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Quickguides

Bribery and Corruption: UK Guide

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This guide provides an overview of the steps taken in the UK to tackle bribery and corruption, focusing on the UK Bribery Act 2010.

Topics covered include:

- International enforcement
- The offences under the Bribery Act
- The impact of the Act on overseas organisations
- Corporate liability for actions of third parties
- Particular concerns: corporate hospitality, facilitation payments and "offset" arrangements
- Enforcement and the encouragement to self-report
- Practical steps – putting in place adequate procedures

The Appendix provides details of the DPAs that have been approved.

Bribery and Corruption: UK Guide

The UK Bribery Act 2010, which came into force on 1 July 2011, affects corporate entities based in both the UK and overseas. This Quickguide provides detail on the Bribery Act and what it means for business, and suggests practical ways of ensuring that companies and individuals do not unwittingly fall foul of the new legislation.

International enforcement

In order to look at the steps taken in the UK to tackle bribery and corruption, it is helpful to put them in context.

The prosecution of bribery offences and enforcement of bribery legislation is a major international issue. All 36 Organisation for Economic Co-operation and Development (OECD) member states and 8 non-OECD countries have adopted the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[1] It is aimed at reducing corruption in developing countries by encouraging sanctions against bribery in international business transactions carried out by companies based in the Convention member countries. In order to monitor compliance with the OECD Convention, and assess the effectiveness of national law in fulfilling a Convention member's obligations under it, the OECD established a Working Group on Bribery in International Business Transactions (WGB).

The UN Convention against Corruption (UNCAC) was adopted by the General Assembly of the UN in 2003 as part of its global programme against corruption. As of June 2018, it has been ratified by 186 countries. Its aim is to prevent and combat corruption efficiently and effectively and to encourage and enhance international co-operation.

At the European level, steps taken to combat corruption and bribery include those of the Council of Europe, and include the Criminal and Civil Law Conventions on Corruption, which entered into force in 2003. The Criminal Convention requires signatory states to enact legislation extending criminal liability for bribery to the private sector. The Group of States Against Corruption (GRECO) has the role of monitoring implementation of the Conventions.

There are also a number of high-profile organisations which monitor countries and hold to account those which are prone to bribery. The Global Infrastructure Anti-Corruption Centre (GIACC) is an international organisation which provides anti-corruption resources and services specifically aimed at the infrastructure, construction and engineering sectors. It offers anti-corruption programmes and tools concerning a number of areas including training, procurement, and gifts and hospitality. GIACC also provides services such as anti-corruption training and compliance monitoring. Transparency International (TI) is also a leading international organisation with the primary aim of monitoring countries and providing information and resources to aid the reduction of global bribery and corruption. TI engages with local governments and businesses in over 90 countries worldwide.

The UK anti-bribery regime

Prior to the new bribery regime, UK law on bribery was viewed as "*…both out-dated and in some instances unfit for purpose*".[2] It was difficult to follow and prosecute in practice.[3] WGB prepared several reports heavily criticising the UK for its failure to address deficiencies in its law on bribery, particularly

[1] The UK has been a signatory to the OECD Convention (which entered into force on 15 February 1999) since December 1997 and the UN Convention Against Corruption since 9 February 2006.

[2] Law Commission's Consultation Report "Reforming Bribery", p. xiii, paragraph 1, dated 20 November 2008.

[3] Prior to the Act, the law on bribery consisted of the common law offence of bribery and certain statutory offences, principally set out in three anti-corruption statutes, namely the Public Bodies Corrupt Practices Act 1889 (general bribery offences where a person acts corruptly) and the Prevention of Corruption Acts 1906 and 1916 (bribery offences in relation to agents including employees and commercial agents). The Anti-terrorism, Crime and Security Act 2001 extended the law on bribery to cover offences in relation to foreign public officials or office holders and gave the courts jurisdiction over bribery offences carried on wholly outside the UK by UK nationals and/or bodies incorporated under UK law.

in relation to the bribery of foreign public officials by UK nationals and foreign subsidiaries of UK companies.[4]

Consequently, the UK legislation on bribery underwent a major overhaul. The result is the UK Bribery Act 2010 (the Act). The principal aims of the Act are to:

- modernise and simplify existing legislation to allow for more effective prosecution of bribery and related offences committed in the UK or abroad, in order to comply with the UK's international obligations; and
- encourage commercial organisations to actively take steps to eradicate bribery.

The Act is accompanied by Government guidance on the steps companies need to put in place to prevent bribery (the Guidance).[5] Prosecution guidance has also been published which provides guidance on the approach prosecutors will take when deciding whether to prosecute offences under the Act (the Prosecution Guidance).[6]

In 2018, a House of Lords Select Committee (the Select Committee) was appointed to review the Act and whether it is having the effect it was designed to achieve. In March 2019 the Select Committee published its findings, and concluded that the Act "*is an excellent piece of legislation*" and "*an example to other countries, especially developing countries, of what is needed to deter bribery*."[7] No further changes were recommended to the Act, although recommendations were made with regard to the Guidance (referred to below).

The Act has a direct impact on the way in which companies, particularly those with overseas operations, carry out their business activities. The Act's key provisions are as follows:

- the establishment of two general bribery offences: one concerned with giving bribes and the other concerned with taking them;
- the creation of a separate offence of bribery of a foreign public official;
- the introduction of a new corporate offence of "failure to prevent bribery"; and
- maximum penalty for individuals found guilty of bribery offences of ten years' imprisonment, or an unlimited fine, or both. Companies may also be subject to an unlimited fine.

The offences under the Act

What is a bribe?

The Act refers to "a financial or other advantage". This is deliberately broad and goes beyond the payment of money and the handing over of "brown envelopes". It may cover a wide range of things, including:

- gifts and corporate hospitality;
- promotional expenses, travel expenses and accommodation costs;
- employing public officials or their relatives;
- vouchers or other cash equivalent;
- provision of services such as use of a car or provision of a decorator;

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4 OECD WGB, United Kingdom: Phase 2, Report on the application of the Convention on combating bribery of foreign public officials in international business transactions and the 1997 recommendations on combating bribery in international business transactions, Executive summary, available at http://www.oecd.org/dataoecd/62/32/34599062.pdf.

5 Available on the Ministry of Justice website: http://www.justice.gov.uk/guidance/bribery.htm.

6 Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions, published on 30 March 2011. See: https://www.cps.gov.uk/legal-guidance/bribery-act-2010-joint-prosecution-guidance-director-serious-fraud-office-and.

7 The report is available on the parliamentary website: https://publications.parliament.uk/pa/ld201719/ldselect/ldbribact/303/303.pdf.

- awarding a contract to a company connected to a public official;
- awarding a contract to a particular company; or
- making political or charitable donations.

Unlike other bribery laws, the Act applies equally to bribes paid to public officials and those paid in the private sector, business to business.

The general bribery offences and bribery of a foreign public official

General bribery offences

The Act consolidates the previous common law and statutory offences of bribery and replaces these with two simple general bribery offences concerned with giving bribes (active bribery) and receiving bribes (passive bribery).

Giving bribes (section 1): a person (an individual or body corporate) is guilty of the active offence if he/she/it:

- offers, promises or gives a financial or other advantage to another person (directly or indirectly) and intends the advantage to induce a person to perform a function or activity[8] improperly or to reward a person for the improper performance of such a function or activity; or
- offers, promises or gives a financial or other advantage to another person and knows or believes that the acceptance of the advantage would itself constitute the improper performance of a function or activity.

Receiving bribes (section 2): a person (an individual or body corporate) is guilty of the passive offence if he/she/it commits any of the following (directly or indirectly):

- firstly, where the recipient requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a function or activity should be performed improperly;
- secondly, where the recipient requests, agrees to receive or accepts a financial or other advantage and such request, agreement or acceptance itself constitutes the improper performance of a function or activity;
- thirdly, where a recipient requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance of a function or activity; or
- fourthly, where, in anticipation of or in consequence of a recipient or potential recipient requesting, agreeing to receive or accepting a financial or other advantage, a function or activity is performed improperly.

Points to note

- For a person to commit the active bribery offence, there has to be intention, knowledge or belief on the part of that person in addition to the giving of the bribe.
- Both the active and passive offences incorporate the notion of "improper performance", or "wrongfulness element" as it is described in the Prosecution Guidance. The key to whether an offence has been committed is the connection between the bribe and this "wrongfulness element"; without the connection, no offence is committed.
- What is "improper" is assessed by reference to whether a reasonable person (in the United Kingdom) would consider the recipient of the bribe to have breached an expectation of "good faith", "impartiality" or "trust".
- These general offences apply to activities of a private or public nature and apply equally to individuals and corporate entities.

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[8] What constitutes a function or activity is dealt with in section 3 of the Act.

Bribing a Foreign Public Official (FPO)[9]

Section 6 of the Act sets out the offence of bribing an FPO, which involves a person either directly or indirectly offering, promising or giving an advantage to an FPO, or to another person at the FPO's request or with his assent or acquiescence, in circumstances where the person intends to influence the official in his/her capacity as an FPO, and where the person intends to obtain or retain business or a business advantage.

This offence can be committed by individuals or corporate entities and also requires a subjective element, i.e. the intention of the person bribing the FPO to influence that person and obtain a business advantage. There is no requirement to show impropriety for the offence to be committed. However, no offence is committed if the advantage to the FPO is permitted or required by the written law applicable to the FPO, which will be:

- if the performance of the FPO's functions would be subject to the law of any part of the UK, the law of that part of the UK; or
- if the FPO is an official or agent of a public international organisation, the written rules of that organisation; or
- the written law of the country or territory in which the official conducts his duties – but not what is permitted purely by reference to unwritten local customs or practices.

Bribery committed in the UK

If any of the offences of active or passive bribery, or bribery of an FPO, take place in the UK, any individual or body corporate can be prosecuted irrespective of whether they have any connection with the UK.

Bribery committed overseas

The offences of active or passive bribery, or bribery of an FPO, also apply to acts of bribery committed outside the UK, as long as:

- the act or omission in question would have amounted to an offence if it had occurred within the UK; and
- the person whose acts or omissions form part of an offence has a close connection with the UK (for example: British citizens; British nationals (overseas); individuals ordinarily resident in the UK; and British overseas citizens or bodies incorporated under the law of any part of the UK).[10]

However, the real extra-jurisdictional reach of the Act lies in the section 7 corporate offence of failure of a commercial organisation to prevent bribery (see below).

Corporate liability

For a corporate to be convicted of one of the above offences the prosecution will need to prove that a very senior person in the organisation, e.g. the CEO or Managing Director, committed the offence as that person's activities would then be attributed to the organisation (known as the "directing mind" test). Historically, this test has caused prosecutors difficulty so it is more likely that a corporate will be prosecuted under the new section 7 offence which is far wider in scope (see below).

Directors' liability

If a body corporate commits one of the above offences, a senior officer or person purporting to act in that capacity may also be held individually liable if he/she consented to or connived in the commission of the offence.[11] This follows the Law Commission's recommendation that individual criminal liability of

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[9] The definition of an FPO is drafted broadly. It includes individuals holding legislative, administrative and judicial functions for a foreign country and also includes individuals exercising a public function for a foreign country. Examples include state employees, employees of a state entity (if carrying out functions of a public nature) and government officials.

[10] Section 12.

[11] Section 14.

senior officers should mirror that of section 12 of the Fraud Act 2006, which deals with the liability of company officers for offences by bodies corporate. To "connive" in the commission of an offence is to know it may occur but to do nothing to prevent its commission, without providing actual assistance or encouragement. Connivance may occur through reckless conduct (knowing that there is a risk of offending but doing nothing) whereas, broadly speaking, complicity requires intention or knowledge as to the offending behaviour.

The corporate offence: failure of a commercial organisation to prevent bribery

Section 7 of the Act introduces a new offence of failure on the part of a commercial organisation to prevent bribery being committed in connection with its business. A commercial organisation (C) may face prosecution where:

- a person associated with C bribes another person; and
- the bribe was made with the intention of obtaining or retaining business, or an advantage in the conduct of business, for C.

C will only be liable if an offence of active bribery or bribery of an FPO is committed. Knowledge on the part of the organisation is not a requirement. However, an organisation will have a complete defence if it can show that "adequate" procedures designed to prevent bribery were in place. What is "adequate" is not defined in the Act but is covered by the Guidance and has now been tested before a jury (*R v Skansen Interiors Limited*). See the section "Practical steps – putting in place adequate procedures" below where we discuss both the Guidance and the case in more detail.

In its Report, the Select Committee considered the corporate offence to be "*particularly effective, enabling those in a position to influence a company's manner of conducting business to ensure that it is ethical, and to take steps to remedy matters where it is not.*" As such, no amends to the legislation were recommended. However, the Select Committee did consider that further clarification is required in the Guidance as to what constitutes "adequate procedures". This is discussed below.

Section 7 is potentially far-reaching. It covers bribery in both the UK and abroad and applies to both UK and overseas businesses. It is this wide jurisdictional reach which has caused most concern. In particular:

- what level of connection with the UK is required for an overseas organisation to fall within the definition of a commercial organisation; and
- how broad is the definition of "associated person" and the range of third parties this could apply to?

Both of these issues have been tackled in the Guidance and we look at them in more detail below.

Prosecution and penalties

The Act does not have retrospective effect. Therefore, any bribery offences committed before 1 July 2011 and any pending investigations, legal proceedings and enforcement actions, continue to be governed by the pre-Act regime.

Under section 11 of the Act, an individual guilty of an offence under section 1, 2 or 6 (giving or receiving a bribe or bribing an FPO) is liable to a maximum ten-year imprisonment or a fine, or both. Any other person (such as a body corporate) guilty of an offence under section 1, 2 or 6 is liable to a fine. An organisation guilty of an offence under section 7 (failure of commercial organisations to prevent bribery) is liable to a fine.

Conviction of an offence under the Act could also lead to mandatory debarment under the EU Directive 2014/24 on public procurement, preventing the organisation in question from continuing to tender for public sector work. However, an organisation convicted under the section 7 corporate offence will not

automatically be barred from participating in tenders for public contracts. However, public authorities may still have the discretion to exclude organisations convicted of the section 7 offence.[12]

Prosecution of offences under the Act requires the consent of one of the three following prosecuting bodies: the Director of Public Prosecutions, the Director of the Serious Fraud Office or the Director of Revenue and Customs Prosecutions. Decisions to prosecute must be taken in line with the Prosecution Guidance under the terms of which any prosecution has to be in the general public interest.[13]

What is a "commercial organisation"? The impact of the Act on overseas companies

Organisations at risk of committing the corporate offence of failure to prevent bribery include not only those which have been incorporated in the UK, but also non-UK companies which carry on a business, or part of a business, in any part of the UK. Potentially, this is very broad and extends the jurisdictional reach of the Act to overseas companies.[14]

What is meant by "carries on a business or part of a business in the UK" is not defined within the Act. This lack of clarity caused concern leading to further clarification in the Guidance. Ultimately, and as noted in the Guidance, the courts will decide whether a commercial organisation carries on business in the UK. However, the UK Government expects a "common sense" approach to be applied so that companies that do not have a "demonstrable business presence in the United Kingdom" are not caught. Applying that test, the Government would not expect the mere fact that a company's securities are traded on the London Stock Exchange to qualify that company as carrying on a business or part of a business in the UK. Likewise, having a UK subsidiary will not, in itself, mean that a parent company is carrying on a business in the UK, since a subsidiary may act independently of its parent or other group companies.[15]

In most cases it will be clear whether an overseas company is carrying on business or part of a business in the UK. Where there is room for debate, further scrutiny will be required. The prosecutors have indicated that they will take a broad view as to what constitutes a commercial organisation.

Corporate liability for actions of third parties – when will they be "associated persons"?

The corporate offence was drafted broadly so as to cover the whole range of individuals and corporate entities connected to an organisation that might be capable of committing bribery on the organisation's behalf. It covers anyone who performs services for or on behalf of the organisation, including employees, subsidiaries, sub-contractors, suppliers, agents and joint ventures.[16]

The broad scope of "associated persons" understandably caused concern. Questions asked by the business community included what level of investment was required for an organisation to have a sufficient connection and how far down the supply chain the relationship extended.

The Guidance has attempted to address these concerns and deals with the specific issues raised with regard to:

- contractors and supply chains;
- joint ventures; and

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12 A conviction for a direct bribery offence under section 1, 2 or 6 will, pursuant to the Public Contracts Regulations 2015 (which give effect to the EU Directive), trigger mandatory debarment from all EU public sector contracts for a period of up to five years. The section 7 offence is not specifically referred to, but a public authority could still exclude an organisation if it can demonstrate that the organisation is "guilty of grave professional misconduct, which renders its integrity questionable" (regulation 57(8)). It is unclear exactly what sort of misconduct is covered and whether it includes a section 7 offence, but it remains a possibility.

13 Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions, published on 30 March 2011.

14 Overseas companies will also be caught by the Act if the company has committed a section 1, 2 or 6 offence in the UK.

15 See paragraphs 34-36 of the Guidance.

16 Section 8.

- subsidiaries.[17]

Contractors and supply chains

Contractors and suppliers will be "associated persons" to the extent that they are performing services for or on behalf of a commercial organisation (C). However, it is unlikely that sub-contractors hired by a contractor will be performing services for or on behalf of C. C will only exercise control over its relationship with its contractual counterparty – the contractor or supplier. The next person in the chain will be performing services for the contractor and not for the other persons in the contractual chain. Best practice in these circumstances is for C to require its contractual counterparty to put in place anti-bribery provisions mirroring those in the counterparty's contract with C. The Guidance also clarifies that suppliers of goods are unlikely to perform services on behalf of an organisation.

Joint ventures

The Guidance attempts to provide clarification on joint ventures and the extent to which these vehicles are deemed to be "associated persons". In doing so, it makes a distinction between separate legal entity joint ventures and contractual joint ventures.

Separate legal entity joint ventures

As regards joint ventures operating through separate legal entities, there was concern over what level of investment is required to make the investor company associated with the joint venture. For example, where several investors provide the financing to set up Company A, is every investor potentially liable if a bribery offence is committed by A's employee? Although every case is fact-specific, the Guidance clarifies that the existence of a joint venture entity will not of itself mean that it is "associated" with any of its members. Liability will not be triggered simply by virtue of the members benefiting indirectly from the bribe through their investment in or ownership of the joint venture. A member will only be liable if the joint venture is performing services for the member and the bribe is paid with the intention of benefiting that member.

Contractual joint ventures

With contractual joint ventures the bar is set higher and liability is more likely to arise where a bribe is paid in connection with the joint venture business. The Guidance states that this will turn on the degree of control of the organisation over the joint venture arrangement – a question of fact to be decided by the courts on a case-by-case basis. Prosecutors are likely to be more sympathetic with regard to pre-Act contractual relationships. However, for joint venture arrangements entered into after the Act came into force, it will be difficult for commercial organisations to show that they did not exercise the relevant level of control. They will then need to fall back on whether or not they had in place adequate procedures in order to prevent bribery from occurring.

Subsidiaries and group companies

For subsidiaries, as with joint ventures, the Guidance emphasises that there has to be an intention to benefit the parent for section 7 to apply. Indirect benefit via ownership or otherwise is not sufficient to establish the proof of the specific intention required. As such, bribes paid by independent subsidiaries, or joint ventures, acting on their own account and for their own benefit, should not engage liability on the part of the parent or joint venture members.

Section 7 liability is not limited to the parent company. As illustrated by the Serious Fraud Office's (SFO) first deferred prosecution agreement (see below), it can also extend to other companies within the corporate group. That case concerned two sister companies (Tanzanian and UK) acting together on a joint mandate. The bribery was committed by senior employees of the Tanzanian company, and both the Tanzanian company and the employees were regarded as having committed the underlying bribery offence. However, given that both sister companies stood to benefit from the transaction (with the fee split 50/50), and were acting jointly (with different but complementary roles), the employees and the

[17] See paragraphs 37-43 of the Guidance.

Tanzanian company were regarded as associated persons of the UK company and their act of bribery was regarded as benefiting both companies.

Particular concerns: corporate hospitality, facilitation payments and "offset" arrangements

Corporate hospitality

The Act was criticised for being unclear in relation to the issue of corporate hospitality. However, as the Guidance makes clear, "*the Act does not aim to stop corporate hospitality per se, but simply to prevent bribery under the façade of corporate hospitality*".[18]

The SFO has adopted a similar stance. It recognises that bona fide hospitality or promotional or other legitimate business expenditure is an established and important part of doing business. However, it will prosecute offenders who disguise bribes as business expenditure, but only if the case is a serious or complex one that falls within the SFO's remit. As former Director of the SFO David Green QC has been quoted as saying:

"*The sort of bribery we would be investigating would not be tickets to Wimbledon or bottles of champagne. We are not the 'serious champagne office'*".

Whether a particular item of expenditure constitutes a bribe will always depend on the surrounding circumstances. However, given the recognition that reasonable and proportionate hospitality which seeks to improve a company's image is an established and important part of doing business, hospitality that falls within the standards or norms for the particular sector is in itself unlikely to trigger the bribery offence.

The Guidance also clarifies that, for corporate hospitality to be an offence, there has to be a direct link between the corporate hospitality and an intention for that hospitality to induce improper conduct. The more lavish the hospitality or expenditure, the greater the inference that it is intended to encourage or reward improper performance. Another factor will be whether or not the hospitality or expenditure is clearly connected with the legitimate business activity or whether it was concealed. However, it confirms that payments for flights and hotel accommodation for legitimate business reasons, and invitations to foreign officials or clients to attend sports events designed to cement good relations, are unlikely to raise the necessary inference of an intention to induce improper performance.[19]

That said, the Select Committee did consider that there remains uncertainty surrounding what will be regarded as legitimate corporate hospitality. The evidence suggested that corporates were being too cautious. As such, the Select Committee recommended that the Guidance clarify the boundary between bribery and legitimate corporate hospitality and add clearer examples of what might constitute acceptable corporate hospitality.[20] The Select Committee also offered this advice: "*It may help if businesses look at the situation from the point of view of the recipient of hospitality: would the guests expect to be treated in this way whatever decision they might reach on the business in question, or would they believe that the level of hospitality offered was an attempt to influence them improperly into taking a decision which they might not otherwise have taken? Businesses might also consider what a reasonable member of the public, properly informed, might think of the hospitality they are proposing to offer*."[21]

To best protect against the risk of prosecution, organisations should ensure that their policies address the issue of hospitality and promotional expenditure and that they put in place procedures to allow clear reporting and recording.

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18 As per the Select Committee in their Report on the Act, paragraph 117.

19 The 2012 conviction of certain individuals in connection with the bribery of a supermarket potato buyer provides a good example of lavish entertainment. There, the corporate hospitality included thousands of pounds spent on expensive restaurants and hotels including Claridge's and The Dorchester.

20 In its response published in May 2019, the government considered that it was not best placed to provide the more detailed clarification suggested and referred to other sources of guidance on adequate procedures and corporate hospitality, such as that published by Transparency International.

21 Paragraph 130 of the Report.

Facilitation payments

Facilitation or "grease" payments are bribes paid to secure routine, non-discretionary acts from public officials. While the US 1977 Foreign Corrupt Practices Act (FCPA) contains an express carve-out of such "routine government action",[22] the decision was taken by the UK Government not to follow suit in providing such exceptions. As a result, facilitation payments are not distinguished from any other offences under the Act, and are therefore criminalised.[23]

However, both the Guidance and the Prosecution Guidance indicate that the UK Government recognises the problems businesses face with regard to the demands for facilitation payments overseas. Businesses are encouraged to take action to ensure the locals are aware that these payments are unacceptable, ensuring agents and employees are given guidance on how to deal with requests for such payments and, if appropriate, using diplomatic channels to try and change local practice. In its Report, the Select Committee recommended that the Government provide more support to companies and ensure that embassies have at least one official who is properly trained and instructed in the local customs and cultures, or who can rapidly contact officials of foreign government departments on behalf of companies facing problems in this field.[24]

The Guidance also confirms that prosecutors will consider very carefully what is in the public interest before deciding whether to prosecute.[25] On that basis, prosecutors are expected to prosecute only significantly serious offences.[26] Although one-off payments are unlikely to result in prosecution (especially if these are fully recorded in the company books), the SFO's concerns will be raised if these one-off payments become regular features of the business; if repeated, even payments of small amounts could indicate a course of conduct that may lead to prosecution.

"Offset" arrangements

Foreign companies, when investing in or bidding for work overseas, are often asked to provide additional investment in the form of community investment, e.g. building a hospital or donating to a certain charity. The Guidance confirms that this is unlikely to give rise to any difficulties under section 6 (bribing a foreign public official) where such arrangements are allowed by local law or are a legitimate part of a tender exercise.[27] Precautions an organisation could take in such circumstances include making enquiries to ensure that the funds or aid reaches its proper target and making sure that all payments are documented.

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[22] The FCPA lists the following examples, among others: obtaining permits, licences or other official documents, processing governmental papers, such as visas and work orders. It does not include any decision by a foreign official to award new business or continue business with a particular party.

[23] The Select Committee agreed that they should remain criminalised: "*any attempt to relax or amend the UK's approach to facilitation would be a backward step*" (paragraph 145 of the Report).

[24] Paragraph 152 of the Report.

[25] See paragraphs 46-48 of the Guidance.

[26] Whether or not the SFO prosecutes in relation to facilitation payments will always depend on whether it is a serious or complex case which falls within the SFO's remit.

[27] Paragraph 25 of the Guidance.

Enforcement and the encouragement to self-report

UK enforcement

In recent years one of the main criticisms directed at the UK has been its lack of enforcement. A case in point was the decision by the SFO in 2006 to abandon the corruption investigation into the BAE Systems arms deal, due to Saudi Arabia's threat to suspend diplomatic and intelligence co-operation with the UK.

However, the tide has turned. The SFO has repeatedly emphasised its role as prosecutor and investigator, and recent years have seen several high-profile investigations and prosecutions by both the SFO and the FCA, involving companies such as ENRC Ltd, Airbus Group, British American Tobacco, KBR Inc and Rolls-Royce. That said, the investigation process has been slow; witnesses before the Select Committee reported that investigations take 4 to 6 years to complete. Improving efficiency and speed of investigations had already been identified as a priority by Lisa Osofsky as the new Director of the SFO. The Report, together with the new funding model introduced in 2018,[28] should help achieve this goal.

Civil avenues are also available. Since April 2008 the SFO has had powers to recover property regarded as being the proceeds of crime pursuant to Part V of the Proceeds of Crime Act. This proved popular under the leadership of former SFO Director Richard Alderman. However, their use attracted judicial criticism and the approach changed once David Green became Director of the SFO in 2012. As such, they have not been used since July 2012, when Oxford Publishing Limited was ordered to pay almost £1.9 million in recognition of sums it received which were generated through unlawful conduct relating to subsidiaries incorporated in Tanzania and Kenya.

This approach is unlikely to change under the leadership of Lisa Osofsky, who became Director of the SFO in August 2018. Civil recovery powers will only be deployed after investigations have taken place and the SFO is unable to meet the prescribed tests of the Code for Crown Prosecutors.[29] Consequently, they will be rarely used, particularly given the other enforcement tools now available to the SFO, most notably the ability to offer deferred prosecution agreements.

Other civil law enforcement tools that became available to the SFO in 2018 include Unexplained Wealth Orders (UWOs) and supporting Interim Freezing Orders. Introduced by the Criminal Finances Act 2017, their purpose is to help authorities more easily investigate and act on highly suspicious wealth, especially in circumstances where there is increasing evidence that the UK has become a safe haven for corrupt assets. As such, their use is limited to recovering the proceeds of any corrupt activity where that is not possible through prosecution.

Self-reporting and "genuine co-operation"

When he became Director of the SFO in 2012, David Green was keen to reinforce the SFO's primary role as an investigator and prosecutor. That approach looks set to continue under the SFO's current Director, Lisa Osofsky. As such, a company's decision to self-report will be seen as one of a number of factors to be taken into consideration by the SFO in deciding whether to prosecute.[30]

The deferred prosecution agreements agreed to date (see the Appendix) suggest that, while the SFO is keen to incentivise self-reporting, a corporate that self-reports will only be rewarded if it genuinely co-operates with the SFO. Compare the fates of Standard Bank and Sweett Group PLC. Both were charged with the section 7 offence for failing to prevent bribery, and both self-reported. However, Standard Bank was able to secure a DPA due to the level of co-operation provided to the SFO, whereas Sweett

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[28] Previously the SFO had to rely on "blockbuster" funding to help fund particular investigations. 2018 saw a departure from this policy with an introduction of a new funding model. Consequently, the SFO's core funding increased from £32.9 million to £52.7 million for 2018/2019.

[29] This is in line with the guidance issued by the Attorney General: Asset recovery powers for prosecutors: guidance and background note 2009 (published 29 November 2012).

[30] The Guidance on Corporate Prosecutions sets out the extent to which self-reporting by a corporate body is relevant to the decision to prosecute. This guidance explains that for a self-report to be part of a public interest factor tending against prosecution, it must form part of the "genuinely proactive approach" of the corporate management team.

Group was successfully prosecuted as, according to company reports, the level of co-operation was found wanting by the SFO.

The potential benefits of self-reporting include the prospect of a largely civil outcome rather than criminal prosecution, the opportunity for the company to be seen to be managing its problems and, where a negotiated settlement is achieved, the avoidance of the mandatory debarment provisions under the Public Contract Regulations 2015, allowing the organisation in question to continue to tender for public sector work. If a DPA is secured, a company can also minimise reputational damage if it is able to keep any investigation confidential until the DPA is announced (as was the case for Standard Bank). And, given the increased intelligence-sharing between UK enforcement agencies and overseas agencies, the increased risk of being caught provides further incentive.

The main drawbacks include the fact that self-reporting exposes the corrupt activities of the company which may face reputational damage as a result. The company will also be required to co-operate fully and give full disclosure if it wants to secure a DPA. The high bar set is made clear by the formal guidance published by the SFO: "*Co-operation means providing assistance to the SFO that goes above and beyond what the law requires*".[31] Corporates are expected to be open and frank about their wrongdoing and provide unrestricted access to documents, witnesses and witness interview records and statements. Claims to privilege are likely to be challenged unless properly established. This level of co-operation can be costly: Rolls-Royce spent £123 million on its internal investigation and dealings with the SFO. And there is no guarantee that it will secure a DPA. As the guidance makes clear, even "*full, robust co-operation*" does not guarantee any particular outcome. Each case will turn on its own facts.

A corporate's systems and controls will also be scrutinised and there is the cost of compliance which will be expected of a corporate as part of the DPA. Rolls-Royce, which had already spent £15 million on overhauling its compliance systems, agreed to continue with improvements under its DPA.

A deal with the SFO will also not guarantee against enforcement action overseas, although the increase in international co-operation between enforcement agencies should help militate against the likelihood of this. However, where a company refuses to self-report the SFO may regard such non-co-operation as a negative factor, which could increase the prospects of a criminal investigation followed by prosecution and a confiscation order. There will also be significant disruption to a company's activities pending any investigation.

Deferred prosecution agreements (DPAs)

The success of a self-reporting regime is heavily dependent on the SFO's ability to enter into plea agreements with those that come forward. The ability of the SFO to enter into these US-style arrangements was thrown into question after Lord Justice Thomas's judgment in March 2010 on the plea agreement made between the SFO and Innospec.

A US-style plea bargaining regime has since been formally introduced in the UK. DPAs were introduced under the Crime and Courts Act 2013 and became available to the SFO in February 2014. A DPA is an agreement reached between a designated prosecutor and an organisation facing prosecution for certain economic or financial offences. The effect of a DPA is that proceedings are instituted, but then deferred on terms (such as the payment of a financial penalty, compensation, and implementation of a compliance programme). If, within the specified time, the terms of the agreement are met, proceedings are discontinued; a breach of the terms of the agreement can lead to the suspension being lifted and the prosecution pursued.

A key feature that distinguishes DPAs from US plea bargains is the level of judicial control: the court must be satisfied that a DPA is likely to be in the interests of justice and that the proposed terms are fair, reasonable and proportionate. Once formally approved and declared by the court, the DPA and the

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[31] David Green resisted calls for formal guidance on the level of co-operation required while he was Director of the SFO. In contrast, Lisa Osofsky wants the SFO to be more transparent, hence the publication of Corporate Co-operation Guidance in August 2019.

underlying documents are made public. These include the agreed statement of facts, which sets out details of the alleged offence.

Practical guidance on the DPA process and when prosecutors will consider it appropriate is provided by the Code of Practice on DPAs and the chapter on DPAs in the SFO's Operational Handbook.[32] Guidance on financial penalties for companies convicted of economic crimes has been published by the Sentencing Council.[33] The latter is used to inform the level of any financial penalty that forms part of a DPA. Both the Code and the sentencing guidelines reflect the SFO's rhetoric of DPAs not being an "easy option". They make it clear that the SFO's primary role is as prosecutor and it will only be in specific circumstances that a DPA will be offered instead of full prosecution. Self-reporting is no guarantee of the DPA route, but the earlier a company self-reports and the level of co-operation given are key factors the SFO will take into account.

The Select Committee considered DPAs to be a positive development: "*in the short time they have been in operation deferred prosecution agreements have proved to be an excellent way of handling corporate bribery, providing an incentive for self-reporting and for co-operating with the authorities*."[34]

Details of the DPAs entered into by the SFO and comments on their significance can be found in the Appendix.

Level of fine

As the DPAs illustrate, fines will vary depending on the seriousness of the conduct, levels of co-operation, and the corporate's ability to pay. However, it is notable that the SFO is following the US approach and higher fines are becoming the norm.

That said, the approach taken on discounting is further illustration of the shift towards incentivisation. Originally, the sentencing guidelines recommended a one-third reduction, in line with a guilty plea. It had been criticised as not providing sufficient incentive for companies to self-report. These criticisms have been acknowledged by both the SFO and the presiding Judge in relation to the second DPA agreed with Sarclad Limited. As the Judge said: "*In the circumstances, a discount of 50% could be appropriate not least to encourage others how to conduct themselves when confronting criminality as Sarclad has*". A 50 per cent reduction was applied in the Rolls-Royce DPA, confirming that this benchmark is now firmly established.

Although it considered that "*the discounts being applied to financial penalties are appropriate to encourage companies to self-report but not so large as to deprive the penalty of its effectiveness*",[35] the Select Committee did recommend that "*if self-reporting is to be encouraged, a distinction should be drawn between the discount granted to a company which has self-reported and one which has not*." In other words, a company which has not self-reported should normally receive a lesser discount than a company which has done so.[36] While we are yet to see the reduction of a discount to reflect the failure to self-report, the Court has been prepared to sanction the reduction of the discount to 40% in order to reflect an initial reluctance to fully cooperate with the SFO.[37]

Prosecution of individuals

DPAs are only available to corporates, not individuals. As part of the co-operation required under a DPA, the SFO will require the corporate to provide access to information on implicated individuals. This was confirmed by the Select Committee e which recommended that: "*the co-operation expected of a company must include provision of all available evidence which might implicate any individuals, however senior, who are suspected of being involved in the bribery being considered*."[38]

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32 This was published in October 2020 and is available on the SFO website.
33 See the Sentencing Council website. It came into force on 1 October 2014.
34 Paragraph 328 of the Report.
35 Overall Assessment of the Report.
36 Paragraphs 308-310 of the Report.
37 The DPA between the SFO and G4S Care and Justice Services (UK) Ltd approved on 17 July 2020.
38 Paragraph 317 of the Report.

As far as the Select Committee is concerned: "*the DPA process, far from being an alternative to the prosecution of individuals, makes it all the more important that culpable individuals should be prosecuted*." The prosecution of individuals will therefore remain a focus of the SFO although to date, securing a conviction has proven difficult.[39]

Practical steps – putting in place adequate procedures

Government guidance on adequate procedures

"*Combating the risk of bribery is largely about common sense, not burdensome procedures. The core principle it sets out is proportionality*" (Foreword to the Guidance).

Risk-based approach

Guidance was published on 30 March 2011.[40] The Guidance is intended to be of general application and help commercial organisations of all sizes and types to understand what they can do to try to prevent bribery. To achieve this, it is formulated around six guiding principles that apply across all sectors and all types of business.

As the principles make clear, organisations are expected to adopt a risk-based approach to managing bribery risks. The Government recognises that no policies or procedures are capable of detecting and preventing all bribery. However, adopting a risk-based approach will help organisations focus the effort where it is needed and ensure that procedures are proportionate to the risks faced.

Many were concerned that where there is a single act of bribery that slips through the compliance net, the conclusion reached (by a jury should it go to criminal trial) will be that the procedures were, by definition, inadequate. This was a point made before the Select Committee. Several witnesses argued that "adequate" should be replaced by "reasonable". This would also ensure that the section 7 offence is in line with the similar offence of failure to prevent criminal facilitation of tax evasion in the Criminal Finances Act 2017, which refers to procedures "reasonable in all the circumstances". Although the Select Committee considered it unnecessary to amend the wording of section 7, it did recommend that the Guidance be amended to make clear that "adequate" does not mean, and is not intended to mean, anything more stringent than "reasonable in all the circumstances". It also recommended that the Guidance provide more examples of adequate procedures and suggest procedures which, if adopted by SMEs, are likely to provide a good defence.[41]

What follows is a summary of the main points by reference to the six principles and by way of practical guidance for organisations on the steps they need to take and the policies and procedures they should be putting in place.

Note also that in assessing the effectiveness of a corporate's compliance program, the SFO will do so by reference to these six principles.[42]

Principle 1: Proportionate procedures

The Guidance emphasises the need for proportionality. What is proportionate will depend on both the bribery risks faced and the nature, size and complexity of the organisation. As such, large global organisations, even if in a low risk industry, will be expected to put in place more by way of policies and procedures than a small business with the same level of bribery risk. This gives comfort particularly to small and medium-sized businesses that are low risk. However, and as highlighted by

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39 Paragraph 315 of the Report. The SFO has yet to secure a conviction of individuals in circumstances where the corporate entered into a DPA. See the Appendix for more detail.

40 See the Ministry of Justice website: http://www.justice.gov.uk/guidance/bribery.htm.

41 In its response published in May 2019, the government considered that it was not best placed to provide the more detailed clarification suggested and referred to other sources of guidance on adequate procedures, such as that published by Transparency International.

42 See the SFO guidance on 'Evaluating a Compliance Programme' which forms part of the SFO Operational Handbook.

the Select Committee, all but the smallest companies are likely to need procedures tailored to their particular needs.[43]

In terms of assessing what organisations require in terms of procedures, some will use third parties and others will rely on internal resources, such as their compliance teams. The key thing is for management to ensure that someone is tasked with responsibility for putting the procedures in place and implementing them.

Principle 2: Top-level commitment

The Government expects leadership on anti-corruption to come from the top. This is reflected in the Guidance, which states that top-level management (i.e. board members and owners) should be at the forefront of fostering a culture in which bribery is never acceptable. Without this top-level commitment, there is a risk that any company's procedures will be perceived as "inadequate". This is the case whatever the level of bribery risk a commercial organisation faces.

In practice, top-level management will be expected to:

- communicate the organisation's anti-bribery stance both internally and, if appropriate, externally; and
- become involved to an appropriate degree in developing and monitoring bribery prevention policies and procedures.

In other words, it is not enough for the board to pay lip service to any policies and procedures in place. This message has been repeatedly made by the SFO and is evident in the DPAs and in the one case where the adequate procedures defence was tested (*R v Skansen Interiors Limited*, (unreported)).[44]

Rolls-Royce has certainly taken that point on board, enhancing the role of compliance in the aftermath of its corruption investigation. Compliance teams must be seen to be working with the board's co-operation and oversight. In *Skansen*, a case involving a small company of approx. 30 employees and a senior executive who pleaded guilty to paying bribes to secure contracts, the prosecution noted that the company had not designated anyone with responsibility for the compliance role. So even small companies, with no compliance function, will be expected to assign that responsibility to a senior employee.

Principle 3: Risk assessment

As emphasised by the Select Committee, it is essential that all businesses conduct a properly documented risk assessment. Without this, a company will not be in a position to decide what level of anti-bribery procedures it needs.[45]

There are several ways of assessing risk and how an organisation conducts its risk analysis will depend on the level of perceived risk and size of organisation. Organisations will need to consider whether any risk assessment can be carried out internally, or whether external expertise will be required, the use of which is proportionate to perceived risk. Different approaches include the use of workshops, questionnaires or round-table meetings. Whichever method is chosen, organisations need to make sure that the risk analysis is documented.

In terms of identifying areas of risk, the Guidance is useful and distinguishes between external and internal risk.

Commonly encountered external risks include:

- Country risk – certain countries have a reputation for corruption and organisations with business operations in those countries will need to ensure that their procedures are adequate to deal with the additional risk.

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[43] Paragraph 194 of the Report.
[44] See our briefing for more detail.
[45] Paragraph 192 of the Report.

- Sector risk – certain sectors are higher risk than others, e.g. oil and gas, construction.
- Transaction risk – certain types of transactions tend to be higher risk, e.g. charitable or political contributions, licences and permits, and transactions related to public procurement.
- Business opportunity risk – risks may arise in, for example, high value projects or projects involving many contractors or intermediaries.
- Business partnership risk – certain relationships may involve higher risk, e.g. consortia or joint venture partners.

Organisations such as Transparency International are useful sources of information, in particular in relation to country and sector risk.[46]

Internal structures or procedures may also add to an organisation's risk, for example:

- deficiencies in employment training and knowledge;
- a bonus culture that rewards excessive risk-taking;
- lack of clarity in procedures;
- lack of clear financial controls; and
- lack of a clear anti-bribery message from top-level management.

Principle 4: Due diligence

Due diligence is relevant to organisations which deal with persons performing services on their behalf or organisations that are involved in takeovers and joint ventures. Effective due diligence is necessary in order to ascertain how risky the business relationship or transaction is and ensure the risk is mitigated by putting in place appropriate procedures.

How due diligence is conducted will vary depending on the circumstances. In transactions, it is standard to use due diligence questionnaires that can be adapted depending on the level of risk perceived. Other practical steps that can be taken in order to carry out due diligence include the following:

- Ascertain the scope of due diligence required and ensure that the information requested in the due diligence questionnaire reflects that.
- If the transaction is high risk, satisfy yourself of key areas such as beneficial ownership, background and reputation of the target, and the involvement of politically exposed persons. This may require interviews with management of the target and key employees, or on-the-ground due diligence.
- Have a clear statement of the precise nature of the services offered, costs, commissions and fees.
- Undertake research, including internet searches or using third-party research and intelligence services.
- Make enquiries, if appropriate, with the relevant authorities.
- If thought risky, follow up references and clarify any matters arising from the questionnaire.
- Request sight or evidence of anti-bribery policies.
- Effective follow-up is key: ask the right questions and monitor responses.
- Include appropriate warranties and contractual protections in the transaction documents.

Generally, more information will need to be requested of corporates as opposed to individuals. In addition, it may be necessary to consider conducting due diligence on employees and to adapt recruitment policies accordingly.

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[46] Transparency International produces a number of surveys and indices highlighting areas of corruption risk. See its website for more detail: http://www.transparency.org/.

In an M&A transaction, if the due diligence reveals gaps in the policies and procedures or other ABC issues, post-transaction remediation will be essential. Ensure full alignment with the parent's policies, procedures and ABC training. And make any necessary reports to the relevant enforcement authority.

It is also essential to ensure that everything is fully documented.

Principle 5: Communication and training

Commercial organisations should ensure that a zero-tolerance approach to bribery is clearly communicated both internally and externally. Internal communications should convey the "tone from the top" and will naturally focus on the organisation's policies and procedures. Training is a useful way to communicate the message. In terms of external communication, this will depend on the kind of industry an organisation is involved in and the level of risk. Many FTSE 100 companies make their zero-tolerance approach to bribery clear on their websites via ethics statements or codes of conduct. Organisations in high risk industries communicate that message to third parties they contract with, and insert appropriate warranties into their contractual arrangements.

The level of bribery risk and the size of the organisation will also determine the requirement for training. However, the Guidance recognises that some training is likely to be effective in establishing an anti-bribery culture within a commercial organisation whatever the level of risk.

The *Skansen* case illustrates the importance of ensuring that policies are effectively communicated to staff and regular training/reminders are provided on those policies and procedures. The company had argued that the nature and size of the business meant that it did not require sophisticated policies and procedures (it had approx. 30 employees and operated primarily in south-east England). It did have policies in place which emphasised the need to deal with third parties in an ethical, open and honest manner (one of which was displayed prominently on a wall), and financial controls and payment approval procedures were in place to minimise risk. However, it was unable to prove that its staff had read the policies that were available or that they had been reminded periodically of their existence.

Principle 6: Monitoring and review

Monitor and review mechanisms are required in order to ensure compliance with policies and procedures and to identify any issues as they arise. Commercial organisations will need to consider what works best for them. Examples provided include using existing internal checks and balances, e.g. financial monitoring, formal periodic reviews or external verification or assurance of the effectiveness of anti-bribery policies.

Corporations should also periodically review their policies and procedures to ensure they are still fit for purpose. An organisation's risk profile may change, or there may be changes in the law that it needs to take into account. In *Skansen*, the prosecution relied on the fact that the company was unable to show what steps it had taken when the UK Bribery Act came into force in 2011, or that it had used that as an opportunity to remind staff of the company's ethics policy and expectations.

Policies and procedures – what should they cover?

Having undertaken a risk assessment, an organisation should be in a position to revise or draft its policies and procedures.

First, management will need to decide who will be responsible for implementation. Ideally, this should be someone from senior management.

The anti-bribery policies and procedures can be stand-alone or incorporated into existing policies and procedures, but will need to be clear, practical and applicable throughout the organisation regardless of location. They should set out the standards of behaviour expected of all employees and, if appropriate, third parties associated with the organisation.

Generally, the issues anti-bribery policies should cover include:

- a zero-tolerance ethics statement from management;

- gifts and corporate hospitality;
- promotional expenditure, travel, accommodation and per diem allowances;
- facilitation payments;
- charitable and political contributions;
- dealing with business partners (e.g. agents, intermediaries and joint venture partners); and
- penalties for breaches of agreed policies and procedures.

Organisations may also need to put in place procedures, systems and controls that provide for transparency and accurate recording. It may well be that existing procedures can be used for bribery prevention purposes; for example, financial and auditing controls. Examples of the issues such procedures will need to cover include:

- reporting incidents of bribery;
- recording corporate hospitality and promotional expenditure payments;
- recording any exceptional facilitation payments;
- recording payments to third parties, particularly intermediaries; and
- effective management of all incidents of bribery, including arrangements for internal investigation, reporting the outcomes to senior executives and/or the board, and the disclosure of material findings to the relevant external authorities and interested parties, e.g. shareholders and business partners.

There is a wealth of information and best practice recommendations available from the bodies and associations active in this area, such as the OECD's Guidelines for Multinational Enterprises[47] and Business Approaches to Combating Corrupt Practices.[48] Transparency International UK's online tool – Global Anti-Bribery Guidance – is also a useful practical resource.[49] And the International Organisation for Standardisation (ISO) has released a global standard (ISO 37001) to help organisations to implement effective anti-bribery management systems. ISO 37001 sets out a series of measures that corporates can take to help them prevent, detect and address bribery. The principles are very similar to the guidelines laid down by the UK Bribery Act and Guidance. There is also a certification process whereby an ISO-approved certifier declares corporate compliance with the standard.

Document compliance and keep records of all steps taken

In any investigation, the enforcement authorities will want to see what steps were taken to embed a culture of compliance within a corporate. Without that evidence, a corporate will have an uphill struggle persuading a jury or enforcement authority that its procedures were adequate. This is again illustrated by the *Skansen* case where no records had been made of any compliance discussions or steps taken. It was therefore very difficult for the company to show what compliance steps it had taken, let alone satisfy a jury that they were adequate.

Making sure employees can spot and address red flags

Recent cases, and statements made by both the US and UK prosecutors, indicate that unless employees are properly alive to the bribery issues that can arise in their business, and know how to deal with them, the best-drafted policies are rendered worthless in terms of mounting an adequate procedures defence. Another common trend appears to be the disproportionate attention paid to low risk areas (for example, general corporate hospitality) and not spending enough time and resource on the key risks, for example, agents and intermediaries.

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47 See http://www.oecd.org/dataoecd/0/33/2638728.pdf.
48 See http://www.oecd.org/daf/inv/corporateresponsibility/WP-2003_2.pdf.
49 TI's Global Anti-Bribery Guidance is available at www.antibriberyguidance.org.

What is required is a culture in which employees are able to spot a bribery risk and react to it. The effectiveness of an organisation's procedures will ultimately be judged by how things manifest themselves in practice. The quality of a compliance culture is not judged by how much money has been spent on implementation, but by how people at the coalface actually live it. Regular, focused and properly targeted training is therefore key.

Minimising risk – joint ventures, intermediaries and facilitation payments

Companies who are involved in joint ventures, regularly appoint intermediaries or agents, or operate in jurisdictions where the payment of facilitation payments is commonplace are at greater risk. The Guidance offers practical advice on minimising those risks.

Joint ventures

When entering into a new joint venture, companies might consider:

- having representation on the board of the joint venture company;
- ensuring the joint venture itself has adequate anti-bribery procedures in place;
- establishing an audit committee for the joint venture; and
- including a contractual term in the joint venture agreement prohibiting any partner from breaching applicable anti-bribery laws.

Agency agreements/intermediaries

These can involve risks since it may be difficult for the company to monitor what the agent or intermediary is doing. The following actions might mitigate the risks:

- ensure there is a proper and supportable commercial justification for the appointment and that the proposed payment mechanism is appropriate;
- establish at the outset a clear statement of the precise nature of the agent/intermediary's services, costs and commission (or other remuneration);
- use Agent Questionnaires to ask questions in relation to key areas such as ownership, connections to Foreign Public Officials, and information on its own ABC compliance processes. Ensure follow-up of any red flags;
- carry out risk-based due diligence; the higher the risk, the greater the level of scrutiny of the agent or intermediary. At the very least, desktop due diligence should be undertaken through internet searches or third-party providers. For high risk agents, on the ground due diligence from a third-party provider is advisable or face-to-face interviews with the agent;
- where practical, ensure that the person/body who approves the appointment of the agent is independent of the business unit that wants it;
- communicate the company's anti-bribery procedures to the agent/intermediary, and give training where appropriate; and
- review contracts with agents/intermediaries annually, and include terms that: require the agent/intermediary not to offer bribes; allow the company to audit activities and expenditure; require the agent/intermediary to report any requests for bribes by officials; and give the right to terminate if the agent/intermediary's actions are suspicious.

Facilitation payments

These are illegal under the Act and companies that are regularly faced with requests for them should adopt strategies to deal with this, including:

- training staff on how to respond to a request for a payment, such as questioning the legitimacy of the demand, or requesting paperwork (e.g. the official's ID, or receipts);
- clarifying in their written policies that facilitation payments are not permitted;
- seeking local law advice relating to facilitation payments in the particular country; and
- using diplomatic channels, or participating in local non-governmental organisations to apply pressure on authorities in the particular country.

Particular recommendations relating to the use of intermediaries: the "red flags"

The Woolf Committee, which was set up by the Board of BAE Systems plc to report on its ethics policies and processes following the corruption allegations made against the company in relation to the Al Yamamah UK-Saudi Arabia arms deal (see above), published a report on ethical business conduct at BAE Systems in May 2008.[50] The report included a list of "red flags" to alert companies to areas of risk in relation to the appointment, management or payment of advisers, agents, brokers, consultants, intermediaries, middlemen or representatives (Advisers). These red flags include:

- a history of corruption in the territory;
- an Adviser lacks experience in the sector and/or with the country in question;
- non-residence of an Adviser in the country where the customer or the project is located;
- no significant business presence of the Adviser within the country;
- an Adviser represents other companies with a questionable reputation;
- refusal by an Adviser to sign an agreement to the effect that he/she has not and will not make a prohibited payment;
- an Adviser states that money is needed to "get the business";
- an Adviser requests "urgent" payments or unusually high commissions;
- an Adviser requests that payments be made in cash, via a corporate vehicle (including in the form of equity), or that he/she is paid in a third country, to a numbered bank account, or that payments are made to some other person or entity;
- an Adviser requires payment of the commission, or a significant proportion thereof, before or immediately upon award of the contract by the customer to the company;
- an Adviser claims he/she can help secure the contract because he/she knows all the right people;
- an Adviser has a close personal/professional relationship to the government or customer that could improperly influence the customer's decision;
- an Adviser is recommended by a government official or customer;
- an Adviser arrives on the scene just before the contract is to be awarded;
- an Adviser shows signs that could later be viewed as suggesting he/she might make inappropriate payments, such as indications that a payment made to him/her will be set aside for a government official; and/or
- there are insufficient bona fide business reasons for retaining an Adviser.

[50] See http://www.giaccentre.org/documents/WOOLFREPORT2008.pdf.

Appendix: Summary of DPAs entered into in relation to economic crime

Corporate, date of DPA, enforcement authority and presiding Judge	Charge and facts	Multi-jurisdictional?	Terms	Financial penalty and discount	Commentary
Standard Bank Plc (SB) 30 November 2015 SFO Rt. Hon. Sir Brian Leveson	Failure to prevent bribery contrary to section 7 of the Bribery Act 2010. This indictment was immediately suspended on 30 November 2015 pursuant to the DPA. The suspended charge related to a US$6 million payment by a former sister company of SB, Stanbic Bank Tanzania, to a local partner in Tanzania, Enterprise Growth Market Advisors (EGMA). The SFO alleged that the payment was intended to induce members of the Government of Tanzania (GOT) to show favour to Stanbic Tanzania and SB's proposal for a US$600 million private placement to be carried out on behalf of GOT. The placement	Yes. A US investigation had also been initiated regarding possible violations of the FCPA. However, the US investigation was closed in the light of the UK DPA. As part of the global deal, SB paid US$4.2 million to settle SEC charges of failing to disclose certain payments in connection with debt issued by GOT in 2013.	SB was required to: (i) pay compensation of US$6 million plus interest of just over US$1 million; (ii) disgorge profit on the transaction of US$8.4 million; (iii) pay a financial penalty of US$16.8 million; (iv) co-operate with the relevant authorities in all matters relating to the conduct arising out of the circumstances of the draft indictment; (v) commission and submit to an independent review of its existing internal ABC controls, policies and procedures; and	In calculating the fine of US$16.8 million, the following factors were relevant: • Medium culpability: The section 7 offence "*is not a substantive bribery offence*" and the evidence did not reveal that SB executives or employees intended or knew of an intention to bribe. However, SB did play a significant, albeit not intentional, role and failed to act on the obvious red flags. • Harm: The 1.4% fee of US$8.4 million. A multiplier of 300% was applied (range was 100%-300% for medium culpability) in the light of the serious failings on the part of SB to deal with the	This was in many respects a perfect case for a DPA. It involved early self-reporting and genuine co-operation with the SFO, it was an isolated incident, and there had been a subsequent change of corporate ownership. However, it demonstrated that DPAs are not an easy option and that they will be subjected to close judicial scrutiny. Factors that led to the DPA included: • The promptness of the self-report: disclosure was within days of the suspicions coming to SB's attention, and before its solicitors had commenced (let alone completed), their own investigation. • Level of co-operation: SB conducted a detailed internal investigation that had been sanctioned by the SFO and reported its findings to the SFO. The SFO was provided with access to electronic and documentary evidence, a summary of first accounts of interviewees, material specifically

Corporate, date of DPA, enforcement authority and presiding Judge	Charge and facts	Multi-jurisdictional?	Terms	Financial penalty and discount	Commentary
Standard Bank Plc	generated transaction fees of US$8.4 million, shared equally by Stanbic Tanzania and SB. There was no evidence that the SB employees were aware of the alleged bribery, but compliance failings at the bank meant that obvious red flags were ignored. Suspicions were raised after the payments had been made and the bank self-reported as soon as it became aware that there was a problem. Almost two years after the payment was made, ICBC acquired a 60% majority shareholding in SB, a new Board was appointed, and the business group involved in the conduct was transferred out of SB to a new entity, which remained a wholly owned subsidiary of Standard Bank Group		(vi) pay the SFO's legal costs of £330,000. The term was set at three years, taking into consideration the fact that SB had co-operated fully and from an early stage allowing for a thorough investigation to be carried out, and that there had already been improvements in its ABC policies and procedures. The DPA expired on 30 November 2018, SB having fully complied with all its terms.	unethical conduct and the substantial harm to the public. • Fine calculated at US$25.2 million. • One-third reduction applied (in line with the Sentencing Guidelines' reduction for a guilty plea), to reflect prompt self-reporting and level of co-operation. • The US Department of Justice (DOJ) confirmed that the financial penalty was comparable to the penalty that would have been imposed had the matter been dealt with in the US.	requested, and witnesses for interview by the SFO. • There was no evidence of history of similar conduct. • Change of corporate ownership. Following this DPA, the SFO spoke repeatedly of "genuine" co-operation, as opposed to those who try to "game the system". However, despite the co-operation given, the fine was still very high and many criticised the one-third reduction as being too low and not offering sufficient incentive to self-report. There were other notable features of this case. The **Associated Person** in this case was SB's sister company. The level of control and involvement of SB in the transaction was repeatedly referred to. Both banks were acting jointly and on behalf of one another in arranging the transaction; the fee was split 50/50; SB exercised a significant level of control over the structure of the deal; the employees worked closely together; and the act was intended to benefit both banks.

Corporate, date of DPA, enforcement authority and presiding Judge	Charge and facts	Multi-jurisdictional?	Terms	Financial penalty and discount	Commentary
Standard Bank Plc	(i.e. the South African parent).				**Adequate procedures**: The case also illustrated that having policies and procedures in place will not assist unless employees are trained on recognising and acting on red flags. Here, a lack of clear guidance or understanding of SB's policies meant that the SB team did not appreciate its obligations/procedures when two entities within the Standard Bank Group were involved in a transaction and the other Standard Bank Group entity engaged an introducer or a consultant. As such, SB delegated responsibility for the necessary compliance checks on EGMA to its sister company. These proved to be deficient and led to SB missing obvious red flags. This highlights the importance of a thorough risk assessment when drafting policies, and dealing with the risks inherent in sister companies'/JV partners' dealings with third parties, particularly in high risk circumstances.

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Sarclad Limited 8 July 2016 SFO Rt. Hon. Sir Brian Leveson	The charges included allegations of 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. This indictment was immediately suspended on 8 July 2016 pursuant to the DPA. The suspended charges relate to the period June 2004 to June 2012, in which a small group of senior employees were involved in the systematic offer and/or payment of bribes via agents to secure contracts in foreign jurisdictions. The SFO concluded that, of the 74 contracts it examined, 28 were found to have been procured as a result of bribes, with a value of £17.2 million. Gross profit	No.	Duration of at least two and a half years, and up to five years. This is so that Sarclad has time to pay, as payment is to be made in instalments. Disgorgement of gross profits of £6,201,085. £1,953,085 of this is to be contributed by Heico as being the repayment by Heico of a significant proportion of dividends that it had received from Sarclad. Financial penalty of £352,000. Past and future co-operation with the SFO in all matters relating to conduct arising out of the circumstances of the draft indictment. Annual review, maintenance of and reporting to the SFO on the organisation's existing	The financial penalty of £352,000 was low because that was all Sarclad could pay. The alternative would have been to force Sarclad into insolvency, which was considered to be disproportionate in the light of the mitigating factors. It is interesting to note how this was arrived at: • With culpability ranked as high, the lowest starting point for the fine was £16.4 million (250% of £6.5 million). • The Judge would have applied a 50% discount rather than one-third for a guilty plea. The additional credit was given in the light of the fact that the admissions were made far in advance of the first reasonable opportunity a guilty plea could have been made. "*In the circumstances, a discount of 50% could be*	This case illustrates that, even when faced with bribery that went all the way to the top, the SFO and the courts are prepared to offer a DPA and be lenient when it comes to financial penalties if appropriate co-operation is given and the financial circumstances warrant it. As the Judge commented: "*it is important to send a clear message, reflecting a policy choice in bringing DPAs into the law of England and Wales, that a company's shareholders, customers and employees (as well as all those with whom it deals) are far better served by self-reporting and putting in place effective compliance structures. When it does so, that openness must be rewarded and be seen to be worthwhile.*" Factors that weighed in favour of a DPA included: • The majority of the bribes were instigated by the intermediaries – not Sarclad's employees – and the bribing mechanism was not particularly sophisticated. • The speed and the extent of the self-reporting. As noted by the Judge, but for the self-report, the conduct may never have been revealed to the SFO.

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Sarclad	from those contracts equalled £6.5 million. In 2000, Sarclad was acquired by a US company, Heico Companies LLC. During the period following the February 2000 acquisition, Heico received dividend payments totalling £6 million. Prior to 2012, Sarclad did not have adequate compliance. Heico addressed this in late 2011 and implemented its global compliance programme. As a result, at the end of August 2012, concerns came to light about the way in which a number of contracts had been secured. Sarclad immediately retained a law firm to undertake an independent internal investigation. The law firm delivered a report to the SFO on 31 January 2013,		compliance programme, including a report addressing all third-party intermediary transactions, and the completion and effectiveness of its existing ABC controls, policies and procedures. The SFO did not seek its costs.	*appropriate not least to encourage others how to conduct themselves when confronting criminality as Sarclad has*." On the face of it, that reduced the figure to £8.2 million. • Although not a mitigating factor, it was relevant that Sarclad had already spent £3.8 million in fees arising from the steps it had taken in relation to the investigation and self-cleansing. • Taking into account the sum to be disgorged of £6,201,085, a financial penalty of £352,000 gave a total which equated to the gross profit on the implicated contracts.	• The genuinely proactive approach adopted by Sarclad to its wrongdoing. • The totality of the information provided. This included investigation reports, and oral summaries of interviews. • The new compliance culture that had been put in place. • Change of management: the two implicated senior employees and agents had gone and bids for the two suspect contracts withdrawn. Sarclad was a culturally different company from that which committed the offences. That said, the Judge was at pains to make it clear that this was an exceptional case and that the individuals concerned would not go unpunished. The case also **has implications for parent companies** whose subsidiaries are involved in bribery. The Judge made it clear that here there was no question of the parent knowingly making a profit from its subsidiary's criminality or that it should have known what was going on. Furthermore, there was no contractual or legal obligation attaching to an innocent

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Sarclad	after which the SFO conducted its own investigation. In related proceedings concerning the prosecution against the ex-employees, the SFO was criticised for not insisting on disclosure of first interview notes and instead accepting oral proffers (*R (on the application of AL) v Serious Fraud Office* [2018] EWHC 856 (Admin)). Three individuals were prosecuted by the SFO as a result of the investigation. On 16 July 2019 they were acquitted of conspiracy to corrupt and conspiracy to bribe. Consequently, reporting restrictions were lifted and Sarclad Limited named as the SME party to the DPA (prior to that it was referred to as XYZ).				parent that required it to contribute to the financial penalty. But, as the Judge pointed out, a parent company receiving financial benefits arising from the unlawful conduct of a subsidiary (albeit unknown) must appreciate how that will be perceived. Heico had received £6 million in dividends from Sarclad since acquiring it in February 2000. It was the Judge who appears to have suggested that an appropriate proportion be reflected in the terms of the DPA – hence the agreement to pay £1,953,085 towards disgorgement. A payment which "*further demonstrates Heico's continuing commitment to the DPA process and its support of Sarclad* ". The "*sterling assistance*" provided by Heico must also have factored into the decision as to whether to offer a DPA. It was certainly a factor in ensuring that Sarclad avoided insolvency. This could be a sign that overseas parent companies will be expected to become more involved in order to ensure that a DPA is secured in circumstances where the parent indirectly receives a benefit. In the final judgment, the Judge also makes it clear [para 28], that where there is

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					evidence that a parent company has set up a subsidiary as a vehicle for the payment of bribes, it will be prosecuted under section 7.
Rolls-Royce 17 January 2017 SFO Rt. Hon. Sir Brian Leveson	The allegations concerned the conduct of its civil aerospace business, defence aerospace business and former energy business, and relate to the sale of aero engines, energy systems and related services. The draft indictment included 12 counts of misconduct, including the making of corrupt payments, the concealment of the use of intermediaries in jurisdictions where their use was restricted, and the section 7 failure to prevent bribery in certain jurisdictions. Described by the Judge as a case of "*egregious criminality*", the allegations concerned conduct that took place	Yes. There were parallel investigations in the US and Brazil and the enforcement authorities worked together to ensure a coordinated global resolution. Parallel to this DPA, Rolls-Royce settled with the DOJ (fine of just under US$170 million) and with the Brazilian authorities (fine of US$25.8 million). The US agreement covered the conduct of Rolls-Royce's energy business in Brazil, Kazakhstan and Thailand, and also addressed conduct relating to Rolls-Royce arising from an investigation into its use of Unaoil.	Duration of four to five years. Terms agreed included: (i) The future co-operation and access to information/witnesses in relation to any investigations/prosecutions brought by the SFO, or other domestic or foreign enforcement agencies, in relation to the conduct arising out of the circumstances of the draft indictment. (ii) Disgorgement of profits of £258,170,000. (iii) Payment of a financial penalty of £239,082,645. (iv) Payment of the SFO's costs of £13 million.	The financial penalty of £239,082,645 was arrived at by looking at each of the 12 counts (some of which were grouped together) and assessing harm and culpability for each of them. The culpability multiplier applied ranged between 200% and 400%. The total reached amounted to £478,165,290.00. In the light of the "*extraordinary cooperation*" demonstrated by Rolls-Royce, the Judge considered it appropriate to apply a 50% discount to the figure, which gave a total penalty figure of £239,082,645.00. Payment is to be made in instalments.	This DPA demonstrates that any case may be appropriate for a DPA. Until Rolls-Royce, many thought that DPAs would not be offered in cases of conduct of an egregious nature. However, *Rolls-Royce* was a case of "*egregious criminality*". It also shows that a company does not have to self-report to the SFO to obtain a DPA. Prior to *Rolls-Royce*, it was thought that self-reporting was key to securing a DPA. However, it was the SFO that contacted Rolls-Royce following internet postings by a whistleblower. A key consideration for the granting of the DPA was the "*extraordinary*" level of co-operation given by Rolls-Royce once it was contacted by the SFO. As commented on by the Judge "*the company could not have done more to expose its own misconduct*". The company not only reported frankly on issues that the SFO was aware of, but also provided information on other wrongdoing of which

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Rolls-Royce	over three decades in seven jurisdictions, and involved senior management and politically exposed persons. Rolls-Royce did not self-report. It was the SFO that contacted Rolls-Royce following internet postings by a whistleblower alleging corruption in its business in Indonesia and China. However, once contacted, Rolls-Royce immediately commenced an investigation and its "*extraordinary cooperation*" enabled the SFO to conduct its own extensive investigation. On 22 February 2019 the SFO announced the closure of the investigations into the individuals concerned, due to there being insufficient evidence to provide a realistic prospect of conviction or it not being		(v) Continuation, implementation and regular monitoring and review of the compliance systems and controls overhaul commenced in January 2013, which was overseen by Lord Gold, and which had already cost Rolls-Royce £15 million.		the SFO was unaware, including in relation to parts of its business wholly unconnected to the SFO's original investigation. It spent over £123 million on its investigation and co-operation with the various enforcement agencies. As subsequently confirmed by the SFO, it was this level of co-operation and disclosure that meant that the lack of a self-report was not fatal to the DPA. However, in cases where the SFO has to investigate the case without the benefit of openness from the corporate, or where the information already provided is so detailed that there is little the corporate can do to make up the deficit in information, it may well be. The incentive to self-report remains. Rolls-Royce also provided unfiltered access to over 30 million documents and to witness statements and witnesses. With regard to witness interviews, it provided witness interviews on a limited waiver basis, agreed to audio record interviews if asked by the SFO, and allowed the SFO to interview witnesses before they were interviewed by the company.

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Rolls-Royce	in the public interest to bring a prosecution.				The Judge was also satisfied that the internal changes made by Rolls-Royce showed a genuine intention to clear out all the disreputable practices that had occurred. Rolls-Royce spent over £15 million overhauling its compliance regime, and appointed a new Board and executive team. Rolls-Royce was no longer the company it once was. The impact that prosecution would have had on the company, its employees and third party interests was also a factor. However, the Judge was clear to point out that this was not a determinative factor, just one to be weighed in the balance when considering the public interest: "*…a company that commits serious crimes must expect to be prosecuted and if convicted dealt with severely and, absent sufficient countervailing factors, cannot expect to have an application for approval of a DPA accepted*" (para 57). In addition, the total financial impact of the penalties and costs imposed exceeded £500 million. The Judge was satisfied that it: "*achieves the objectives of punishment and deterrence*" and that "*the penalty is substantial enough to have a real economic*

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					impact" and "*will bring home to both management and shareholders the need to operate within the law without putting it out of business which outcome would be inappropriate in these circumstances*".
Tesco Stores Limited (Tesco) 10 April 2017 SFO Rt. Hon. Sir Brian Leveson	The allegations concerned false accounting practices. According to the statement of facts, between February and September 2014, a culture existed at Tesco that encouraged illegal practices to meet accounting targets, including improperly recognised income in the UK accounts, by "pulling forward" income from subsequent reporting periods. An employee reported the accounting irregularities to the legal department in September 2014. This was quickly escalated to the CEO of Tesco plc, and internal and external	No	Duration of 3 years. Terms included: (i) Co-operation with the SFO and other law enforcement/regulatory authorities in their related investigations; (ii) Payment of a financial penalty of £128,992,500; iii) Payment of the SFO's costs of £3 million; and iv) At its own expense, implement an ongoing compliance programme during the three year term of the DPA.	The financial penalty was arrived at by determining the relevant harm figure by reference to 10-20% of relevant revenue (as recommended by the Sentencing Guidelines in cases where there is no gross profit figure to work from). After applying a percentage figure of 11.25%, this gave an overall harm figure of £85,995 million. Culpability was determined as high, and the starting point of 300% was used as the aggravating factors and mitigating features balanced each other out. That gave a figure of £257.985 million	The Tesco DPA is a further example of the high level of co-operation expected by the SFO and the courts. The conduct complained of was serious. It took place over a sustained period, involved senior management, and led to the maintenance of a culture within Tesco Stores which led to the concealment of illegitimate accounting practices that caused substantial harm to the integrity of and confidence in the markets. Despite that, the court was prepared to approve a DPA in light of the following factors: • The companies acted "*immediately, and responsibly*" on discovery of the wrongdoing, appointing auditors, reporting to the market and taking action against the senior management involved, resulting in a significant change in the UK leadership team.

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	auditors were instructed to investigate, and an independent firm instructed to verify the process. On 29 October the SFO opened a criminal investigation. Tesco plc and Tesco Stores provided full co-operation throughout the investigation. Three former Tesco employees who held senior management roles in the Tesco UK business were also charged over allegations of fraud and false accounting. All three were subsequently acquitted of all charges in late 2018 and early 2019.			In the light of "*the exemplary standard of co-operation*" exhibited by Tesco, the Judge considered it appropriate to apply a 50% discount to the figure, which gave a total penalty figure of £128,992.500.	• The "*exemplary*" co-operation exhibited. It voluntarily reported the offending, made early admissions, and fully co-operated with the SFO's investigation. • The "*wide ranging and comprehensive*" remedial measures taken, including simplification of reporting lines, the launch of an external whistleblowing service, increased legal and compliance teams, and investments in technology to aid financial controls. • The impact that a criminal conviction would have on others, including shareholders, employees, pensioners and those in the supply chain. The Judge concluded with remarks concerning the reputational damage suffered by companies where offences are committed at a senior level. In his view, that damage "*can only be limited by the demonstration of integrity, by the company operating through its most senior management…. It generally requires self-reporting to the authorities, co-operation with an investigation, a willingness to learn the lessons and recognition that where corporate liability could be established, a penalty must be imposed for punishment*

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					and deterrence. In that way, the company concerned can demonstrate to its Board, its employees, its agents, its customers and its shareholders that it has learnt and will adhere to the highest standards required of those engaged in corporate activity in this country." In his view, once the offence was discovered, Tesco Stores and Tesco plc demonstrated that level of integrity.
Serco Geografix Limited (SGL) 4 July 2019 SFO Mr Justice William Davis	The proposed indictment included three offences of fraud and two offences of false accounting arising from a scheme to dishonestly mislead the Ministry of Justice (MoJ) as to the true extent of the profits being made between 2010 and 2013 by SGL's parent company, Serco Limited (SL), from its contract for the provision of electronic monitoring services. In late 2013 SL's parent, Serco Group plc (Serco),	No	Duration of 3 years. Terms included: (i) Payment of a financial penalty of £19.2 million. This is an addition to the settlement monies already paid by Serco to the MoJ in 2013. (ii) Payment of the SFO's costs of £3.7 million; and (iii) SGL to be credited for payments made pursuant to the 2013 settlement, which fully offset the compensation (£12.8 million) SGL otherwise	The financial penalty was determined by reference to the loss suffered by the MoJ - £12.8 million (the harm). Culpability was high and the starting multiplier of 300% was applied as the aggravating and mitigating factors balanced each other out. That gave a figure of £38.4 million. A discount of 50% was then applied to reflect the level of co-operation provided.	As described by the Judge (para 26), this was a "*quite deliberate fraud*" against the MoJ which took place "*over many months*" and which reflected "*business practices apparently ingrained in the company*". However, a DPA was considered to be in the public interest for the following reasons: • The prompt and detailed reporting by Serco and its subsidiaries of the fraudulent conduct. • The substantial co-operation by Serco and its subsidiaries with the investigation by the SFO. This included not interviewing witnesses at the SFO's request, providing unrestricted access to data, waiving privilege over

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	self-reported to the SFO after uncovering evidence which appeared to show that there had been manipulation of accounting between SGL and SL designed artificially to reduce the profit margins reported to the MoJ. Although SL was the beneficiary of the fraud, SL was not party to the DPA as no "directing mind" of SL could be shown to be involved in the devising of the fraud and putting it into effect. However, the evidence indicated that individuals within SGL who could properly be described as directing minds of the company were party to the scheme. As such, only SGL was party to the DPA. SL and Serco subsequently paid various sums to the		would be obligated to pay. This also represents SGL's disgorgement of profit. (iv) Co-operation with the SFO and other law enforcement/regulatory authorities; (v) Improvement and annual reporting of ethics and compliance policies; and (vi) An undertaking from Serco, in which it agreed to ongoing co-operation with the SFO and other law enforcement and regulatory authorities and the improvement and annual reporting of its ethics and compliance policies.		accounting material, and proactively informing the SFO of new evidence or developments. • The lack of any history of similar conduct on the part of Serco or its subsidiaries. • The age of the conduct and the remedial measures taken since the matter was reported to the SFO. In addition to the settlement with the MoJ, Serco has undergone a complete change of management and reviewed and strengthened its compliance procedures and policies. • The disproportionate consequences which might result from a criminal conviction of SGL. These include the debarment of SGL/SL from participation in any government procurement exercise. The issue of debarment was one that troubled the Judge. He commented (at para 27) that if his approval of the DPA was the determining factor in the question of debarment then he doubted whether he would have given approval. However, as the government would have the discretion to debar in the case of a conviction or a DPA (in accordance with the Public

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	MoJ by way of settlement of the MoJ's claims. Since January 2018 SGL has been a dormant company with no expectation of future trading. Investigations into the individuals implicated are ongoing. As such publication of the Statement of Facts has been postponed pending those investigations.				Contracts Regulations 2015), this meant that his decision to approve, while relevant, was not determinative of what should be a political decision. In any event, the government exercised its discretion against debarment in light of the extent of the "*self-cleaning*" measures adopted. Another key factor in the decision to approve the DPA was the undertaking given by Serco. Since SGL is a dormant company, the obligations to which it is subject under the DPA are of limited value. This potential problem was addressed by Serco agreeing to provide an undertaking that mirrored the requirements imposed on SGL by the DPA. This is the first time that a parent company undertaking has been required in relation to a DPA entered into by one of its subsidiaries. As noted by the Judge, it "*is an important development in the use of DPAs. The nature of modern corporate structures means that it may be problematic to show that a controlling mind of the parent company was involved in the criminality carried out by a subsidiary*

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					company even where the benefit of the criminality tended to accrue to the parent company. Yet it will be the parent company which necessarily must engage in any compliance programme and cooperate with law enforcement agencies. The approach taken by Serco Group PLC in this case strengthens the public interest in the approval of this DPA".
Güralp Systems Ltd (GSL) 22 October 2019 SFO Mr Justice William Davis	GSL is a UK registered SME that specialises in the development, design, manufacture and sale of devices and systems for seismic measurement. Its business is international. The conduct concerned payments totalling US$1 million to a South Korean public official, Dr Chi. The payments were made between 2002 and 2015 and therefore engaged both the pre-UK Bribery Act laws and the UK Bribery Act. In September 2015 the new Chairman of GSL became	Yes. GSL self-reported to both the UK SFO and the US DOJ. The US proceedings concerned Dr Chi. He was convicted in July 2017 on one count of laundering the proceeds of corrupt payments he had received from GSL and a US company. In August 2018 the DOJ closed its inquiry into GSL (presumably in recognition of the SFO's prosecution of the company).	Duration of 5 years. Terms included: (i) Disgorgement of profit made by GSL in the sum of £2,069,861, to be paid by the end of the 5 year period (but no timetable set within the DPA); (ii) Full co-operation with the SFO; and (iii) Review of and implementation of ABC controls, policies and procedures, and annual reporting to the SFO on those systems and controls for the duration of the DPA.	Not applicable. This is the first DPA where no financial penalty was ordered to be paid. The Judge was satisfied that GSL would be unable to pay a financial penalty over and above the disgorgement sum, and that the overall sum payable was fair, reasonable and proportionate. The Judge considered that, had a penalty been appropriate, after allowing for a 50% discount, it would have been in the region of £3 million.	According to the Judge this was a case of "*serious and sustained criminality*". It involved corrupt payments made routinely to a public official over many years (2002-2015) by senior officers and employees. "*On the face of it the activity of GSL richly merits prosecution.*" (para 25 of the judgment). The Judge drew parallels between the sustained corrupt activity that was the subject of the Rolls Royce DPA, and the fact that the gravity of the offence did not prevent that DPA from being in the interests of justice. Accordingly, and taking into account the following factors, a DPA was in the interests of justice in this case:

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	suspicious about the relationship between GSL and Dr Chi. He instructed external solicitors to investigate, as a result of which concerns were reported to the SFO and the DOJ in October 2015. GSL and three senior officers and employees were charged with conspiracy to make corrupt payments to Dr Chi. GSL was also charged with failing to prevent bribery under section 7. GSL was subsequently invited by the SFO to enter into a DPA in relation to its alleged criminal conduct. GSL agreed. On 20 December 2019 the SFO announced that the three individuals had been acquitted of conspiracy to make corrupt payments in relation to payments made				• Self-reporting of its suspicions together with a full report of its findings to the SFO by the external law firm; • Complete change in management - those responsible for the payments are no longer associated with GSL; • No other criminal conduct: the activity was confined to Dr Chi and not part of a general pattern with regard to other public officials GSL engaged with; • Substantial remediation undertaken since discovery of the payments, including termination of distribution contracts that gave rise to concerns and the introduction of a compliance program; and • The "*extensive and ongoing co-operation*" provided by GSL (para 13 of the statement of facts). While these factors are common to most DPAs agreed with the SFO, this case does have some notable features. First is the fact that yet again, the SFO has been unable to secure a conviction against the individuals implicated. This is also the first DPA where the company does not have to pay a financial penalty (see financial penalty column). The

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	to Dr Chi between 2002 and 2015. Consequently, reporting restrictions on the DPA were lifted.				Judge acknowledged that the appropriate level of penalty (£3 million) would "*put GSL out of business*" to the detriment of its innocent employees. Further allowances were made for GSL's precarious financial position in the terms set for payment of the disgorgement sum. No timetable for payment was ordered as this would not be a "*practicable option*", and GSL was given the option to vary the terms should it face difficulty in making payment by the 5 year deadline. For these reasons GSL was also ordered not to pay any costs.
Airbus SE 31 January 2020 SFO Rt. Hon. Dame Victoria Sharp	Airbus is the largest aeronautics and space company in Europe. The parent company, Airbus SE, is based in the Netherlands. Its main operations are in France but it has substantial operations and subsidiaries in multiple jurisdictions, several of which were implicated in the wrongdoing. However, only	Yes. The UK DPA is part of a broader global settlement involving, UK, French and US enforcement agencies. The French agency, Parquet National Financier (PNF) had primacy in the investigation. In that respect, it provides useful insights into how global investigations are conducted.	Duration of three years. Airbus is required to: (i) provide full and honest cooperation with the SFO and any other domestic or foreign law enforcement and regulatory authorities during the term of the DPA; (ii) disgorge profits of €585,939,740 to the SFO by 31 January 2023;	The financial penalty of €398,034,571 was arrived at by looking at each of the 5 counts (some of which were grouped together) and assessing harm and culpability for each of them. In reaching the harm figure, the SFO took the gross profit from the contracts obtained as a result of bribery as its starting point. However, in calculating the figure, the	According to the Judge "*the criminality involved was grave*" (para 5). The conduct took place over many years, extended to every continent in which Airbus operates, and involved senior personnel. Both the financial gain and the harm caused to the integrity and confidence of markets by the conduct was substantial. Despite "*this extremely high level of seriousness*", she considered that the interests of justice are nevertheless served by a DPA rather than a prosecution. In

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Airbus SE	the parent company was a party to the DPA. The indictment covers five counts of failure to prevent bribery under section 7 of the Bribery Act 2010. The conduct involves Airbus' Commercial and Defence & Space divisions. The conduct covered by the UK DPA took place across five jurisdictions: Sri Lanka, Malaysia, Indonesia, Taiwan and Ghana between 2011 and 2015. Much of the conduct concerned was conducted by Airbus' business partners (BPs). It is alleged that those BPs offered financial incentives in order to win business for Airbus SE. For its part, Airbus SE did not prevent, or have in place at the material times adequate procedures designed to prevent that conduct.	The SFO and the PNF conducted a joint investigation, which ran in parallel with the US investigation. Each agency took responsibility for geographical areas or customers. The SFO was responsible for Malaysia, Sri Lanka, Taiwan, Indonesia and Ghana. The PNF handled China, Colombia, Nepal, South Korea, the UAE, Saudia Arabia, Taiwan and Russia. The US authorities looked into bribery offences in China. In total, the settlements agreed require Airbus SE to pay approximately €3.6 billion (including €2.08 billion to the PNF and €525 million to the DOJ). The level of fines reflect that fact that primacy was given to the PNF, and France's and the UK's interests in the case were	(iii) pay a financial penalty of €398,034,571 within 30 days; (iv) pay the SFO's investigative and legal costs of €6,989,401 within 30 days; and (v) continue to implement compliance and ethics programme improvements throughout its operations.	Court agreed that the approach adopted in the Sentencing Guidelines could be departed from "*for reasons of totality and proportionality and to assist in the wider global resolution of this case*" (para. 102 of the judgment). The approach adopted by the other enforcement agencies was therefore taken into account. The total reached amounted to €796,069,142. In light of Airbus' "*exemplary cooperation and remediation*", the Judge considered it appropriate to apply a 50% discount to the figure, which gave a total penalty figure of €398,034,571. Payment to be within 30 days.	doing so, she took into account the following factors: • Self-reporting and "*exemplary*" co-operation: Although she accepted that Airbus was slow off the mark (concerns had been raised in 2014), and that the "*true catalyst*" for the self-report to the SFO was UKEF, Sharp J considered that Airbus had cooperated "*to the fullest extent possible*" (paras 69 and 73). She was particularly impressed by the fact that a Dutch and French domiciled company accepted that the SFO had extra-territorial jurisdiction and was so fulsome in its cooperation. This included helping the joint investigation become aware of offences overseas that it may not have otherwise discovered, assisting in the efficient review of over 30.5 million documents, waiving privilege over witness first accounts, and providing full access to individuals and information. • Remedial measures and culture change: Airbus was now "*a changed company to that which existed when the wrongdoing occurred*" (para. 87). In addition to identifying compliance concerns and taking significant steps to

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Airbus SE	Concerns were raised internally in 2014. Consequently, in September 2014, Airbus initiated an internal review of all third party relationships. Action was taken, including a freeze on payments to BPs, the introduction of new compliance processes, the dismissal of certain employees and the closure of the committee responsible for oversight of the relationships with BPs. In parallel, Airbus was responding to and investigating concerns raised by the UK Export Finance (UKEF). This led to both Airbus and UKEF reporting to the SFO on 1 April 2016. On 15 July 2016 the SFO opened a criminal	much stronger than that of the US. In addition, Airbus is subject to a French monitorship for three years by France's Anti-corruption Agency (AFA).			overhaul its compliance processes, Airbus completely changed its management team and conducted disciplinary investigations against existing and former employees. It also commissioned an independent panel to regularly review its revised policies and procedures. The third report is due in 2020. • Collateral effects: While acknowledging that "*No company is too big to prosecute*", the Judge accepted that a criminal conviction would have "*a number of materially adverse consequences*." A conviction would most likely result in debarment in the UK, EU and other jurisdictions. The significant impact it would have on the financial health of the company would impact on other innocent stakeholders, including employees, shareholders, pension holders, companies in the supply chain. Thousands of jobs would be at risk and that would in turn impact the economies of the countries in which Airbus operated. Deloitte estimated it could lower the GDP in each of the UK, the United States,

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Airbus SE	investigation into Airbus and associated persons. The investigation into implicated individuals is ongoing. Their identity has not been revealed in any of the DPA documents to ensure a fair trial and to protect those in jurisdictions where the death penalty exists for corruption.				Germany, France and Spain. each of those countries by over €100 billion. There were also other aspects of this DPA which make it notable. The size of the global settlement. With a global payment of €3.6 billion, it tops the enforcement charts, replacing Odebrecht as the world's largest foreign bribery case in history. In the UK, the settlement exceeded the total value of all other DPAs concluded to date. Compliance overhaul: This was not a case of a company not having policies and procedures in place. Airbus' policies and procedures had been independently certified in 2012. However, serious weaknesses within Airbus' compliance and oversight structure and its corporate culture meant that all of the policies and procedures could be circumvented. Significant steps have been taken to address this, including ensuring independent oversight at Board level, a restructuring of legal and compliance to make it more effective, a global risk assessment, reducing use of BPs globally by 95%, regular monitoring and review by an

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Airbus SE					independent panel, redesigning policies and procedures and systems and controls and ensuring employees at risk are given ABC training. The French led global investigation and settlement also highlights a move away from the US being the dominant player in these types of investigations. Another factor that caused difficulty was the French Blocking Statute. However, PNF was able to overcome this and ensured that both its agreements with the SFO and DOJ gave it control over the supply of documents outside France to ensure compliance with it.
G4S Care and Justice Services (UK) Ltd (G4S C&J) 17 July 2020 SFO Mr Justice William Davis	G4S C&J is a UK private limited company and wholly owned subsidiary of G4S plc. Between 2005 and 2015 G4S C&J provided electronic monitoring services for the Ministry of Justice. The indictment covered three offences of fraud	No	Duration of three years. Terms included: (i) Payment of a financial penalty of £38,513,277; (ii) Payment of the SFO's costs of £5,952,711; (iii) G4S C&J to be credited for payments made pursuant to the 2014 settlement with the MoJ,	The financial penalty was determined by reference to the harm to the MoJ and the profit generated from the unlawful conduct - £21,396,265. Culpability was high and the starting multiplier of 300% was applied, as the aggravating and mitigating factors balanced each other out.	The Judge considered the conduct to be serious. The fraud related to an important part of the criminal justice system, involved a substantial loss to the public purse and is likely to adversely impact public confidence in the process whereby public functions are contracted out by the Government. The evidence also indicated that it took place over a six-year period. However, the following factors tipped the scales in favour of approval of a DPA:

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	against the MoJ arising from a scheme to deceive the MoJ as to the true extent of G4S C&J's profits between 2011 and 2012 from its contracts for the provision of electronic monitoring services. The scheme was designed to prevent the MoJ from attempting to decrease G4S C&J's revenues under those contracts. In December 2013, the MoJ raised concerns with G4S C&J relating to financial reporting. Consequently, in January 2014, G4S C&J reported to the SFO that it had discovered material which indicated that the company had failed to provide accurate financial reports to the MoJ. Following an investigation, the SFO concluded that there had been fraudulent conduct in relation to the		which fully offset the compensation (£21,396,265) G4S C&J would otherwise be obliged to pay. This also represents G4S C&J's disgorgement of profit; (iv) Full and honest cooperation with the SFO and any other domestic or foreign law enforcement and regulatory authorities during the term of the DPA; (v) Continuation of the corporate renewal programme; and (vi) An undertaking from G4S plc, in which it agreed to ensure that the compliance measures are maintained and enforced Group-wide and to appoint an external and independent reviewer to review and report on those compliance measures.	That gave a figure of £64,188,795. A discount of 40% was then applied to reflect the level of cooperation provided. That gave a figure of £38,513,277.	• Prompt reporting in January 2014 by the company to the SFO. • Although G4S C&J failed to fully cooperate until a late stage in the investigation (October 2019), overall it substantially cooperated with the SFO investigation. • The relative age of the conduct – it goes back to 2005-2013 and there has been no continuing misconduct. • The extensive remedial measures taken by G4S plc as the parent company. As described by the Judge, the parent had undertaken "*a root and branch self-cleaning process which is continuing*" (para. 34). This included: significant personnel changes, the creation of a Board Risk Committee to oversee the most sensitive and important contracts held by G4S Group; a change in reporting lines; expansion of the Group's audit function; introduction of a 360-degree review process of all contracts with the Government; and reviews and assessments of the financial governance of G4S by outside bodies.

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	contracts for the provision of electronic monitoring services. Further, it was concluded that, from August 2011 and by reference to the identification principle, the company was criminally liable for that conduct. The draft indictment charged G4S C&J with three offences of fraud. G4S C&J accepted the SFO's invitation to enter into a DPA and accepted responsibility for the three offences of fraud. The DPA only relates to the potential criminal liability of G4S C&J. Investigations into the individuals implicated are ongoing. As such, publication of the Statement of Facts has been postponed pending those investigations. Separately, in March 2014, G4S C&J settled various				• The disproportionate consequences which potentially would flow from any conviction of G4S C&J. • The potential collateral effects on the public and on employees and shareholders of G4S C&J in the event of conviction. This DPA is noteworthy in several respects. First, the approach to cooperation. The Judge considered that G4S C&J had failed to fully cooperate at the outset. In his view, the company's level of cooperation could not be said to be "*exemplary*" until October 2019 when it intensified very significantly. It was then that the company provided access to all interviews conducted by its solicitors and accountants on a limited waiver of privilege basis. This reflects the SFO guidance on corporate cooperation published in August 2019 and indicates the high level of cooperation required before it can be considered "*exemplary*". However, the Judge still considered that a DPA was appropriate. For the purposes of approving a DPA, it is the overall level of cooperation that is relevant.

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	claims with the MoJ for approx. £121 million, which included a sum of £22,115,505 to reflect "*unanticipated cost efficiencies*".				Instead, any failure to cooperate should be considered when deciding on the level of discount on a financial penalty. Given that the Judge considered that the cooperation was lacking until a late stage in the investigation, he agreed that a discount of 40%, rather than 50%, was appropriate (para. 40). Second, the role of the parent, G4S plc. This is the second time that a parent company undertaking has been required in relation to a DPA entered into by one of its subsidiaries. However, unlike the Serco DPA (see above), G4S C&J remains a substantial trading entity. Therefore, the undertaking is of "*greater significance*" in the context of this DPA (para. 43). The parent undertaking is likely to become a feature of DPAs approved with wholly owned subsidiaries. As explained in the Serco DPA (see above), it will be the parent company which necessarily must engage in any compliance programme and cooperate with law enforcement agencies. As such, the role of the parent company will be a key factor in deciding whether a DPA is in the public interest.

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					The DPA is also significant as regards the extent of remediation and monitoring imposed on the parent. In addition to the extensive measures already taken, the DPA requires G4S to ensure that compliance measures are maintained and enforced Group-wide. These include appointing a Group-level head of internal audit and compliance with a properly funded office by March 2021. In addition, an external and independent Reviewer is to be appointed to review and report to the SFO on the corporate renewal being undertaken by G4S. As noted by the Judge (para. 43), the level of external scrutiny is greater than in any previous DPA. However, it was considered necessary and appropriate given the exposure of both G4S C&J and the parent company to government contracts. It also ensured that the public interest in approving the DPA was "*very high*" (para. 28). Expect this to be a feature of future DPAs where government contracts are concerned. Finally, the issue of debarment was also raised. As with the Serco DPA (see above), the Judge was satisfied that his decision to

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					approve the DPA, while relevant, was not determinative of what should be a political decision.
Airline Services Limited (ASL) 30 October 2020 SFO Mrs Justice May DBE	ASL is a UK company. Its business encompassed the provision of a number of services for airlines, including the manufacture and adaptation of parts for aircraft interiors. The indictment covered three counts of failing to prevent bribery arising from the company's use of an agent to win three contracts in the period 2011-2013, together worth over £7.3m, to refit commercial airliners for Lufthansa. In addition to assisting ASL, the agent was also working as a project manager for Lufthansa, as a consultant and then employee. The agent used this position to	No, although the SFO was assisted by the Public Prosecutors of Frankfurt am Main.	Duration of one year (ASL is in the process of being wound up and one year was thought sufficient to allow it to comply with the terms). Terms included: (i) Payment of £2,229,685.76 (which comprises a financial penalty of £1,238,714.31 and disgorgement of profit of £990,971.45); (ii) Payment of the SFO's costs of £750,000; and (iii) Full cooperation with the SFO and any other domestic or foreign law enforcement and regulatory authorities during the term of the DPA.	The financial penalty was determined by reference to the harm (in this case the profit generated from the unlawful conduct - £990,971.45). Culpability was high but the starting multiplier of 300% was reduced to 250% as the mitigating factors outweighed the aggravating factors. That gave a figure of £2,477,428. A discount of 50% was then applied to reflect the level of cooperation provided. That gave a figure of £1,238,714.31.	ASL's conduct was considered to be "egregious" having taken place over a sustained period of time and across multiple jurisdictions, repeated over three separate agreements, and taking into account senior management's wilful disregard of the commission of bribery offences, the lack of an effective compliance programme, and the risk of harm to other bidders and Lufthansa. However, the following factors tipped the scales in favour of approval of a DPA: • timely self-reporting on the part of ASL, having conducted its own investigation; • the active and full cooperation provided by ASL to the SFO throughout its investigation (which included ASL's agreement to a limited waiver of privilege over its own internal investigation); • the offences are "firmly in the past" with no possibility of a repeat;

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	provide an illicit competitive advantage to ASL. Concerns were raised within ASL and external solicitors were instructed to investigate in 2014. Consequently ASL self-reported to the SFO in July 2015, and cooperated with the SFO investigation which was formally opened in December 2015. The ambit of the investigation extended beyond ASL's German operations, but it was decided that there was insufficient evidence to justify further action in relation to the operations outside Germany. Under the terms of the DPA, ASL accepted responsibility for the three offences. The company is no longer trading but will be kept open as a non-trading				• senior management had been replaced; and • the company is in the process of being wound up and is only being maintained to discharge its obligations under the DPA. This DPA is fairly straightforward but there are a couple of points of interest. The case shows that, while a complete lack of adequate procedures will be a factor that weighs in favour of prosecution, it is not determinative. Here, ASL's compliance procedures were described as "woefully inadequate". ASL chose not to follow the advice of external advisers regarding the need to implement policies and procedures prior to the coming into force of the UK Bribery Act. As of early 2015, ASL accepted that it did not have any adequate procedures in place to prevent bribery. However, self-reporting and full cooperation meant that a DPA, and full discount of 50%, was in the public interest. It is also noteworthy that it took nearly 5 years to conclude the SFO's investigation. A reminder that these investigations,

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	entity to fulfil the terms of the DPA.				particularly where assistance in other jurisdictions is required, can take several years.

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