March 2017

UK Anti-Bribery Newsletter - Spring 2017

Welcome to the latest edition of our Anti-Bribery Newsletter, our regular review of developments in the UK's fight against bribery and corruption. The Bribery Act 2010 has been in force for over 5 years and the UK's Serious Fraud Office is now beginning to see the results of some of its long-running bribery cases. This newsletter provides an update on UK enforcement activity, analysis of recent enforcement trends, news of the impending review of company liability for criminal offences and commentary on the UK government's anti-bribery goals as outlined in last year's Anti-Corruption Summit.

ENFORCEMENT ACTIVITY AND TRENDS

The Serious Fraud Office (SFO) has recently achieved some notable successes in its anti-bribery enforcement activities. These cases show that the SFO is keen to make a clear distinction between offending companies who do not self-report or actively co-operate with the SFO's investigation, resulting in a criminal prosecution (e.g. Sweett Group, below), and those who are offered a Deferred Prosecution Agreement or DPA, for which prompt self-reporting and assistance in the investigation are pre-requisites (e.g. Standard Bank, below). In a recent speech, the SFO outlined the factors which have influenced the SFO and the court in their decision to grant a DPA or proceed with a criminal prosecution. They include:

- How promptly did the company self-report?
- What steps had the company already taken to investigate the matter?
- Is the company co-operating with the SFO in providing access to the facts surrounding the investigation and in identifying, collecting, preserving and providing data which is relevant to it?
- To what extent is the company willing to respond to the interests of the SFO in conducting the investigation, for example in drawing relevant material to the attention of the SFO, even where it was unsolicited, and not seeking to exert pressure on the SFO through the media or otherwise?

The Rolls Royce DPA, outlined below, was something of a landmark in the SFO's approach to dealing with the most serious bribery cases. The judge himself commented that the appropriateness of a DPA in a case of such "egregious criminality over decades" and involving vast sums in corrupt payments could be seen as surprising, begging the question as to whether there was any future for criminal prosecutions for bribery. Other commentators accused the SFO of a failure of courage in offering a DPA instead of taking the case to trial. True, the SFO recently described DPAs as "the new normal" for bribery cases, but importantly, only where the company demonstrates an exemplary response to rooting out the problem and assisting the SFO in its investigation, which the judge in the Rolls Royce case acknowledged had been the case.

The SFO is mindful of the need to strike a balance between making a DPA sufficient punishment for the seriousness of the offence, whilst at the same time encouraging other companies to have the courage and integrity to self-report. This balance was particularly evident in the case of XYZ Ltd, also outlined below.

As a quid pro quo, it seems clear that companies who fail to self-report or co-operate with the SFO will be punished by the severest of criminal penalties. The SFO has also made reference to the cost savings to the public achievable by a DPA over a lengthy criminal trial. So whilst it does seem likely that DPAs will become increasingly prevalent in bribery cases, the SFO is clearly using them as a means of achieving the culture change hoped for by the government when the Bribery Act was first introduced.

DEFERRED PROSECUTION AGREEMENTS

Rolls Royce plc – in its highest profile bribery case so far, in January 2017, the SFO concluded a Deferred Prosecution Agreement with Rolls Royce plc, including a penalty of £497m (in addition to payment of £141m to the US Department of Justice) following the SFO's 4-year investigation into 12 counts of conspiracy to corrupt and failure to prevent bribery. The offences, carried out over three decades, related to the sale of aircraft engines and related products and services in Indonesia, Thailand, India, Russia, Nigeria, China and Malaysia. Whilst the settlement reflects the gravity of the offences, the DPA takes account of the full co-operation of Rolls Royce in the investigation and its programme of reform and anti-bribery compliance put in place by the new management of the company, and enables the company to avoid a criminal prosecution which would result in debarment from public procurement projects. This was significant for Rolls Royce, since it asserted in the proceedings that up to 30% of its revenue was derived from government contracts. Investigations are ongoing into the conduct of individuals.

XYZ Ltd – The SFO's second DPA was concluded with an unnamed SME, referred to only as XYZ Ltd due to ongoing proceedings. The company agreed to pay a total of £6.5m, including a financial penalty of £350,000 and disgorgement of profits of £6.2m of which a significant proportion was paid by the company's US parent.

The company demonstrated exemplary levels of co-operation, but had limited financial means so the settlement was designed to enable the company to avoid insolvency. This illustrates the flexibility inherent in the award of a DPA in circumstances where a penalty calculated on the standard formula would have had an adverse impact on employees and others who were dependent on the fortunes of the company.

Standard Bank Plc – the UK's first ever DPA was concluded with Standard Bank Plc in November 2015, following bribery charges in relation to payments made by a Tanzanian sister company to a local partner in Tanzania to facilitate Standard Bank's proposal for a $600m private placement on behalf of the Government of Tanzania from which Standard Bank stood to gain around $8.4m in fees. The total amount payable by Standard Bank under the DPA was in excess of $32m.

RECENT PROSECUTIONS

Sweett Group – In 2016, Sweett Group PLC, an AIM-listed firm of quantity surveyors, pleaded guilty to the section 7 Bribery Act offence of failure

to prevent bribery, the first UK corporate entity to be convicted under section 7. Sweett Group were ordered to pay a total of £2.25m, of which £1.4m was the fine, around £850,000 was the confiscation order and £95,000 for the SFO's prosecution costs. Taken in context, this represents a fairly tough penalty – around 18% of Sweett Group's then market capitalisation.

The bribery offence itself related to payments totalling around £680,000, made by a Cypriot subsidiary of Sweett Group to secure the award of a contract to project manage the building of a hotel in Dubai.

This case is a salutary reminder of the need for corporate groups to enforce their anti-bribery measures in overseas subsidiaries. Subsidiaries based either in the UK or overseas are treated as associated with a UK parent, in this case Sweett Group, and liability accrues to the parent, as illustrated in this case, despite the absence of any evidence that the bribes are made with the knowledge or approval of the parent.

Sweett Group was also criticised for failure to upgrade and enforce its anti-bribery systems and procedures in the Cypriot subsidiary despite being made aware by its auditors several years previously that those procedures were inadequate.

It is also notable that Sweett Group failed to secure a DPA, even though it pleaded guilty, as a penalty for failing to self-report the matter promptly (it only did so several months after the SFO had already opened its investigation) and for deliberately trying to mislead the SFO in the course of the investigation. This result emphasises the importance of early self-reporting and an open and co-operative approach to dealings with the SFO if a company is to stand any chance of being offered a DPA.

Richard Kingston – Following the conviction of the Sweett Group, the SFO continued a separate investigation into individuals at the company who were involved in alleged corruption relating to construction projects in Iraq. In December 2016, the SFO convicted Richard Kingston, the former managing director of the Sweett Group in the Middle East, for destroying mobile phones thought to contain information relevant to the SFO's investigations. He was jailed for 12 months.

H2O/Total Asset Finance – Four individuals have been found guilty of conspiracy to make corrupt payments and to commit fraud against Barclays Bank and the UK subsidiary of Belgian banking group KBC. The fraud, amounting to almost £160m, involved the creation of false contracts for the supply of internet cabling. The four individuals were sentenced to 15, 12, 10 and 7 years' imprisonment respectively, including 6 years for conspiracy to make corrupt payments.

Other bribery cases/investigations

The SFO has a number of other investigations ongoing, some of which are in the public domain, others not. Some of the more notable cases are reported as follows:

Airbus – the SFO is investigating the civil aviation business of Airbus in connection with allegations of irregularities concerning third party consultants.

F.H. Bertling – F.H. Bertling Ltd and seven individuals were charged in summer 2016 with conspiring to make corrupt payments to assist the award and retention of contracts for the company's freight forwarding business in Angola. As the allegations relate to activities between 2004 and 2006, pre-dating the Bribery Act 2010, the action is being brought under previous legislation.

Soma – At the end of 2016, the SFO announced it had finally closed its investigation into Soma Oil & Gas Ltd. Soma had applied for judicial review of the SFO investigation into its business, arguing that the cloud cast over the business by the long running bribery investigation (with which they were fully cooperating) was impacting its ability to raise finance. Just before the case was due to be heard last summer, the SFO conceded that there was insufficient evidence of criminality to proceed.

The Soma case illustrates how costly, in terms of both resource and reputation, an SFO investigation can be for the company concerned, but as the SFO

has frequently said, its remit is to investigate the most serious or complex cases and assembling evidence in such investigations takes considerable time and effort.

The SFO reportedly has a number of other significant investigations ongoing, including those involving GlaxoSmithKline, Barclays Bank and ENRC.

ANTI-CORRUPTION SUMMIT

Last year, the UK hosted an Anti-Corruption Summit attended by over 40 countries who signed up to a set of general principles designed to promote co-operation and information sharing in order to tackle the movement of corrupt money around the financial system and corruption in public contracting, health and sport.

Specifically, the UK's key commitments included the following:

- Introduction of a public register of beneficial ownership in UK companies. This measure came into force in June 2016 in the form of the PSC (persons with significant control) regime and is due to be updated shortly in line with the requirements of the 4th Money Laundering Directive.

- Establishment of a public register of beneficial ownership information of foreign companies owning UK real estate or bidding for UK government contracts (this measure is the subject of a public consultation).

- Introduction of a penalty for UK companies who fail to prevent employees from facilitating tax evasion and other economic crime. Such penalties would be modelled on the Bribery Act offence of failing to prevent bribery.

  The Criminal Finances Bill published in October 2016 incorporates two new criminal offences relating to failure to prevent tax evasion, and is expected to become law later this year.

  As to the separate offence of failing to prevent fraud, money laundering and other economic crimes, there is no formal consultation as yet. The Ministry of Justice is currently taking evidence as to whether legislative or regulatory reform is necessary (see **Review of Corporate Criminal Liability for Economic Crime** below).

- Development of an International Sport Integrity Partnership with international sports bodies, and launch of a domestic charter of integrity and good governance in sport.

- Developing a UK Anti-Corruption Strategy (the publication of which seems to have been delayed as a result of Brexit but work is underway).

- Launching an Anti-Corruption Innovation Hub to share and support innovative approaches to anti-corruption (expected to be launched later this year).

LARGE COMPANIES NOW REQUIRED TO REPORT ON ANTI-BRIBERY AND CORRUPTION ISSUES

Under the Non-Financial Reporting Directive, large public-interest companies in the UK (and across Europe) are now required to make disclosures about anti-bribery and corruption compliance issues in their strategic report.

The Directive requires the relevant companies to report on "instruments in place to fight corruption and bribery", i.e. to report on measures taken to address bribery risks and prevent bribery taking place in the organisation, alongside other disclosures on environmental and social issues and the company's diversity policy.

The new requirements apply to financial years beginning on or after 1 January 2017.

REVIEW OF CORPORATE CRIMINAL LIABILITY FOR ECONOMIC CRIME

In January 2017, the UK government launched a call for evidence on reforming the law on the liability of companies for economic crimes such as fraud, false accounting and money laundering, with a view to making it easier to bring criminal

prosecutions against companies in future. This is the government's second attempt at reform in this area. The proposal for a new offence of failure to prevent economic crime was included in the 2014 Anti-Corruption Plan, and shelved in 2015 for lack of evidence of widespread wrongdoing.

The proposal was resurrected following the conviction of the Sweett Group, the Standard Bank DPA and the XYZ DPA.

One of the options for reform is to create a new corporate offence of failure to prevent fraud/money laundering/false accounting which is modelled on the existing corporate offence of failing to prevent bribery (section 7 Bribery Act). As noted above, the government has already taken steps to apply the "failure to prevent" model of corporate liability to tax evasion.

The section 7 offence was designed to overcome the difficulties inherent in English law in attributing criminal intent to a corporate entity. For example, for a company to be successfully prosecuted for the core bribery offences of bribing and receiving a bribe, or under other legislation, such as fraud, it is necessary to identify a senior manager who is the "directing mind" of the company, for whose shortcomings the company may be held liable, and for that person individually to be guilty of the relevant offence.

In most large organisations, management functions are devolved, making it very difficult to satisfy that "directing mind" test. This same principle was largely responsible for the failure of high profile prosecutions against companies involved in high profile corporate manslaughter cases such as the Herald of Free Enterprise ferry disaster and the rail accidents at Clapham Junction and Hatfield.

By contrast, a conviction for the section 7 bribery offence does not require criminal intent on the part of an individual manager, just a failure in the organisation as a whole to prevent bribery (where the organisation does not have adequate procedures in place to prevent bribery).

A director can be prosecuted under the Bribery Act 2010 if he or she consented to or connived in bribery carried out by the company, *but only* if the company is itself found guilty of the primary offence of bribing or receiving a bribe.

Other options for reform set out in the call for evidence include:

- broadening the scope of those considered to be a "directing mind" for the purposes of the current law;
- a strict (vicarious) liability offence which would make the company liable for the actions of its employees and agents without the need to prove fault on the part of the company;
- a strict (direct) liability offence whereby a company would be directly liable for offences committed on its behalf;
- a new "failure to prevent" offence modelled on section 7 of the Bribery Act; or
- strengthening regulatory (rather than criminal) penalties for misconduct on a sector-by-sector basis (modelled on the accountability regime applicable to senior managers in the financial services sector).

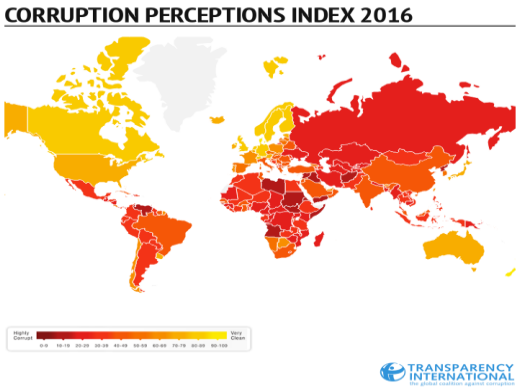
The proposals for reform set out in the call for evidence apply only to economic crimes other than bribery and tax evasion so, for the time being, there is no suggestion that it could become easier to prosecute a company for the core bribery offences.

However, the pursuit of any of these options for reform could have a significant impact on corporate governance and risk management procedures, requiring companies to implement new compliance measures as many had to do when the Bribery Act was first introduced.

The call for evidence closes at the end of March. Given that the government has stopped short of launching a formal consultation on proposals for reform, it is still possible that it will conclude that no further action is necessary, as it did back in 2015.

LATEST CORRUPTION PERCEPTIONS INDEX FROM TRANSPARENCY INTERNATIONAL

The UK remains close to the top of the table of the least corrupt territories in the 2016 Corruption Perceptions Index, sitting alongside Germany and Luxembourg.



However, as noted by Transparency International, there is no room for complacency and no territory gets close to a perfect score - the UK's score is 81/100 which keeps it at 10th equal in the table.

Two thirds of the countries included in the index score below 50, and indeed, the global average is 43/100, suggesting widespread and endemic public sector corruption. Even those with reasonable scores are not showing year-on-year improvement, and Transparency International notes that having a comprehensive legal framework to eradicate bribery is not enough. Effective implementation will be the key to improving our ranking and hopefully the SFO's recent successes will begin to make an impact.

If you have any questions about any of the topics discussed in this newsletter, please do get in touch.

Travers Smith LLP, March 2017

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