality of procedures, sector-specific issues).
17. These specific challenges can be considered in terms of R v SIL, the first contested prosecution of the UKBA 'failure to prevent' corporate offence. Extensive commentary on the conviction of a micro-enterprise that self-reported but was not offered a DPA and failed to uphold its 'adequate procedures' defence at trial. This commentary has included questions of whether the prosecution considered the statutory guidance, as required by the Prosecutors Code, and whether the statutory guidance still provides a clear message on what is required for 'adequate procedures'. There is a further danger that the messages being heard from R v SIL include one to avoid self-reporting.
18. At the time of the offending the company had light-touch and partly undocumented procedures that resemble the advice provided by the Government's 2011 Quick Start Guide to the Bribery Act (e.g. "If there is very little risk of bribery being committed on behalf of your organisation then you may not feel the need for any procedures to prevent bribery", "In micro-businesses it may be enough for simple oral reminders to key staff about the organisation's anti-bribery policies.", etc). In light of this some aspects of the Quick Start Guide should be revisited to clarify expectations of small and micro-enterprises.
19. Some of the advice from this Quick Start Guide has been re-expressed in more recent HMRC guidance on the corporate criminal offence of failure to prevent facilitation of tax evasion (reference Question 6, para 20). A more consistent approach would help avoid unintended consequences and help companies make the most effective use of internal resources.
20. The BBA and many other UK trade bodies produced their own guides to the UKBA. The general principles will typically fall short of the specific guidance required to mitigate sector-specific risks effectively, such as petty corruption at customs and ports, or land clearance and compensation schemes in the extractive industries. HM Treasury-approved industry guidance on anti-money laundering/Counter Terrorism Financing helps to supplement the Financial Conduct Authority's guidance on financial crime, with HM Treasury-approved industry guidance also allowed for the corporate criminal offence of failure to prevent facilitation of tax evasion (reference Question 6, para 20). A similar provision for HM Treasury-approved industry guidance on the UKBA could add value.
21. In comparison to other financial crime regulations etc. there is very limited "official" guidance available and further guidance would be

beneficial, especially Small/Medium Enterprises (SME's). There should be more emphasis on the risks, which will support SMEs in further understanding what they are exposed to and what actions they need take to prevent, detect and report.

Challenges

Question 4. How have businesses sought to implement compliance programmes which address the six principles set out in the Ministry of Justice's guidance on the Bribery Act 2010? What challenges have businesses faced in seeking to implement their compliance programmes? Are there any areas which have been particularly difficult to address?

22. Many of the general principles of the statutory guidance are required by other UK regulations and international regimes. Managing international complexity is a key challenge for global financial services, with international anti-bribery compliance involving varied legal definitions and enforcement approaches (reference to question 8, paragraph 37).

23. The UKBA definition of 'associated persons' is very wide, looking through the formal capacity in which they provide services for or on behalf of the corporate and to be determined by reference to all the relevant circumstances. Mapping and managing associated persons can sometimes require analysis of the detailed contractual terms and is particularly challenging in certain traded markets. There are views that the Criminal Finances Act has perhaps exacerbated this issue as consideration now has to be given to the concept of associated persons in the context of tax evasion facilitation and the "reasonable" procedures required in section 3.

24. The nature of bribery and corruption to the other financial crime disciplines means that firms are reliant on self-disclosure and good ethics of staff for required pre-authorisations for events etc. Preventative controls are difficult in terms of determining the proportionality that is required and relying on the honesty and compliance of staff. Monitoring and reviewing effectiveness through implementing and performing detective controls reconciliations and after the fact investigating tends to be a requirement.

Question 5. What impact has the Bribery Act 2010 had on small and medium enterprises (SMEs) in particular?

25. There is extensive commentary on R vs SIL (reference Question 3, para 14). New work by the Government to promote greater awareness and confidence among SMEs in managing the risk of corruption in overseas frontier markets.

26. The question of proportionality in risk assessment and documentation of procedures is not just a question for smaller companies, as large and

international companies have to work across a wide range of suppliers and other partners.

Question 6. Is the Act having unintended consequences?

27. The approach to enforcement can drive unintended consequences if commercial organisations anticipate being held to a disproportionate standard of prevention, by reducing firms' risk appetites, focusing resource into low value low outcome economic crime prevention activity and reduce the attractiveness of the UK as a place to do business.
28. Further costs and uncertainties could flow from inconsistencies between overlapping forms of corporate liability. The different approach taken by the Criminal Finances Act's corporate criminal offence of failure to prevent facilitation of tax evasion (e.g. defence of 'reasonable procedures' not adequate, provision for HMT-approved industry guidance, express HMRC acknowledgement that provided a commercial organisation has conducted a risk assessment then it may be appropriate to have no other preventive procedures). A more consistent approach would help avoid unintended consequences and help companies make the most effective use of internal resources
29. Unintended consequences may arise from the impact of other legislation, namely Data Privacy, for example applying a lawful base to Third-Party Due Diligence under the General Data Protection Regulation. In terms of outsourcing work, it can be difficult to determine where responsibilities end in the supply chain.

Deferred Prosecution Agreements

Question 7. Has the introduction of Deferred Prosecution Agreements (DPAs) been a positive development in relation to offences under the Bribery Act 2010? Have DPAs been used appropriately and consistently? Has their use reduced the likelihood that culpable individuals will be prosecuted for offences under the Act?

30. The first UK DPA was with a regulated financial services firm. The introduction of DPAs has provided more clarity and transparency in relation to non-prosecution resolutions (rather than civil settlements.)
31. The multi-jurisdictional aspects of DPAs and opportunities to use them in wider and/or faster multi-jurisdictional settlements (reference to question 8).
32. Countries are now introducing and using the concept of DPAs, so this is a positive step change across the globe. The fact that the investigation can be over sooner (therefore costing less) with the co-operation of the defending organisation / individual can only be seen as a positive outcome. However, as the majority of the prosecutions relate to historic events, aspects may have changed to reflect an enhanced awareness and

improved framework in many of these organisations. When these cases are enforced, it can be difficult to assess whether there has been enough change to reform the organisation. This impacts Banks, due to the associated persons relationships with the organisations, where assessment is required to be undertaken to either retain or exit the relationship. More transparency is required in terms of how commitments are being tracked and met.

International aspects

Question 8. How does the Bribery Act 2010 compare with anti-corruption legislation in other countries? Are there lessons which could be learned from other countries?

33. The UKBA was produced in parallel to a review of the OECD anti-bribery instruments, culminating in a 2010 Anti-Bribery Recommendations and associated good practice guide for implementing specific legal provisions of the OECD Anti-Bribery Convention such as jurisdiction and corporate liability. The Parliamentary process included written and oral evidence from the OECD Secretariat and subsequent to Royal Assent in December 2010, the OECD Working Group on Bribery assessed the UKBA as conforming to the requirements of the Convention. The 2010 Anti-Bribery Recommendation included a recommendation for member countries to discourage use of facilitation payments and for those countries with an exemption to review whether this was still necessary.
34. While the OECD's 2010 good practice guide provides additional detail on how the requirements of the Convention should be met, it still allows some flexibility in line with functional equivalence between different national legal regimes (e.g. effective corporate liability can also be by the US 'respondeat superior' model of strict liability for all employees and agents, by the more expansive Canadian version of the Common Law 'directing mind' doctrine or the mixed German model of either attribution of the actions of senior management or their inadequate supervision of junior staff).
35. OECD good practice is not limited to legislation, and that the OECD is currently conducting a study of non-trial resolutions. A number of other OECD countries are following the UK in adopting a variant of the US DPA model, typically with more judicial oversight and public transparency. The deterrence of bribery in international business transactions is increasingly a function of cooperation between countries, with the largest fines typically multi-jurisdictional settlements and with many smaller settlements being facilitated by cooperation between national authorities. DPAs can help support more efficient and timely resolution of multi-jurisdictional investigations, and that new OECD standards in this area could further support greater efficiency and effectiveness.
36. The UK recently published formal policy on compensation for overseas victims of economic crime
(<https://www.cps.gov.uk/sites/default/files/documents/publications/General-Principles-to-compensate-overseas-victims-December-2017.pdf>).

Previous inter-agency arrangements led to compensation in a number of UK bribery enforcement actions, including the first DPA.

37. There should be a cross referral undertaken to understand the enhanced or new legislation in other countries, to determine how they exceed the UKBA and how successful prosecutions have been. This will allow the Select Committee to further understand if there are best practices to be learned to enhance the UK legal and regulatory framework and consider whether programmes similar to the Department of Justice's pilot programme would be helpful.

Question 9. What impact has the Bribery Act 2010 had on UK businesses and individuals operating abroad?

38. Managing international complexity is a key challenge for global financial services, with international anti-bribery compliance involving varied legal definitions and enforcement approaches (reference to Question 8, para 28). To manage this complexity international group policies will set global standards for some issues, typically setting requirements at one of the higher requirements set nationally by leading international financial centres and major markets. The jurisdictional reach and corporate liability model of the UKBA has helped contribute to this trend.
39. Many firms have specific welfare and security policies regarding individuals travelling and working overseas, due to the risks of extortion and petty corruption from public officials particularly in developing and frontier markets. These policies typically do not permit facilitating payments unless strictly recorded and justified in terms of the member of staff being in a vulnerable position, such as threats to life or liberty. A proportionate approach to enforcement is important to help firms manage these welfare and security issues, with the joint prosecutor guidance on the UKBA expressly acknowledging vulnerability as one of the criteria for non-prosecution.
40. Not all businesses (unregulated and outside the UK) appreciate that, as they do business in the UK, despite being headquartered offshore, the UKBA is applicable to them.

31 July 2018

Haseeb Ur-Rehman – Written evidence (BRI0008)

1. In this submission of evidence, I would like to briefly discuss the emergence of remuneration and job-security based forms of bribery, resultant of the increase in outsourcing activities and associated principal-agent problems, in the financial and legal services industries.
2. Outsourcing, is the practice of contractually transacting with an unrelated party from outside of an organisation, to perform activities that were ordinarily conducted by the original organisation, at greater levels of efficiency or at lower costs to the original organisation, than had that organisation conducted the activity itself. The theory of outsourcing is that the costs of certain activities conducted within an organisation, may be higher owing to the lack of exposure of those activities, to the external pricing pressures they would be exposed to in an open market and similarly that the organisation in question, is unlikely to be the lowest cost producer for all the inputs and activities resulting in its product. Outsourcing can thus be seen as the outcome of tensions between the costs of internal production within an organisation and the costs of external transaction, which in turn defines the extent of the limits of the organisation's perimeters, as opposed to the market without.
3. The principal-agent problem emerges where one party, (the agent) has the discretionary power to make decisions that affect the interests and wealth of another party (the principal). Misalignment of principal-agent objectives is aggravated by informational asymmetries between the parties, where the agent, who is more proximate than the principal to the realisation of an organisation's objectives and is not subject to adequate monitoring by the principal, finds a venue to act in their own favour. Outsourcing invariably reflects trade-offs between the labour and capital inputs of an organisation and is thus fertile ground for informational asymmetries between organisations seeking to outsource and the parties they transact with, in order to do so.
4. In the financial and legal services industries and in the interaction between these industries, outsourcing is a standard and developed practice. The functions of the originating organisation (law firms, legal-client organisations e.g. banks, regulators etc.) are broken down into particular tasks and provided to outsourcing organisations (including staffing agencies, legal process outsourcers etc.), which in turn either further outsource the work to contractors or otherwise fulfil the task outsourced to them, by retaining short-term employees. Such organisations, being of an ad-hoc and unregulated nature, staffed mainly by recruiters and payroll managers, have little or no measures in place or indeed the means to prevent bribery or other related offences, have little or no exposure to statutory guidance on the Bribery Act 2010 and are unlikely to understand the risks of bribery that their business may be exposed to. The extent of the liability of the outsourcing organisation for governance and outcomes may be covered by the contractors' individual

indemnities or other insurances or by the legal service provider (if any) between the end-client and the outsourcing organisation.

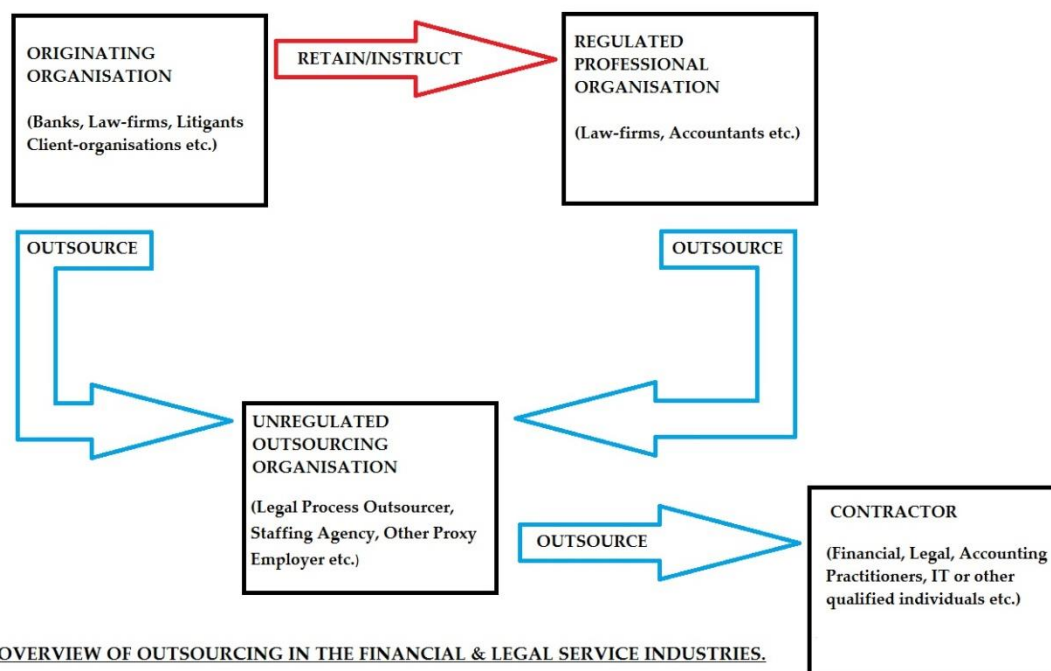


FIG.1 OVERVIEW OF OUTSOURCING IN THE FINANCIAL & LEGAL SERVICE INDUSTRIES.

5. The contractors themselves are highly mobile, frequently move between various outsourcing organisations and have little to no involvement or interest in the originating or outsourcing organisations, beyond the extent of their short-term remuneration. They thus can become and indeed are exposed to incentives resultant of the informational asymmetries between themselves and the outsourcing organisation, as much as the outsourcing organisation is exposed to such incentives resultant of informational asymmetries, between itself and the originating organisation. A further effect of such outsourcing is the movement of the originating organisation's ownership and control of the process or activity in question to the outsourcing organisation, which has the advantage of limiting the extent of the original organisation's liabilities for governance and employment etc. relating to the process and its outcomes. In effect, outsourcing detracts from and may indeed be without of the scope of any "adequate procedures" that the originating organisation may have in place for the purposes of s.7 the Bribery Act 2010.
6. To my knowledge, the safety of the outcomes of a related set of recent, high-profile litigations and thus the scope of the course of justice in those cases, may have been corrupted by the offer (and acceptance) of a more lucrative and permanent contractual role, to a contractor at a financial institution, by an outsourcing organisation. The purpose of this offer was to both induce and reward that contractor, in relation to the concealment of previous failures and corruption in the process and governance of the outsourced legal activities and functions. These matters were reported to

the appropriate regulators at the time, the outcomes of which are unknown to me.

7. The case for adequate and incentivising remunerative policies on the part of organisations to detract from such problems has often been made, particularly in discussions relating to executive compensation and principal-agent issues. However, in the wake of the financial crisis the cost advantages of labour arbitrage that outsourcing affords an organisation has become increasingly important and attractive to particularly legal organisations and has resulted in a “race to the bottom” situation with outsourcing organisations aggressively seeking to outbid each other on costs. This is further aggravated by the stark disparity between the values of the matters outsourced and the remuneration policies of outsourcing organisations, which can incentivise bribery and other corrupt practices amongst contractors.

29 July 2018