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United Kingdom

BRIBERY & CORRUPTION

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This country-specific Q&A provides an overview of bribery & corruption laws and regulations applicable in United Kingdom.

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UNITED KINGDOM
BRIBERY & CORRUPTION

1. What is the legal framework (legislation/regulations) governing bribery and corruption in your jurisdiction?

The Bribery Act 2010 ("**UKBA**") provides for a general offence of bribery, which criminalises both the receipt and payment of bribes. It relates to offences that were committed on or after 1 July 2011.

Offences that were committed before 1 July 2011 are prosecuted under a number of different pieces of legislation (e.g. the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1906) and the common law.

2. Which authorities have jurisdiction to investigate and prosecute bribery in your jurisdiction?

The Serious Fraud Office (SFO) is the main prosecutor with the responsibility for enforcing the UKBA. Broadly speaking, when determining whether to commence a prosecution (against corporates or individuals), the SFO will consider both the evidential case against the suspect and whether a prosecution would be in the public interest.

3. How is 'bribery' (or its equivalent) defined?

A person (natural or corporate) is guilty of a bribery offence if they: (1) are in the UK, or have a "close connection to the UK", or any aspect of the offence occurs in the UK; (2) offer, promise, give , request, agree to receive, or request a financial or other advantage; and (3) intend that in consequence, a person will "improperly perform" a "relevant function or activity," or to reward them for doing so, or knowing or believing that acceptance of the advantage would of itself constitute improper performance.

A "***close connection to the UK***" includes, amongst other things, being incorporated under the laws of the UK, being a UK citizen, or ordinarily residing in the UK.

A "***relevant function or activity***" includes, amongst other things, any function of a public nature, an activity connected with a business, and an activity performed in the course of employment (i.e. the definition is not restricted to public sector bribery).

To "***improperly perform***" means to perform the function in breach of an expectation to do so in good faith, impartially, or while in a position of trust. The expectation test is what an English Judge considers a reasonable person in the UK would expect. Any local custom or practice specific to the jurisdiction where the bribe occurred is actively disregarded, unless it is permitted under written law in the relevant country/territory.

A corporate or commercial organisation registered in the UK, or which carries on business or part of its business in the UK will also commit an offence under Section 7 UKBA where a person "associated with" it bribes another person, intending to obtain or retain business for the organisation or to obtain or retain an advantage in the conduct of business for the organisation. This is a strict liability offence that can be committed irrespective of where in the world the underlying bribe occurs. Note that a person will be "associated with" the organisation for these purposes where the person acts on the organisation's behalf. This could include an employee, agent or subsidiary of the organisation. Contractors, suppliers, joint venture entities and joint venture partners may also be associated persons. While there is a rebuttable presumption that an employee acts on behalf of his or her organisation, an individual's association will be determined by reference to all relevant circumstances, not merely the relationship between the individual and the organisation.

It is a complete defence for an organisation to prove that it had "adequate procedures" in place to prevent bribery.

In addition, Section 6 UKBA includes a specific offence of

"bribery of foreign public officials" (FPOs). Broadly, an offence will be committed where a person directly or indirectly offers, promises, or gives a financial or other advantage to an FPO in their capacity as an FPO (or to a third party at the FPO's request) and intends to obtain or retain business or a business advantage. Nb. for the purposes of Section 6 UKBA, it is not necessary for a "relevant function or activity" to be improperly performed.

For the purposes of the UKBA, an FPO includes an individual who holds a legislative, administrative or judicial position of any kind; exercises a public function for or on behalf of a country or territory outside the UK or for any public agency or public enterprise of that country or territory; or is an official or agent of a public international organisation. Foreign political parties or candidates for foreign political office are not considered FPOs.

The offence is not committed where the FPO is either permitted or required by the written law applicable to the FPO to be influenced in his or her capacity as an FPO. Effectively, this is only likely to provide protection in the very limited circumstances where a written law explicitly permits or requires the payment to the FPO.

4. Does the law distinguish between bribery of a public official and bribery of private persons? If so, how is 'public official' defined? Are there different definitions for bribery of a public official and bribery of a private person?

The general offences of bribery in the UK anti-bribery legislation do not distinguish between bribes paid to a public official and those paid in the private sector. However, the UKBA does provide an additional offence of bribery in relation to foreign public officials (the Section 6 offence, as described above).

5. What are the civil consequences of bribery in your jurisdiction?

The SFO has civil recovery powers to recover property obtained through unlawful conduct without resorting to criminal prosecution. Victims of bribery may also make civil claims for damages against the briber and/or the recipient of the bribe for financial loss. In general, civil claims for bribery appear more common in the USA than in the UK. However, they are becoming more common in the UK. In particular, there have been claims arising out of supposed mis-selling of derivatives and allegations of bribery against banks. In Libyan Investment Authority v Goldman Sachs [2016] EWHC 2530 (Ch), the LIA argued that offering an internship within Goldman Sachs to the brother of the Deputy Chairman of the LIA improperly influenced the LIA to enter into trades of $1.2 billion; in this instance the LIA's claim was unsuccessful. The High Court ruled that the internship offered by Goldman Sachs did not go beyond the normal cordial and mutually beneficial relationship between a bank and its client. The High Court noted that if the relevant derivative trades were in fact unsuitable, they were no more unsuitable than other investments made by the LIA in the same period. The High Court gave guidance on the issue at hand by stating that, for banks to be found liable, there needs to be an element of serious impropriety.

In UBS v KWL [2017] EWCA Civ 1567 the Court of Appeal ruled that a water company could rescind a credit protection contract in relation to derivatives entered into with a Swiss bank on the basis of bribes paid by the company's financial advisor.

6. What are the criminal consequences of bribery in your jurisdiction?

An individual convicted of committing any of the general bribery offences may: (a) be imprisoned for a term of up to 10 years; and/or (b) be subject to an unlimited fine. A company or partnership that commits any of the general bribery offences will be liable on conviction on indictment, to an unlimited fine, and to automatic and perpetual debarment from competing for public contracts.

Note that a conviction under Section 7 UKBA will attract discretionary rather than mandatory disbarment from competing for public contracts. Where an organisation has been convicted of a bribery offence, senior officers of the organisation who have consented to or connived in the conduct can also be convicted of the offence concerned. As noted below (Question 23) there has been a noticeable lack of individual prosecutions even where an organisation has been found guilty of bribery offences.

Where evidence supports a prosecution of a company and a prosecution is deemed to be in the public interest, a designated prosecutor (the SFO and the Director of Public Prosecutions) may invite the company to enter into negotiations to agree a Deferred Prosecution Agreement ("DPA") as an alternative to criminal prosecution. A DPA is an agreement that the company's prosecution will be deferred subject to certain conditions, which usually include the payment of a financial penalty, payment of compensation, disgorgement of profits arising from the wrongdoing, and

a financial contribution to the costs of the investigation. The DPA is subject to judicial agreement. The key features of DPAs are that they enable a corporate body to make full reparation for criminal behaviour without the collateral damage of a conviction (for example, sanctions that could put the company out of business and destroy the jobs and investments of innocent people); they 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'; they avoid lengthy and costly trials; and they are transparent, public events.

DPAs are not available to individuals.

7. Does the law place any restrictions on hospitality, travel and entertainment expenses? Are there specific regulations restricting such expenses for foreign public officials? Are there specific monetary limits?

Corporate hospitality will only amount to one of the general offences if there is improper conduct on the part of the person bribing or being bribed. If the act of hospitality is routine and inexpensive, it is unlikely to amount to a breach of an expectation of good faith, impartiality or trust. As a general point, it is important for an organisation to be able to show that payments to a third party or agent reflect a reasonable level of compensation for the services being provided; this would reduce the chances of any such payment being viewed as corrupt. The UK government has confirmed that legislation should not be used to penalise legitimate and proportionate hospitality, including in respect of foreign public officials, but its view is that hospitality is also an issue best considered by prosecutors rather than by Parliament. For hospitality events, it is important to check whether the proposed guests are subject to hospitality/gift restrictions imposed by their industry or professional governing bodies. By way of example, the UK's Ministry of Defence has previously issued guidance restricting hospitality events for Ministry of Defence staff. Such guidance is not always publicly available. When offering a hospitality invitation it is prudent to enquire about any applicable standards or guidance notes that may apply to the intended guest. Various factors will be relevant to an objective analysis of whether an offer of hospitality or gift may be perceived to be improper and at risk of being viewed as a bribe. Such factors include the context of the provision of the event / gift; whether a reasonable person would regard the event / gift as unduly extravagant in the circumstances; whether the event / gift would be proportionate; the nature of the benefits which might be secured from the guest or recipient; whether the event / gift is being offered in conjunction with (or in close proximity to) any procurement or contract negotiations; and whether there is transparency about the provision of the event / gift.

8. Are political contributions regulated? If so, please provide details.

Various items of legislation apply to political contributions. The UKBA does not include any specific provisions in relation to political contributions, although the general offences of giving or receiving a bribe may be applicable.

9. Are facilitation payments regulated? If not, what is the general approach to such payments?

A facilitation payment refers to the practice of paying a small sum of money to a public official as a way of ensuring that they perform their routine, nondiscretionary duties, either promptly or at all. Facilitation payments constitute a bribe l under the UKBA. In 2011 and thereafter, the UK government has recognised "the problems that commercial organisations face in some parts of the world and in certain sectors" (see here for a copy of the Government's Guidance on the UKBA). However, in May 2019, the House of Lords' Select Committee on the UKBA recommended no changes in the law in relation to facilitation payments, stating that it would be a retrograde step to legalise facilitation payments. Moreover, in its response to the Select Committee's conclusions, the UK Government agreed that facilitation payments will remain a form of bribery and should not be legalised. The Government confirmed that there was no plan to change the law in this regard. Are there any defences available?

There are no defences available to the general bribery offences where an individual or corporation pays or receives a bribe. It is a defence, however, to the corporate offence under Section 7 UKBA if an organisation proves, on the balance of probabilities, that it had "adequate procedures" in place to prevent persons associated with it from engaging in bribery.

10. Are there any defences available to the bribery and corruption offences in your jurisdiction?

N/A.

11. Are compliance programs a mitigating factor to reduce/eliminate liability for bribery offences in your jurisdiction?

For the purpose of Section 7 UKBA only, it is a defence for an organisation to prove, on the balance of probabilities, that it had "adequate procedures" in place to prevent bribery. The effectiveness of an organisation's compliance programme will be relevant to the consideration of whether it had "adequate procedures" and the UK Ministry of Justice has issued guidance on procedures that commercial organisations can put into place to help prevent persons associated with them from bribing (see question 13 below). Additionally, the SFO will assess the effectiveness of an organisation's compliance programme when investigating it and it will inform the SFO's decision-making in respect of: the public interest test; whether an organisation should be invited to enter into negotiations for a DPA; and it will be a relevant factor in respect of a charging decision (for example, the Guidance on Corporate Prosecutions provides that an additional public interest factor in favour of prosecution is that the offence was committed at a time when the company had an ineffective corporate compliance programme). The SFO's 2020 internal guidance on evaluating a compliance programme is available here.

Following the introduction of the Criminal Finances Act 2017, it is now also a criminal offence for a company to fail to prevent a person associated with it from facilitating tax evasion. Similar to the Section 7 UKBA offence, the company will have a defence if it had prevention procedures in place which were "reasonable in all the circumstances" to prevent the criminal facilitation of tax evasion. It will also be a defence if it was not reasonable to expect the company to have any prevention procedures in place.

12. Who may be held liable for bribery? Only individuals, or also corporate entities?

Both individuals and corporates can be held liable for bribery, with the exception of offences under Section 7 UKBA, which applies only to commercial organisations. Senior officers can be held liable for the offences of their organisation if they consented to or connived in the offence and had a close connection to the UK.

It is important to note the broad jurisdictional nexus of the UKBA whereby the offences have both intra-territorial and extra-territorial application. For individuals, this means that a person will commit the offences of bribing another person, being bribed, and bribery of foreign public officials (a) if any of the constituent acts or omissions take place in the UK and (b) if (i) no act or omission that forms part of the offence takes place in the UK; (ii) a person's acts or omissions done or made outside the UK would form part of such an offence if done or made in the UK; and (iii) the person has a "close connection with the UK".

A "close connection" can mean that the person is, e.g. a British citizen, ordinarily resident in the UK or a body incorporated under the law of any part of the UK. In addition, the specific offence which applies to a commercial organization under Section 7 UKBA includes a body that is incorporated under the law of any part of the UK and that carries on a business (whether in the UK or elsewhere) and any other body corporate/partnership (wherever incorporated/formed) that carries on a business, or part of a business, in any part of the UK.

The UKBA does not define the term "carries on a business or part of a business". UK Government Guidance indicates that with regard to organisations incorporated or formed outside the UK, whether they carry on a business in the UK will be determined by the courts and the Government advocates a common sense approach. A foreign parent which has a UK subsidiary alone would not necessarily be carrying on a business in the UK. The Government's reasoning for this is that a subsidiary "may act independently of its parent company or other group companies". The implication appears to be that, where there is no such independence, then the parent would be carrying on a business in the UK by owning a subsidiary which does carry on business in the UK. In the absence of a definition of the term, companies should take a cautious view of the definition.

13. Has the government published any guidance advising how to comply with anti-corruption and bribery laws in your jurisdiction?

The UK Ministry of Justice has issued guidance on procedures that commercial organisations can put into place to help prevent persons associated with them from engaging in bribery. The Ministry of Justice's guidance is not prescriptive as to the nature of systems and procedures that organisations should implement in order to meet the "adequate procedures" standard necessary to provide a defence against the Section 7 corporate offence. A one-size-fits all approach is simply not possible; whether an organisation has adequate procedures in place to prevent bribery will depend on the specific facts and circumstances of the case.

However, the guidance highlights six principles of

bribery prevention that an organisation's officers should consider when drafting an anti-bribery compliance program: (a) proportionate procedures: an organisation's internal procedures to prevent bribery by persons associated with it ought to be proportionate to the bribery risks it faces and to the nature, scale and complexity of the organisation's activities; (b) top-level commitment: the management of an organisation (i.e., directors, owners or any other equivalent body or person) ought to be committed to preventing bribery by persons associated with it and the management should endorse a culture in which bribery is never acceptable; (c) risk assessment: an organisation should consider the nature and extent of its exposure to potential risks of bribery on its behalf by persons associated with it and its assessment ought to be "periodic, informed and documented"; (d) due diligence: an organisation must implement due diligence procedures, applying a proportionate approach, in respect of persons who perform or will perform services for or on its behalf; (e) communication (including training): an organisation should seek to ensure that its anti-bribery policies are understood throughout the organisation via internal and external communication and, if appropriate, training; and (f) monitoring and review: an organisation needs to periodically monitor and review its anti-bribery procedures, and where necessary, make improvements.

As noted above (see question 11 above), in January 2020 the SFO published its internal guidance on evaluating compliance programmes (which forms part of its operational handbook). The guidance outlines how the SFO will examine an organisation's compliance programme and includes a summary of the six principles of adequate procedures, described above.

14. Does the law in your jurisdiction provide protection to whistle-blowers?

The UK provides protection to whistle-blowers under the Employment Rights Act 1996, as amended by the Public Interest Disclosure Act 1998 and the Enterprise and Regulatory Reform Act 2013. This legislation protects workers from unfair dismissal or other detriment where they disclose information about wrongdoing in specific circumstances. The two key requirements to be met in order to quality for protection are as follows: (1) there must be a "qualifying disclosure" of information. This means the worker must reasonably believe the disclosure is made in the public interest, and tends to show that one or more of six relevant failures has occurred, is occurring or is likely to occur (e.g. a criminal offence) and (2) the disclosure must be "protected". Whether or not disclosure is protected depends in part on to whom the disclosure is made.

15. How common are government authority investigations into allegations of bribery? How effective are they in leading to prosecutions of individuals and corporates?

The SFO is a relatively active enforcement agency with around 130 reported ongoing investigations and prosecutions relating to bribery, corruption and complex fraud. The SFO's Annual Report for financial year 2021-22 states the following that throughout the year, 22 defendants were scheduled for trial, and two corporates pleaded guilty to bribery and corruption offences. In addition, in 2022 the SFO succeeded in its first ever prosecution of a corporate under Section 1 UKBA (amongst other provisions), when Glencore Energy UK Ltd pleaded guilty to bribery, and which is will pay over £280 million to the SFO in fines, disgorgements of proceeds and costs orders. The SFO's investigation of Glencore Energy UK Ltd.'s officers is said to be ongoing.

16. What are the recent and emerging trends in investigations and enforcement in your jurisdiction? Has the Covid-19 pandemic had any ongoing impact and, if so, what?

Deferred Prosecution Agreements: The SFO's use of DPAs following corporate bribery investigations has continued. The SFO entered into its first DPA in 2015, with Standard Bank. Other examples have followed: Sarclad Ltd in 2016, Rolls-Royce and Tesco in 2017 and Serco Geografix Ltd and Güralp Systems Ltd in 2019; Airbus SE, G4S Care and Justice Services (UK) Ltd and Airline Services Limited in 2020. The three DPAs agreed in 2021: one with Amec Foster Wheeler Energy Limited and two with unnamed parties, bring the total number of DPAs to twelve at the time of writing, since they were introduced in 2014.

Legal Privilege in SFO Investigations: The SFO has remained assertive in testing claims of legal professional privilege arising in internal investigations. Companies – particularly against the backdrop of negotiating a DPA – are coming under increasing pressure to waive claims to privilege. The SFO has now offered guidance on this issue in its 2019 Corporate Cooperation Guidance (a copy of the guidance can be found here).

The SFO noted that that a company's refusal to waive privilege may undermine a request for a DPA, but will not otherwise be "punished" by the SFO. On the issue of interviewing witnesses and notes of those interviews the guidance provides that, to avoid prejudicing the SFO's

investigation, corporates should consult in a timely way with the SFO before interviewing potential witnesses or suspects, taking personnel/HR actions or taking other overt action. Where a corporate claims privilege over documents, the guidance confirms that the SFO has an expectation that it will be provided with a certification by independent counsel that the material in question is indeed privileged.

The issue of privilege was again considered in the judgment approving the DPA with Airline Services Limited in October 2020. The Court noted that Airline Services Limited had demonstrated a "very high degree of cooperation" which included a limited waiver of privilege in respect of internal investigations it conducted.

Stronger Enforcement Coordination: There remains increased coordination between the SFO and its counterparts in foreign jurisdictions. The Airbus SE investigation was a key example of this as the SFO worked closely with overseas regulators to secure a high value DPA (a global settlement sum of EUR 3.6 billion). The trend of global cooperation was also demonstrated in the DPA with Amec Foster Wheeler Energy Limited, which formed part of a USD 177 million global settlement (the company paid £103 million in the UK in fines and costs) involving the US and Brazilian authorities. Effective coordination between authorities can include sharing of information and documents, creating an increasing challenge for companies under investigation to manage their global regulatory risk.

Re-emergence of SOCPA agreements: Following the appointment of Lisa Osofsky as Director of the SFO in 2018, commentators noted the "Americanisation" of the UK corporate crime scene. In particular, commentators noted the rise of US-influenced techniques being used by UK law enforcement such as witness / individual cooperation and DPAs (see Question 25 for further details). Ms Osofsky has also made no secret of her desire to adopt such techniques. This was demonstrated in the conviction of Petrofac Limited in October 2021 after it pleaded guilty to seven counts under Section 7 UKBA. The conviction was made possible because of the cooperation of a former Petrofac executive, David Lufkin, who assisted the SFO's investigation and also pleaded guilty to fourteen counts of bribery in the agreement he entered into with the SFO pursuant to section 73 of the Serious Organised Crime and Police Act 2005 (SOCPA). Section 73 SOCPA offers the prospect of a reduced sentence to a defendant who provides assistance to an investigator or prosecutor, on the condition that they enter a guilty plea. Mr Lufkin received a suspended sentence of two years (as opposed to a possible custodial sentence of seven years) in return for his cooperation and guilty plea. SOCPA agreements have been rarely used since they were introduced in 2005, at least in part due to scepticism as to the benefits for an individual in entering into one when the sentencing outcome for cooperating cannot be guaranteed. This, coupled with the SFO's poor record of convicting individuals in relation to corporate bribery conduct (at the time of writing, the SFO has yet to successfully prosecute an individual in relation to the conduct which was the subject of the twelve DPAs agreed to date), has led some commentators to question the benefits of SOCPA agreements when it remains to be seen whether the SFO is capable of securing individual convictions in relation to corporate misconduct.

SFO credibility questioned: A further example of the SFO's poor track record in convicting individuals was the overturning of the conviction of a former Unaoil employee, Ziad Akle, in December 2021 following his conviction and sentencing in July 2020 to five years in prison for conspiracy to give corrupt payments to secure contracts. Mr Akle's conviction was quashed on appeal after the Court of Appeal found that the SFO had not complied with its duty of disclosure and failed to provide documents to the defence. This followed the collapse of the prosecution of two former directors of Serco Geografix Limited in April 2020, again due to disclosure failings by the SFO. The SFO's failings in these cases have raised questions about its credibility and in July 2022, the UK Attorney General published a report detailing eleven change recommendations concerning the SFO's operations.

In November 2022, Lisa Osofsky announced she would step-down as Director in August 2023. At the time of writing, no new Director of the SFO has been announced.

17. Is there a process of judicial review for challenging government authority action and decisions? If so, please describe key features of this process and remedy.

The decisions of UK government authorities, including the SFO, are subject to judicial review of the courts in certain, relatively limited, circumstances. Applicants have a narrow time frame to request review and must identify where a decision is irrational, improper or illegal. The criteria to show irrationality are high, and rarely met in practice. Most successful judicial reviews rely upon showing that an authority has not followed its own procedures (an improper decision) or that human rights legislation has been infringed (an illegal decision). Recent JR challenges to the SFO have focused on issues of disclosure and privilege (note the following: (1) R (on the application of AL) v Serious Fraud Office [2018]

EWHC 856; (2) SFO v ENRC [2018] EWCA Civ 2006 and subsequent JR applications; (3) R (KBR Inc.) v SFO [2018] EWHC 2368 (Admin)).

18. Are there any planned developments or reforms of bribery and anti-corruption laws in your jurisdiction?

There are no immediate known plans to change the UKBA. However, the UK Government in February 2023 confirmed its intention to introduce a new "failure to prevent" corporate criminal offence via the Economic Crime Bill. At the time of writing, the details of the proposed new offence are not known, although it is expected that whilst any new offence may overlap with the UKBA, no fundamental changes to the scope of the UK's bribery and anti-corruption laws will occur.

More broadly the Economic Crime Bill is intended to increase the ability of authorities to identify financial crime and improve corporate transparency. Reforms are proposed to the unexplained wealth orders regime, including protection for the National Crime Agency (NCA) from exposure to legal costs in unsuccessful cases and the extension of the period for the NCA to consider the evidence of wealth received from the respondent and determine the enforcement or investigatory proceedings to be taken (if any).

19. To which international anti-corruption conventions is your country party?

The United Nations Convention Against Corruption; the United Nations Convention Against Transnational Organised Crime; the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; the Council of Europe Criminal Law Convention on Corruption (with Additional Protocol); the Council of Europe Civil Law Convention on Corruption; ; and the Agreement for the Establishment of the International Anti-Corruption Academy (yet to be ratified).

20. Do you have a concept of legal privilege in your jurisdiction which applies to lawyer-led investigations? If so, please provide details on the extent of that protection.

The concept of legal professional privilege in England and Wales is considered to be a fundamental human right. If a document is covered by legal professional privilege, it entitles the party claiming privilege to withhold production from those seeking to inspect it. That is so even where the party seeking inspection is a governmental or regulatory body.

Documents will attract legal professional privilege provided that they meet the tests for legal advice privilege or litigation privilege. Legal advice privilege covers confidential communications between lawyers (acting in their professional capacity) and clients for the dominant purpose of giving or obtaining legal advice. It does not matter whether the advice sought relates to contentious or non-contentious matters. Litigation privilege covers confidential communications between clients and their lawyers or between either of them and a third party for the purpose of obtaining information or advice in connection with existing or contemplated litigation, that were made: (a) when litigation was in progress or reasonably in contemplation; and (b) with the sole or dominant purpose of conducting that litigation. Crucially, the litigation must be adversarial, not investigative or inquisitorial.

The meaning of "adversarial" when considering if litigation is in reasonable contemplation for the purposes of litigation privilege applying to investigation has been a developing area of discussion in the UK. This is because the line between an inquisitorial and an adversarial investigation is not always clear. As new facts emerge and regulatory correspondence develops, an organisation should continually assess where the tipping point lies. Case law on this point continues to develop; the following key cases should be noted:

- Tesco Stores Ltd v Office of Fair Trading [2012] CAT 6: the proceedings were considered adversarial once the OFT issued a Statement of Objections and a Supplementary Statement of Objections and Tesco stood accused of wrongdoing (and not just when the OFT issued its decision notice). This case is helpful in highlighting the importance of determining the purpose of the notice served by a regulator and the relevant stage of the investigation. Where the notice has been served in the course of early stage investigations, litigation privilege may not apply. However, it may apply where the notice served sets out the relevant authority's legal case against the company.
- Property Alliance Group Ltd v Royal Bank of Scotland plc [2018] WC2A 2LL considered the issue of litigation privilege but ultimately failed to clarify at what point an investigation by a regulator becomes adversarial.
- ENRC v SFO [2018] EWCA: This remains the

key case on the issue of litigation privilege and investigations. ENRC sought to claim privilege over notes taken by external counsel of interviews that had been conducted in the context of an internal investigation. The Court of Appeal held that litigation was in reasonable contemplation from the outset of the SFO investigation into the company (2 years prior to the SFO formally commencing its criminal investigation). It was held that the ENRC materials in question (including interview notes and forensic accounting materials) were created for the dominant purpose of resisting or avoiding contemplated criminal proceedings, and so protected by litigation privilege. The judgment in ENRC was based on the particular facts of the case. But for an organisation in similar circumstances, ENRC shows the importance of constantly monitoring whether litigation is in reasonable contemplation, and taking practical steps to reinforce any such claim.

Some documents generated in a lawyer-led investigation may well be covered by legal advice privilege. However, it is unlikely that documents generated in a lawyer-led investigation (or, for that matter, any investigation) will be covered by litigation privilege. That is because, as noted above, litigation privilege is concerned with adversarial litigation only. This is an important point to draw out when considering the status of interview notes. In the past, organisations took steps to ensure lawyers led employee interviews to ensure that the subsequent interview notes could be withheld on the grounds of privilege.

Following key judicial decisions in past years (notably, Three Rivers (No 5) [2003] EWCA Civ 474 and the RBS Rights Issue Litigation [2017] 1 WLR 1991), the correct interpretation is that interview notes are not communications between a client and legal adviser and therefore, based on the test set out above, interview notes are not protected by legal advice privilege. It is thus the commonly accepted view in the UK that interview notes are not privileged documents unless the organisation can clearly assert that litigation privilege applies.

This is different to the approach taken in the United States where working papers (including interview notes) can be withheld even where litigation is not in contemplation. As a practical point, the SFO is putting investigated parties under an increasing amount of pressure to waive privilege claims over documents, against the backdrop of co-operation which is necessary to secure a DPA. It has also challenged rules on privilege through the courts (see questions 23 and 25 below).

Finally, organisations undertaking an investigation which relates to third party organisations should consider Common Interest Privilege. This is not a separate privilege right but rather a mechanism that may allow parties that share a common interest (e.g. co-defendants) to share privileged materials between them, without waiving or otherwise losing that privilege. When considering the issue of privilege in internal investigations and interactions with the SFO, the 2019 Cooperation Guidance should be kept in mind (see above).

21. How much importance does your government place on tackling bribery and corruption? How do you think your jurisdiction's approach to anti-bribery and corruption compares on an international scale?

The UK has been described by the OECD as a "major enforcer of the foreign bribery offence". Many perceive the UK to be one of the two most active enforcement regimes in the world (along with the US).

During the 2016 Anti-Corruption Summit, the UK committed to establishing and hosting the International Anti-Corruption Co-ordination Centre (IACCC). The IACCC was officially launched in July 2017 and is hosted by the National Crime Agency in London. The IACCC aims to bring together specialist law enforcement officers from multiple jurisdictions into a single location to tackle allegations of grand corruption.

In December 2017, the UK government launched its Anti-Corruption Strategy 2017 to 2022, setting out plans to tackle domestic and international corruption. Commitments in the plan include better coordination in the fight against economic crime and a new Ministerial position focused on economic crime. The UK government has also put in place improved "blockbuster" funding for the SFO, allowing it greater financial resource to tackle the largest and most challenging cases.

In Transparency International's Corruption Perception Index, the UK's scores have been high. The UK was ranked 18th in 2022.

22. Generally how serious are organisations in your country about preventing bribery and corruption?

UK organisations are governed by some of the toughest

anti-corruption legislation in the world. The SFO is relatively well-funded (a budget of £55 million in 2022-23) and has a team of more than 400 staff including lawyers, investigators and forensic accountants. The SFO has had some high profile success in recent years – the Airbus SE case and Petrofac conviction being particularly significant. However recent high-profile failings (see question 16 above) have cast a shadow over the SFO recently. A list of current cases can be viewed on the SFO's website here.

In our experience, UK organisations are increasingly aware of their anti-corruption obligations and generally take a responsible approach to corporate risk. However, standards may vary depending on the type of company. Most large UK public companies now have compliance programs in place, backed by dedicated compliance teams. However, small to medium sized enterprises are sometimes less committed or simply less-well resourced, and here standards are more mixed.

23. What are the biggest challenges enforcement agencies/regulators face when investigating and prosecuting cases of bribery and corruption in your jurisdiction?

One of the main challenges for the SFO is the evolvement of electronic data and the impact this has on the time and expense of investigations. The IT infrastructure at the SFO is in need of a significant overhaul and it confirmed in its 2020-2021 annual report and accounts that it is investing in improving and developing that infrastructure to meet its operational needs, procure a new document review and case management system, and keep pace with technological developments. This will make the investigation stage of a case more efficient, and it will likely accelerate the speed in which investigations can be completed.

There were also reported difficulties over the SFO's retention and recruitment of senior staff. The SFO has also yet to establish the free flow of experienced legal professionals into and out of the organisation which, for example, has helped to make the US Department of Justice so successful. This high turnover of staff, combined with the complexity of the cases, has been a material cause of delay within the SFO.

Moreover, the SFO has been criticised over its apparent inability to progress from a DPA with companies to the prosecution of the individuals responsible for the offences committed. This is the case despite details of individuals' illegal behaviour being published in the DPA. To date, the SFO has failed to secure any individual prosecutions in respect of the conduct which has been the subject of the 12 DPAs it has agreed.

Whether or not the SFO can secure individual prosecutions linked to the illegal activity of organisations with which it has entered into a DPA will continue to be of interest this year – especially as the issue of individual accountability continues to be a predominant focus regulated sectors.

The SFO has faced challenges in the past regarding the funding of large "blockbuster" cases, although recent moves have been made to a more flexible budget structure which should reduce this challenge in the future.

Finally, there is a relative lack of enforcement precedent under the UKBA compared to, say, the FCPA. The body of case law is small and this can make it difficult for both the SFO and the investigated party to know where the boundaries lie. However, the SFO will not doubt be buoyed by its successful prosecution of Glencore Energy UK Ltd and this may spur further activity in 2023.

24. What are the biggest challenges businesses face when investigating bribery and corruption issues?

Internal investigations are commenced for a number of reasons. Businesses typically decide to investigate for good governance, to control and monitor risk or where a regulator mandates an investigation into a particular concern raised. Whilst every investigation poses its own challenges, some common issues experienced in the context of a global investigation of bribery and corruption include the following:

- Defining the scope and scale:. A key challenge faced by businesses starting an internal investigation is agreeing the appropriate and proportionate scope. Businesses in crisis can have a tendency to apply a broad scope to the investigation search. Whilst this is sometimes necessary, a broad brush approach has the potential to lead to an unmanageable, expensive and ineffective investigation. Good planning will ensure the investigation is proportionate and effective in identifying the relevant conduct. There are a number of factors to consider at the planning stage. For example, avoidance of tipping off whilst briefing senior decision makers can be a difficult route to navigate. Furthermore, ensuring that the investigation plan is based on fact rather than presumption or opinion is

also key.
- Collecting and controlling information: Document management and preservation in an investigation requires ongoing attention. Handling documents in an investigation requires consideration of a number of issues such as data privacy, security of evidence and the effective use of technology to assist with document review.
- Managing information overload: Businesses undertaking investigations frequently need to make a number of simple and complex decisions which dictate the direction of the investigation. Considering that investigations typically last for months (if not years in certain scenarios) and in many cases require reporting to regulators, businesses are faced with the challenge of recounting how and why the investigation progressed in a particular direction. Decision logs and methodology recording becomes an important aspect of effectively managing vast amounts of information in a bribery investigation. These documents assist with the challenge of managing a proportionate and justified investigation.

25. What do you consider will be the most significant corruption-related challenges posed to businesses in your jurisdiction over the next 18 months?

The impact of Covid-19 continues to be felt across all business sectors and the pandemic has begun to expose a multitude of financial scams, although many of these scams will fall outside of the SFO's remit for investigating serious and complex frauds.

Mergers and acquisitions represent a key risk area. Buyer companies face real challenges in conducting pre-acquisition due diligence on a potential target which is sufficient to uncover corruption issues. Issues may not be discovered until after execution of the deal, at which point the buyer has "bought an investigation". Similar risks exist in joint ventures.

A high proportion of bribery cases involve intermediaries such as consultants and agents. The Rolls-Royce case shows the issues which companies face in monitoring and policing action by intermediaries. Putting effective due diligence measures into place to manage this risk remains a significant challenge for UK businesses.

It is also difficult for businesses to keep pace with regulatory and legal developments. The UK has experienced a proliferation of changes in the last few years, but the challenge is not simply volume of law or the pace of change. Companies face a multitude of different business risks, some of which are still emerging (e.g. risks around technology). They face the challenge of applying evolving laws to the evolving business landscape.

Finally, businesses face the challenge of global investigations and increasing cooperation between jurisdictions – sharing information, and joint prosecutions. There are an increasing number of countries co-operating, beyond the UK and US. These include Canada, Australia, France, China, Brazil and other South American countries. The significant fines imposed under the Airbus DPA and the multijurisdictional settlement achieved in the Amec Foster Wheeler Energy Limited DPA are clear evidence of the power of enforcement when authorities work together.

26. How would you improve the legal framework and process for preventing, investigating and prosecuting cases of bribery and corruption?

The UKBA is considered to provide a stringent framework for combating bribery and corruption. The SFO has also been one of the most active enforcing agencies. However, there are certainly areas for improvement. For example, despite the information provided under the SFO's 2019 Cooperation Guidance, there is still a need for clarity on how an organisation should cooperate. In addition, the issue of legal privilege during investigations remains an area of debate.

There arguably remains a need for businesses and individuals to have improved clarity on what is expected of a corporate compliance programme, and what constitutes good co-operation during an investigation. The Airbus judgment is helpful in this regard as it set out clear examples of actions taken by Airbus which contributed to their effective and well received co-operative manner through the case. But there is still real uncertainty on these issues in the UK (and in most other parts of the world bar the US). For example, what amount of internal investigation should be conducted before a corporate should first disclose potential wrongdoing to the SFO and how should an organisation seek input from the SFO before interviewing witnesses? The guidance suggests that preliminary interviews (e.g. for fact checking) cannot take place before a self-report is made, which presents practical issues for the corporate (and it is of note that this differs from the US position, causing real practical difficulties for multinational businesses).

This lack of certainty is perhaps not surprising given the body of UKBA case law is still in its infancy but could be mitigated by improved dialogue between the SFO and corporates. Many commentators also consider that the SFO's guidance on evaluating corporate compliance programmes was a missed opportunity to provide greater detail about what it expects from corporates.

As regards privilege, there remains a degree of uncertainty over the question of how an organisation should address the issue of privilege in interview notes during an investigation. As shown in the SFO v ENRC case, UK enforcement agencies have developed an aggressive stance towards claims of privilege and are testing the boundaries of the previously accepted law, particularly around claims to litigation privilege. This case highlighted the importance of continuously monitoring whether litigation is 'in reasonable contemplation' and that companies need to pay particular attention to how interviews are conducted during internal investigations.

Whilst it might be expected that greater clarity will develop as case law under the UKBA evolves, such development may not come at the pace hoped for given the increasing number of DPAs, which mean that legal questions such as the interpretation of the UKBA are not considered by the courts. Ultimately, the SFO needs to re-establish itself as a credible prosecutor in order for the majority of these improvements to develop.

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