# CORPORATE CRIME BRIEFING

## **Bribery Act 2010:** still a sleeping giant

Having just celebrated its third birthday, the Bribery Act 2010 (2010 Act) is still a sleeping giant. In 2010 and 2011, there was an alarmist atmosphere concerning its perceived broad jurisdictional scope and the requirement to create and maintain adequate procedures to prevent bribery (*see feature article "Bribery Act 2010: what does it mean for your company?", www.practicallaw.com/8-505-9543*). Companies also feared draconian enforcement, particularly for those used to US enforcement of the US Foreign Corrupt Practices Act of 1977 (FCPA).

These fears have not yet been realised. Headlines suggesting that the 2010 Act was the "FCPA on steroids" in hindsight appear wide of the mark and the required adequate procedures have turned out to be prevailing good international compliance practice. To date, the Serious Fraud Office (SFO) has not brought any corporate prosecutions under the new failure to prevent bribery offence and there has yet to be a significant UK corporate prosecution for bribery of overseas public officials.

Despite what may be viewed as a slow start, we do not believe that the SFO has failed to enforce the 2010 Act rigorously or that UK companies can relax about active anti-corruption enforcement. Indeed, SFO pronouncements and its current casework suggest otherwise, and international historical practice indicates that it takes time to mobilise resources to bring cases under a newly enhanced anti-corruption law. In the US, for example, although the FCPA was enacted in 1977, vigorous enforcement of it did not begin until the early 2000s.

### Post-2010 Act reforms

Since the 2010 Act came into force on 1 July 2011, the UK has made significant changes to the criminal justice system to accommodate the anticipated upswing of serious corporate economic crime cases, such as introducing deferred prosecution agreements (DPAs) and new sentencing guidelines.

DPAs, which have been available since 24 February 2014, provide a new means of resolving corporate investigations (*see feature article "Deferred prosecution agreements: moving into the unknown", www.practicallaw.com/6-525-6101*). Under a DPA, a company that admits certain economic and financial offences will be able to avoid prosecution if it complies with set conditions, including the payment of financial penalties. DPAs are intended to act as an incentive for companies to co-operate with the SFO and achieve a more proportionate sentencing outcome.

Until *R v Innospec Limited*, sentencing principles for corporate corruption were unclear (*[2010] EW Misc 7 (EWCC); see News brief "Self-reporting corporate corruption: where are we after Innospec?", www.practicallaw.com/2-502-1218*). It was almost impossible to predict and advise on a sentencing range for corporate corruption and how UK sentences would be benchmarked against other legal systems. The Crown Court in *Innospec* said that states should adopt a uniform approach to financial penalties for the corruption of foreign government officials so that companies in different states are not subject to widely varying penalties.

In an effort to provide additional uniformity and predictability in relation to corporate fines, new guidelines were published on 31 January 2014 for companies convicted of fraud, bribery or money laundering (*see News brief "Sentencing guidelines for corporates: giving teeth to the DPA?", www.practicallaw.com/4-558-0365*). The guidelines are intended to level the playing field between US

### Enforcement before the Bribery Act 2010

One rationale for the Bribery Act 2010 (2010 Act) was to replace the notoriously difficult Victorian legislation and make it easier for the Serious Fraud Office (SFO) to bring enforcement proceedings. However, despite the challenges of the pre-2010 Act legislation, the SFO has a respectable track record of bringing successful enforcement proceedings. For example:

- In 2009, Mabey & Johnson Ltd was convicted of overseas bribery (*see News brief "Serious Fraud Office: targeting dividends", www.practicallaw.com/3-517-3268*).
- In 2010, Innospec Ltd pleaded guilty to a charge of conspiracy to corrupt (*[2010] EW Misc 7 (EWCC); see News brief "Self-reporting corporate corruption: where are we after Innospec?", www.practicallaw.com/2-502-1218*).
- In 2011, BAE Systems plc pleaded guilty to accounting irregularities following its investigation by the SFO for bribery allegations (*www.practicallaw.com/2-504-8661*).
- In 2011, the SFO obtained a civil recovery order against Macmillan Publishers Limited after it self-reported attempts by its agent to bribe World Bank employees to win book sales in southern Sudan.
- In 2012, the SFO obtained a civil recovery order against Oxford Publishing Ltd after it self-reported bribery in its East African operations.
- In 2014, the Innospec investigation ended with the company's two former CEOs, its business director and sales director being convicted of, and receiving significant prison sentences for, conspiracy to corrupt under the pre-2010 Act legislation (*R v Turner, Kerrison, Papachristos and Jennings, unreported Southwark Crown Court, 4 August 2014*).
- In 2014, Bruce Hall, the former CEO of Bahraini company, Aluminium Bahrain BSC, was sentenced to 16 months in prison for corruption under the pre-2010 Act legislation (*R v Hall, unreported Southwark Crown Court, 22 July 2014*).

(*See also feature article "Foreign bribery and corruption: sentencing trends", www.practicallaw.com/9-525-7910*).

and UK sentences and provide a framework against which DPAs can be negotiated and benchmarked.

The government has also recently announced that it is considering proposals to create a new corporate offence of failing to prevent economic crime, which would mirror and expand the corporate offence of failing to prevent bribery that was introduced in the 2010 Act (*see News brief "Failure to prevent economic crime: a new corporate offence", www.practicallaw.com/7-581-8568*).

### Pipeline delay

The 2010 Act does not apply to conduct carried out before it came into force (*see box "Enforcement before the Bribery Act 2010"*). Given the normal timeline of enforcement cases, this means that there has not necessarily been a delay by the SFO in bringing 2010 Act cases; rather, it means that investigation of post-2010 Act conduct is underway.

Complex, multi-jurisdictional matters always have a reasonably predictable time lag between detection, investigation and the start of enforcement proceedings. In the 1990s and 2000s, it was common for the SFO to have so-called "blockbuster" cases on its roster, with typically no more than one or two cases under investigation at any given time. Investigations of Guinness plc, the Maxwell brothers, Bank of Credit and Commerce International (BCCI), price-fixing by generic drug manufacturers and BAE Systems plc were all notable of their time; indeed, several of these investigations took several years and spanned the tenure of more than one director of the SFO.

The current director, David Green QC, has stated that the SFO currently has 68 cases in the pipeline, including eight projects concerning the 2010 Act. Currently, there are publicly reported bribery and fraud investigations involving numerous UK and global companies and there are undeclared investigations into other well-known UK companies. It is likely that this crop of cases involves conduct both before and after the 2010 Act came into force, and suggests that a significant number of enforcement actions can be expected.

### Future enforcement strategy

It has not always been easy to perceive a consistent enforcement strategy in the evolution of the SFO's corporate enforcement actions. Several previous corporate corruption investigations have been resolved using non-corruption charges, limitations on conduct included in admissions or public resolutions, and civil forfeiture. In addition, there has been no clear policy on the standard by which follow-on proceedings against individuals would be brought.

On 9 October 2012, the SFO announced revised policies regarding corporate self-reporting, hospitality and facilitation payments (the 9 October announcement) (*see News brief "Self-reporting financial crime: moving the goal posts", www.practicallaw.com/1-522-6197*). The revised policies followed a review that was instigated by Mr Green and, somewhat pointedly, superseded the SFO's previous statements and practices (*see box "Procedural guidance"*). The revised policies and later press statements also shed some light on the future strategy of the SFO.

**SFO as prosecutor.** In the 9 October announcement and in subsequent speeches, Mr Green has emphasised that the SFO is a specialist investigator and prosecutor of the highest level of serious and complex fraud, bribery and corruption (*www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2013/cambridge-symposium-2013.aspx*).

Whereas the number of corruption investigations that were resolved by civil recovery had previously increased, the SFO said in the 9 October announcement that, as a matter of policy, there will be no presumption of civil settlements in any circumstances. Mr Green appears to have put this policy into practice; the only corruption-related civil recovery under his tenure, against Oxford University Press in relation to contracts for the sale of educational books to African governments, was agreed under the previous director (*www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/oxford-publishing-ltd-to-pay-almost-19-million-as-settlement-after-admitting-unlawful-conduct-in-its-east-african-operations.aspx*).

**Principled decisions.** The 9 October announcement reaffirmed principled prosecutorial decision making. When considering an enforcement action, SFO prosecutors will be guided by pre-existing and well-established law and protocol in its decision-making process and the exercise of prosecutorial discretion. The SFO's decision to prosecute a company is governed by the Full Code Test in the Code for Crown Prosecutors (*www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf*), the Joint Prosecution Guidance on Corporate Prosecutions (*www.sfo.gov.uk/media/65217/joint_guidance_on_corporate_prosecutions.pdf*) and, where relevant, the Bribery Act 2010: Joint Prosecution Guidance of the Director of the SFO and the Director of Public Prosecutions (*www.sfo.gov.uk/media/167348/bribery_act_2010_joint_prosecution_guidance_of_the_director_of_the_serious_fraud_office_and_the_director_of_public_prosecutions.pdf*).

**Bold decisions.** Mr Green signaled a more aggressive approach to previous decisions by reopening the Weavering Capital case in 2012. The SFO's 2009 investigation into Weavering related to interest rate swaps that inflated the apparent net asset value of a managed fund. The previous director of the SFO had shelved the two and a half-year investigation, but subsequent civil proceedings found that the interest rate swaps were a sham.

The SFO also took bold decisions in the high-profile bribery trial in December 2013 of businessman Victor Dahdaleh. Although the trial ended in defeat for the SFO, in various pre-trial applications it argued and won many of the contentious legal arguments that were believed to be an impediment to a successful but difficult prosecution.

**Real co-operation.** In a recent speech, Ben Morgan, joint head of bribery and corruption at the SFO, reiterated that the SFO expects real and honest co-operation from companies and not just the impression of co-operation (*www.sfo.gov.uk/about-us/our-views/other-speeches/speeches-2014/ben-morgan-speech-to-uk-aerospace-and-defence-industry-seminar-.aspx*). Similarly, Mr Green advised that maximum co-operation on the part of a company and its lawyers is

## Procedural guidance

One common complaint about the Serious Fraud Office's (SFO) announcement of revised policies on 9 October 2012 has been the withdrawal of procedural guidance for companies that wish to self-report corruption to the SFO. While the SFO could do more to regularise self-reporting and set out some baseline positions, the deferred prosecution agreements (DPA) code of practice, published in February 2014, provides some useful guidance on prosecutorial and judicial expectations (*www.sfo.gov.uk/media/264623/deferred%20prosecution%20agreements%20cop.pdf*). It highlights that the SFO expects a timely self-report, will consider the quality of self-reporting and later co-operation, and will want to know about any corporate and individual remediation carried out before the reporting. Companies that can demonstrate having taken these steps will be at an advantage when seeking a DPA.

In addition, even though it was conducted under pre-Bribery Act 2010 (2010 Act) legislation, the Innospec Ltd investigation may shed some light on the SFO's future approach to corporate corruption enforcement proceedings under the 2010 Act. In particular, the case included a company-led investigation tested by the investigating regulators, employee remediation, the imposition of a monitor to evaluate future compliance and the company's co-operation with the subsequent investigation of executives.

an intrinsic part of the DPA process (*www.sfo.gov.uk/about-us/our-views/other-speeches/speeches-2013.aspx*).

In March 2014, Alun Milford, the SFO's general counsel, outlined the SFO's expectations of a company's co-operation when seeking a DPA (*www.sfo.gov.uk/about-us/our-views/other-speeches/speeches-2014/corporate-criminal-liability-and-deferred-prosecution-agreements--.aspx*). In addition to noting that companies would be wise to self-report to the SFO and to co-operate with any SFO investigation, he stated that the SFO expects:

- Early self-reporting and for companies to negotiate with the SFO the terms of a company or lawyer-led investigation.
- Prompt, covert data collection with a disclosed and evidenced methodology agreed with the SFO.
- Waiver of privileged memoranda of witness interviews and other documents.

The current emphasis on co-operation, which may in part stem from a frustration with historic UK defence tactics, risks being taken to the extreme. In particular, the scope of co-operation is not clearly defined, and currently appears to include providing information that would otherwise be subject to legal professional privilege. Notably, this is a road that has been traveled by US regulators, and has resulted in internal US agency guidance stating that waiver of legal privilege is not required to receive full credit for co-operation in an agency investigation.

**UK jurisdiction.** The SFO has always prosecuted individuals regardless of their nationality for crime that was carried out from the UK. However, in the past, the SFO has declined to prosecute foreign and UK nationals where another regulator expressed an interest in the matter. For example, in 2006, the "NatWest Three", UK nationals who were alleged to have participated in a fraudulent scheme with Enron, were extradited to face trial in the US and, in 2011, UK national Jeffrey Tesler, who was accused of being an intermediary to make bribery payments, was also extradited to the US (*www.practicallaw.com/9-202-0412*).

In contrast, the prosecution in 2012 of Paul Jennings of Innospec Ltd (a US/UK national) and the assertion of jurisdiction in 2013 over UK banker Tom Haynes in the London Interbank Offered Rate (LIBOR) cases, who was the target of the parallel US Department of Justice (DoJ) LIBOR investigations, illustrate that the SFO is taking a more assertive role where UK jurisdiction is evident.

**Sectoral sweeps.** In a shift away from a reactive approach, the SFO has indicated that it intends to conduct industry-wide probes and proactive sectoral sweeps. Mr Green has said that he would use intelligence-led policing powers to target the sectors that are most vulnerable to economic crime, such as public contracts and construction, and oil and gas. Mr Green has also indicated that the SFO has enhanced its intelligence capability to enable sectoral analysis, in addition to establishing links with UK intelligence agencies and the National Crime Agency to investigate crime as it is happening (*www.sfo.gov.uk/about-us/our-views/director%27s-speeches/speeches-2014/cambridge-symposium-2014.aspx*).

### Global approach

As well as improving its enforcement framework, over the past decade the SFO has been developing into a global regulator that collaborates with counterparts worldwide in its investigations. The SFO was originally created in the 1980s to handle cases too big for individual UK police forces, but quickly started working with other regulators on global enforcement actions. In the mid-2000s, it started forming close relationships with DoJ counterparts during corruption investigations such as BAE Systems plc, Innospec Ltd and Johnson & Johnson/DePuy.

Fraud cases involving alleged manipulation of LIBOR and the foreign exchange (Forex) market have also demonstrated that multi-jurisdictional and multi-regulator cases are likely to be a mainstay of enforcement proceedings in years to come. The LIBOR investigations alone have included cross-border co-operation between authorities in the UK, US, Switzerland, Australia, Singapore, Canada, Hong Kong, Korea and Japan. Most recently, investigations in the pharmaceutical sector have also seen the SFO working with the Chinese authorities, the first notable instance of Anglo-Chinese co-operation (*www.reuters.com/article/2014/07/23/us-britain-fraud-sfo-gsk-idUSKBN0FS1U320140723*).

*Gary DiBianco is a partner, Matthew Cowie is counsel, and Caroline Wojtylak is an associate, at Skadden, Arps, Slate, Meagher & Flom (UK) LLP.*