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Corporate Economic Crime: bribery & corruption

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Inside:

Contents

Summary

Corporate economic crime is a complex subject on many levels, and efforts at strict definitional exactitude rapidly become self-defeating. Most obviously, companies cannot do anything – people commit criminal acts. The problem at the heart of this subject is how, and when, to separate the company from the individual and, very often, whether it is actually possible to decide who, amongst the management or board, was responsible for the act or acts complained of.

Company offences largely fall under the following headings:

- financial services
- Companies Act offences
- insolvency
- bribery and corruption
- tax fraud
- trading standards

A commonly held view is that too few people are prosecuted for corporate failings. This was exemplified in the financial crash when regulators found little ground on which to bring charges against people for failed banks. New measures in financial services legislation – the senior managers' regime - allow greater identification of individuals with corporate failure.

There has been a new focus on bribery and corruption in the UK and in the wider world. The World Bank has estimated that corruption adds up to 10% to business costs globally and according to the OECD, corruption costs around 5% of global GDP every year.

The UK hosted a major international anti-corruption summit in 2016. This and other initiatives have been recognised by the OECD as evidence that the "UK has made strong progress fighting foreign bribery".

The use of the *Bribery Act* has resulted in successful prosecutions, with more likely to follow, and the first use of the deferred prosecution agreement procedures.

1. Company offences

Corporate economic crime is a complex subject on many levels and efforts at strict definitional exactitude rapidly become self-defeating. Most obviously, companies cannot do anything – people commit criminal acts. The problem at the heart of this subject is how, and when, to separate the company from the individual and, very often, is it actually possible to decide who, amongst the management or board, was responsible for the act or acts complained of.

- 'Companies' covers a very wide range of organisations from multi-nationals to small social enterprise organisations.
- 'Crime' is difficult to define with respect to companies. At its simplest, 'criminal' means anything that is set out as an offence in any statute law provision. However, that would not include the huge array of offences that, for example, financial firms can commit if they break the rules of the financial services regulator. If this category is excluded because what are broken are simply 'rules', then some of the biggest fines on the largest corporations in the country would be excluded.
- If crime is simply something that is not an act rectifiable by civil proceedings then the vast bulk of employment legislation and health and safety become 'crimes' when perhaps this would not be at the forefront of what campaigners think of as 'crime' – particularly 'economic' crime.
- Obvious crimes, such as those under the *Corporate Manslaughter and Corporate Homicide Act 2007* would, however, fall outside of the usual definition of 'economic'.

With these caveats in mind, a reasonable starting list of the broad areas of corporate offences include the following.

Financial services

These rules are set by an independent body – the Financial Conduct Authority – and cover a wide range of acts. A Library note *Crimes and misdemeanours: penalties and punishment in the UK financial services sector* explains the structure of regulation and how breaches are treated at several levels.

Companies Act offences

Companies Act 2006 offences cover a huge range of offences, including auditing, insolvency, company formation and listing, reporting and others.

Hence even 'administrative' non-compliance could be considered 'economic crime' if the impact was on potential investors.

The *Fraud Act 2006* introduced a general fraud crime and associated offences. These apply to companies by way of the *Companies Act 2006*.

Insolvency

Many of the offences under the Insolvency Act 1986 are generally designed to prevent or rectify situations where the directors of a company use the 'shield' of the company for personal enrichment. For example, when directors take large sums from their company, which then closes owing money to creditors. This is often described as the 'phoenix company' syndrome. A number of offences are set out in Schedule 10 of the 1986 Act. Some of these are directed to officers of the company or the insolvency officers; some to the company itself. Others apply to bankrupts. There is a logical difficulty in applying financial sanctions to an insolvent company. However, insolvency is not the only reason why a company might close.

Bribery and corruption

The *Bribery Act 2010* replaced a range of previous offences at common law with two general offences covering the offer, promise and giving of an advantage or request, agreeing to receive or accepting an advantage. More details on the work of the Bribery Act can be found in a Law Society practice note.

Tax fraud and evasion

Tax fraud and evasion could cover almost anything to do with corporation tax, national insurance, VAT, etc. In general the offence would be a failure to properly account for income or expenditure as stated in the *Corporation Tax Act 2010*. HMRC's website gives an explanation of the department's powers regarding criminal investigations. More information on HMRC powers regarding tax compliance, including statutory penalties for late payments, is set out in their Compliance Manual.

Trading Standards

Regulations in this area cover all aspects of commercial transactions – what is sold, where it is sold, who it is sold to and sector-specific requirements such as in agriculture. The 'law' varies between detailed SIs on weights and things with a broader scope, such as the *Consumer Rights Act 2015*.

The main focus of campaigners (and governments) in recent years has been on bribery, corruption and tax avoidance. Material on tax avoidance can be found in another Library Paper: 'Corporate Tax Reform (2010-2016)'; material on the Fraud Act can be found in Library Paper: the Fraud Bill; material on insolvency provisions can be found in a forthcoming Library Paper: Directors' Responsibilities in Insolvency.

Impact of corruption

A good summary of the impact of business corruption can be found in the foreword to a 2016 consultation document about beneficial ownership:

> The World Bank has estimated that corruption adds up to 10% to business costs globally. According to the OECD, corruption costs around 5% of global GDP every year. If this could be cut by just

5%, it would add as much to global GDP as was estimated for the Doha Development Trade Round.

Crime organisations and corrupt individuals frequently use companies to hide the proceeds of bribery, corruption and organised crime. Organised crime costs the UK at least £24 billion each year. Criminals deliberately try and obscure the ultimate ownership of these companies to distance themselves from the assets they really control and ensure law enforcement agencies, regulators, legitimate businesses and the general public are unaware of the true role the companies they control are performing.

Lifting the veil of secrecy over who ultimately owns and controls companies can therefore expose wrongdoing and disrupt a key vehicle for illicit financial flows, including those derived from corruption. The 2015 UK National Risk Assessment of Money Laundering and Terrorist Financing found that billions of pounds of suspected proceeds of corruption are laundered through the UK each year. To tackle corruption more effectively, the UK Government is considering ways to improve transparency in ownership and control of foreign companies that are active in certain ways in the UK.

Enhanced transparency and the associated trust that goes with it is good for business and good for growth. The Government has already taken a series of steps to tackle tax evasion and tax avoidance to ensure that overseas investors pay their fair share and greater transparency will help to complement those steps and ensure that the UK continues to be a safe and secure place to invest.[1]

[1] Department of Business, Innovation and Skills; *Beneficial ownership transparency: Enhancing transparency of beneficial ownership information of foreign companies undertaking certain economic activities in the UK* March 2016.

2. Bribery and corruption

There is nothing particularly new about allegations that UK companies operating overseas either make or have received bribes, but the scrutiny they now face from a range of organisations is at a greater level than ever.

Investors look at the factors that can affect their investment. Charities, trade unions and NGOs scrutinise companies in light of their particular interest, be it the environment, economic development, labour standards or social rights. Governments scrutinise them for their economic and financial activity and the diplomatic or political impact that they may have. Governments around the world also take a joint interest in this as there is an acceptance that international businesses should be conducted openly and fairly and that conditions that promote corrupt practices are destructive of normal commercial relationships.

Because of the spread of interest it is not surprising that controls on companies overseas and their responses to it should be varied in both their aim and impact. Of particular historical concern has been the behaviour of companies involved in mineral extraction and defence companies. Both industries are characterised by contracts that are substantial in value, offer monopoly rights and can last for many years or decades. The value of that contract or agreement is therefore immense and the temptations to influence an outcome similarly huge.

A commonly held view is that too few people are prosecuted for corporate failings. This was exemplified in the financial crash when regulators found little ground on which to bring charges against people for failed banks. Even whole types of activity – e.g. benchmark activity like the LIBOR fixing process - was found to be outside of regulatory scope. That prompted subsequent legislation to rectify that outlined in another Library briefing note.

Who is responsible and who would be the prosecuting authority are often not transparent within financial services – the sector where the biggest problems have arisen. There is a point at which offences become serious enough to be pursued by the Serious Fraud Office (SFO), but, until that point, it is the role of the FCA to punish conduct. However, defining that point is very difficult. (See Library note *Crimes and misdemeanours: penalties and punishment in the UK financial services sector* for more on this.)

With respect to *Companies Act* offences, a detailed review of company law preceded the Act and the guiding principle for future liability was:

> criminal liability should only be imposed where the "victims" of the default were outsiders (i.e. not the company or its members). A review of all the offences in the Companies Acts was conducted in the light of this general principle. Thus, for the most part, noncompliance with those provisions requiring the company to make proper returns to the registrar of company will continue to amount to a criminal offence. This is because the register is a

> public document and may be relied upon by "outsiders" to the company for accurate and up-to-date information.[2]

This principle reflects the fact that a company fine is ultimately paid by the shareholders. If they are victims too, e.g. in an accounting fraud/mistake, then they will effectively have been punished twice.

2.1 Controls on bribery

Over a long period, successive UK governments have worked to improve UK governance on bribery issues. These were outlined in a 2005 written answer.

> More generally, the Government have taken a number of steps in recent years with regard to preventing corruption and empowering law enforcers to investigate such offences. For example, by means of part 12 of the ***Anti-terrorism, Crime and Security Act 2001 (ATCS Act),*** which clarifies that the existing offences of bribery apply to the bribery of foreign officials and introduces a new jurisdiction over acts of bribery committed by UK nationals or UK-based companies overseas.
>
> The UK has also ensured it has an adequate legal framework to implement the OECD Convention, as specifically acknowledged by the OECD Working Group on Bribery. In addition, the Government have made progress towards ratification of the UN Convention Against Corruption with the ***Serious Organised Crime and Police Act 2005***.The Government continue to make efforts elsewhere to prevent foreign bribery, for example, by stepping up its awareness-raising activities with the business community, public officials—in the UK and overseas missions—and NGOs to improve knowledge of the law and of the damage caused by international corruption.
>
> We are exploring sector-specific initiatives with business, e.g. in construction and engineering, to ensure that companies operating in these high-risk areas understand their obligations. And we continue to support codes of conduct and business principles promulgated by the likes of the International Chamber of Commerce and the World Economic Forum. Separately, ECGD has launched a consultation exercise on its anti-bribery measures (applicants for Export Credits Guarantee Department (ECGD) support must of course already comply with its anti-bribery and corruption procedures, which are amongst the most robust in use by any of the world's leading Export Credit Agencies).At the same time, law enforcers have streamlined the arrangements that relate to the handling of such allegations.[3]

UK Export Finance (ECGD)

ECGD, (mentioned in the quote above, and now called UK Export Finance) in a response to previous consultations, published in January 2016 a statement of its anti-bribery position:

> Our anti-bribery and corruption policy was largely established in a series of Government Responses to a public consultation that were published in 2005-06. The aim was to establish how we should play our part in the Government's efforts to combat bribery. The objective was that we should avoid supporting export transactions that may be tainted by bribery and thereby put the

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2 Palmer's Company Law pp2.1804

3 HC Deb 16 June 2005, 435 c612-3W

> taxpayer at risk. A statement of our role in deterring bribery as published by the Government in 2006 is reproduced at Annex A to this document.
>
> We apply a number of principles to fulfil the objective as follows:
>
> - inform customers of the consequences of bribery (as established in the Bribery Act 2010)
> - warn our customers that we will pass any suspicions relating to bribery, corruption or money laundering to investigatory bodies (e.g. the Serious Fraud Office)
> - require customers to make declarations and undertakings that neither they nor certain classes of persons associated with the supply of the exports (e.g. any agent, group company or consortium partner) has engaged in corrupt activity or been convicted or blacklisted for engaging in corrupt activity
> - require customers to supply information about the use of agents in relation to the export transactions we are asked to support
> - make reasonable enquiries to inform a judgement as to whether or not those export transactions may be tainted by bribery or corruption
> - obtain recourse rights so that we can recover any loss suffered where bribery or corruption has occurred in relation to those export transactions[4]

Extractive Industries Transparency Initiative

The most specific environmental target, especially for the large multi-national companies, is the Extractive Industries Transparency Initiative (EITI). This is a DfID inspired proposal aimed at providing a forum for monitoring the activities of those companies which are most often accused of some of the worst aspects of overseas exploitation and harm to natural resources. There is a considerable amount of information published on the DfID website. The Department's press release states:

> The EITI was launched by Tony Blair at the World Summit on Sustainable Development in September 2002. It seeks to increase the transparency of payments by oil, gas, and mining companies to governments, as well as the transparency of revenues received by governments. The aim is to ensure that revenues from the extractive industries fulfil their potential as an important engine for economic growth in developing countries, instead of leading to conflict, corruption, and poverty.
>
> A major international conference on EITI was held in London in March this year. That conference agreed a set of rules that clearly defines the steps that a country must take to implement EITI. Ten countries are currently implementing the initiative: Azerbaijan, Republic of Congo, Democratic Republic of Congo, Ghana, Kyrgyz Republic, Nigeria, Peru, Sao Tome e Principe, East Timor, and Trinidad and Tobago. A number of other countries have endorsed the initiative and are currently considering how to implement the initiative.

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4 UK Export Finance Consultation Summary

> The International Advisory Group was set up on 1 July 2005, it is described below:
>
> The following governments, companies, and organisations have accepted invitations to sit on the International Advisory Group:
>
> Governments: Azerbaijan, France, Nigeria, Norway, USA
>
> Companies: Anglo American, BP, Chevron
>
> Civil Society: Open Society Initiative, Global Witness, Central African Bishops Conference (Cameroon), The Coalition for Improving Transparency in the Extractive Industries (Azerbaijan)
>
> Investors: F&C Asset Management
>
> The group will be supported by a Secretariat in DFID, with help from the World Bank and the IMF.[5]

The directive's core principles include:

> Participants in the Initiative acknowledge the following principles:
>
> - We share a belief that the prudent use of natural resource wealth should be an important engine for sustainable economic growth that contributes to sustainable development and poverty reduction, but if not managed properly, can create negative economic and social impacts.
>
> […]
>
> - We recognise that a public understanding of government revenues and expenditure over time could help public debate and inform choice of appropriate and realistic options for sustainable development.
> - We underline the importance of transparency by governments and companies in the extractive industries and the need to enhance public financial management and accountability.
>
> […]
>
> - We believe in the principle and practice of accountability by government to all citizens for the stewardship of revenue streams and public expenditure.
> - We are committed to encouraging high standards of transparency and accountability in public life, government operations and in business.
>
> […]
>
> - In seeking solutions, we believe that all stakeholders have important and relevant contributions to make - including governments and their agencies, extractive industry companies, service companies, multilateral organisations, financial organisations, investors and nongovernmental organisations.[6]

Currently there are 51 'implementing' countries attached to EITI, covering revenues of $2.3 trillion.[7] Further details may be found on the EITI website.

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5 EITI press release 1 July 2005

6 EITI: Statement of Principles and Agreed Actions, 17 June 2003

7 EITI website

Because it is so central, the issue of measures to counter bribery, and in particular the *Bribery Act 2010*, are contained in the next section of this Paper. Several other initiatives of different sorts are under way as at Spring 2017 to deal with aspects of corruption.

Criminal Finances Act 2017

One of a series of initiatives introduced by the then Prime Minister, David Cameron, following the publication of the 'Panama Papers' was a new Criminal Finances Bill.

Now, as the *Criminal Finances Act,* it provide for a number of measures aimed at improving the Government's ability to target organised crime, focusing in particular on money-laundering and terrorist finances. It amends the Proceeds of Crime Act 2002; make provision in connection with terrorist property; create corporate offences for cases where a person associated with a body corporate or partnership facilitates the commission by another person of a tax evasion offence.

It also introduces a new corporate offence where a corporation or a partnership fails to prevent someone who acts for it, or on its behalf, from criminally facilitating tax evasion.

A government Guidance Document outlines the main provisions and how it is envisaged it will work in practice.

Corporate fraud

The Ministry of Justice (MoJ) announced on 12 May 2016 that it would consult on extending the criminal law around failure to prevent economic crime, to encompass other forms of crime beyond bribery and tax evasion.

In January 2017 the MoJ announced a call for evidence for its review. Submissions had to be in by 24 March 2017. The press release stated:

> The call for evidence is concerned with criminal offences designed to punish and prevent economic crimes such as fraud, false accounting and money laundering when committed on behalf or in the name of companies.
>
> It seeks evidence on the extent to which the identification doctrine is deficient as a tool for effective enforcement of the criminal law against large modern companies.

Beneficial ownership of land and real property in the UK

The UK country statement released after the London Anti-Corruption Summit in May 2016 said that the UK would create a public register of beneficial ownership of foreign companies owning or buying property in the UK.

The consultation paper – *Beneficial ownership transparency: Enhancing transparency of beneficial ownership information of foreign companies undertaking certain economic activities in the UK* – was published by the then Department of Business, Innovation and Skills (BIS) in March 2016. Whilst corruption and economic crime can cause harm in many

ways, the focus of the initiative was property and procurement. The Paper explains why:

> **Property** can provide a convenient vehicle for hiding the proceeds of crime. A recent study found that a quarter of solicitors firms surveyed had experienced clients attempting to use property transactions to launder money or commit fraud.
>
> UK property is in any case attractive to overseas investors due to the UK's stable and open political and business climate. This also attracts criminal organisations and corrupt individuals who want a good investment and may also seek the badge of wealth and respectability that UK property ownership can bestow. The high values of property in London in particular, presents an opportunity for criminals to launder considerable sums of money in one transaction.
>
> Between 2004-2014, over £180m worth of property in the UK has been investigated by UK law enforcement as suspected proceeds of corruption. Moreover, over 75% of these properties use offshore corporate ownership. This is believed to be the tip of the iceberg in terms of the scale of the proceeds of corruption invested in UK property through offshore companies.
>
> **Public procurement** of goods and services in the UK amounted to £242bn in 2013/14, which accounted for 33% of public sector spending. Obtaining more complete beneficial ownership information on foreign companies could have a number of potential benefits including:
>
> - ensuring that the Government receives the best value for money on behalf of tax payers,
> - ensuring that legitimate businesses participating in public contracting are treated fairly, and
> - preventing corrupt individuals and organised crime laundering the proceeds of their crime through public contracts.[8]

Small Business, Enterprise and Employment Act

In July 2013 the Government issued a 'discussion paper': *Transparency & Trust: Enhancing the transparency of UK company ownership and increasing trust in UK business* on the broad question of whether there should be greater transparency of ownership for a wider group of companies and how 'trust' in UK companies might be increased.[9] The Executive Summary began by emphasising the public benefits of transparency and trust:

> Business success - and therefore economic growth - depends on investors, employees, consumers and the wider public having confidence in business. When companies do business with each other, those transactions must also be built on trust.
>
> In the UK, we have a history of championing the importance of good corporate governance – and that trend continues. We are ensuring that equity markets support long-term growth through the implementation of Professor Kay's recommendations. We are working to improve the diversity of UK boardrooms and to

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8 Department of Business, Innovation and Skills; *Beneficial ownership transparency: Enhancing transparency of beneficial ownership information of foreign companies undertaking certain economic activities in the UK* ; March 2016.

9 BIS, *Transparency & Trust*; July 2013

> encourage companies to focus on the issues that really matter through changes to narrative reporting. And our executive pay reforms, which will come into force in the autumn, have been widely welcomed.
>
> These reforms are important – we know that good corporate governance is inherently linked to trust in our capitalist system and that effective governance is therefore a critical characteristic of a business environment that promotes long-term sustainable growth. This in turn makes the UK an attractive place for business and investment.
>
> […]
>
> We know that the overwhelming majority of UK companies contribute productively to the UK economy, abide by the law and make an enormous contribution to society. Companies make up over 60% of private enterprises and over 80% of private enterprise employment and 95% of turnover1.
>
> But there are exceptions. Increased transparency can help shine a light on those who don't play by the rules and pave the way for legitimate investment. Transparency is also an essential element of good corporate governance - it gives investors and others the tools to hold companies to account.
>
> Businesses, investors, employees and consumers must have confidence that companies are acting fairly and that those who don't will be identified and appropriately sanctioned. Businesses and individuals who behave honestly and responsibly should not be at a disadvantage to those who do not. Having an effective and trusted system for identifying and dealing with poor business behaviour gives reassurance that we operate a level playing field, and creates an environment in which investors and honest entrepreneurs are willing to invest in activities promoting growth and employment.[10]

It continued by outlining the current deficiencies in the law:

> We already know who legally owns UK companies. The names of legal owners appear on an individual company's share register, which is publicly available. But if we want to know who *really* owns and controls a company, we must identify its beneficial owners too. The beneficial owners are the individuals that ultimately own or control the company - either because they hold an interest in more than 25% of the company's shares or voting rights; or because they control the management of the company in some other way. With this level of interest or control, they can materially influence corporate decisions, and this confers the potential for abuse, irrespective of whether they own or control the company directly as a legal owner or director or indirectly by using a nominee shareholder or director to own shares or manage the company on their behalf.
>
> There is currently no requirement for companies to hold information on their beneficial owners as a matter of course. This means that individuals can hide the fact that they own or control a company; and then use the company to help them carry out a range of illegal activities. It is very difficult to prove that these individuals are linked to the company in question, which

[10] ibid., pp8-9

> decreases the likelihood of a successful outcome for law enforcement and tax authorities.[11]

The Government's response can be found in an April 2014 report, "Transparency & Trust," published in April 2014 and, later, as Sections 81 to 83 of the *Small Business, Enterprise and Employment Act 2015*, which increase the transparency of ownership of companies, especially (in many cases) the beneficial owners of overseas companies.

2.2 The Bribery Act

The *Bribery Act 2010* is now central to the UK's anti-bribery regime. The Act replaces the offences at common law and under the *Public Bodies Corrupt Practices Act 1889*, the *Prevention of Corruption Act 1906* and the *Prevention of Corruption Act 1916* with two general offences covering the offer, promise and giving of an advantage or the request, agreeing to receive or acceptance of an advantage.

The formulation of these two offences abandons the agent/principal relationship in favour of a model based on an intention to induce improper conduct. The Act also creates a discrete offence of bribery of a foreign public official and a new offence of negligent failure of commercial organisations to prevent bribery.

The Library Paper on the Bill can be found here. The extent to which the legislation has proven to be effective is debated.

The Serious Fraud Office (SFO) (the UK's chief enforcement agency) has a budget much smaller than the companies it is up against. According to the SFO's 2015/16 Annual Report and Accounts, its total budget is forecast to decline from £35.7 million in 2015/16 to £33.5 million in 2019/20. However, the SFO point out that there is the option of 'exceptional case additional funding' agreed with the Treasury should it be needed.[12]

Organisational and operational issues have had to be resolved first, namely how the SFO and the National Crime Agency work together.

Addressing why the pace of prosecution had been slow, the then Joint Head of Fraud at the SFO said, in November 2014 that:

> there have been Bribery Act prosecutions: the first SFO prosecution is at court, in front of a jury at Southwark Crown Court as I speak. It is the 'Sustainable AgroEnergy 'Bio Fuel' case and it includes charges under the 2010 Bribery Act, as part of a wider fraud case;
>
> the Bribery Act is not retrospective. Therefore, for conduct to be criminal under the Act it has to have been undertaken after 1 July 2011. Often conduct of this type takes some time to surface; and, once it does, it takes time to investigate. SFO cases must, by definition, be serious or complex and they very often include international parties and conduct. While the SFO is always striving

11 ibid., p10
12 SFO Annual Report & Accounts 2015/16.

> to investigate criminal conduct in as timely a way as possible, these types of cases will take some time to move through the process of investigation and on to prosecution;
>
> the Bribery Act represented a very significant shift in setting the standards for the more ethical corporate culture I referred to a moment ago. When one looks at legislation of this kind, both here and abroad, one can see that a flow of prosecutions can take time to develop. We only have to look at the 1977 Foreign Corrupt Practices Act in the USA, to see that it took many years for that work to build up a head of steam, and not really until the turn of the century did we start to see the level of prosecutions that we do now.[13]

Against these challenges the SFO has been able to record its first bribery related successes in its 2015/16 Annual Report:

> Reflecting our strategic focus and the exercise of newly-available powers, the SFO secured the first Deferred Prosecution Agreement (DPA) in November 2015. In it, Standard Bank accepted responsibility for having failed to prevent bribery in connection with operations in Tanzania. As conditions of the DPA, the bank paid £4.7m ($7m) in compensation to the government of Tanzania and a fine and disgorgement of £16.8m ($25.2m).
>
> By contrast the Sweett group was prosecuted and pleaded guilty to the corporate offence of failing to prevent bribery by associated persons under section 7 of the Bribery Act 2010.[14]

Subsequent to this the SFO has been able to announce the following press release in January 2017:

> Following a four year investigation, the SFO and Rolls-Royce entered into a Deferred Prosecution Agreement (DPA) which was approved by Sir Brian Leveson, President of the Queen's Bench Division on 17 January 2017. The DPA enables Rolls-Royce to account to a UK court for criminal conduct spanning three decades in seven jurisdictions and involving three business sectors.
>
> The DPA involves payments of £497,252,645 (comprising disgorgement of profits of £258,170,000 and a financial penalty of £239,082,645) plus interest. Rolls-Royce are also reimbursing the SFO's costs in full (c£13m).
>
> The investigation into the conduct of individuals continues.

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13 Stuart Alford QC, Joint Head of Fraud at the Serious Fraud Office; speech November 2014

14 SFO Annual Report & Accounts 2015/16.

3. Prosecutions

A number of agencies are involved with the enforcement of prosecutions in this area. The two non-police bodies are the Serious Fraud Office (SFO) and the FCA.

Serious Fraud Office

The SFO's current position and methods in dealing with fraud is different from that of other crimes, and dates from the approach recommended by the Roskill Committee Report. Again from the SFO website:

> During the 1970s and early 1980s, there was considerable public dissatisfaction with the UK system for investigating and prosecuting serious or complex fraud.
>
> The Government established the independent Fraud Trials Committee in 1983. Chaired by Lord Roskill, it considered the introduction of more effective means of fighting fraud through changes to the law and to criminal proceedings.
>
> The 'Roskill Report' (Fraud Trials Committee Report) was published in 1986.
>
> Its main recommendation was to set up a new organisation responsible for the detection, investigation and prosecution of serious fraud cases. The organisational structure it proposed, in which investigators and prosecutors work together from the start of a case, is called the Roskill model and is the structure adopted for the SFO.

In June 2017, the SFO announced prosecutions against individuals who work or have worked for Barclays Bank. The action relates to efforts to raise capital for the bank during the worst of the financial crisis in 2008. A BBC news report gives some context.

Financial Conduct Authority

The Financial Conduct Authority (FCA) was established by the *Financial Services Act 2012*. It replaced the previous Financial Services Authority which was established by the *Financial Services and Markets Act 2000* or FSMA. The FCA is an independent (of government) regulator with its own rule making capacity.

The FCA only has full regulatory power over people or firms conducting regulated activities. The statutory list of activities that come within its remit are set out in secondary legislation, namely the *Financial Services & Markets Act 2000 (Regulated Activities) Order 2001* (and subsequent amendments. However, by virtue of its responsibility for the UK listing Rules, the FCA, may also have authority in cases where there has been 'market abuse'. For example, Tesco was fined by the FCA for accounts' misstatements.

Market abuse frequently encompasses insider dealing offences in connection with share trading, but is drawn more broadly to include 'qualifying investments'. Confusingly, the FCA's only has powers to impose civil penalties on individuals for market abuse actions. However, the FCA can prosecute (except in Scotland) three offences of insider

trading under the authority of the *Criminal Justice Act 1993*. The offences are those of:

- Insider trading;
- Money laundering
- Offences under Schedule 7 to the Counter Terrorism Act 2008 (terrorist financing or money laundering)

The overwhelming bulk of 'law' which the FCA administers is not statutory law, however, but its own rules – to be found in its Handbook. The overwhelming bulk of punishments are fines, either on a company or on individuals, rather than criminal sentences.

There is a substantial section on the FCA website which sets out its enforcement powers and policy and when it decides to conduct a full investigation. The actual enforcement guidelines are set out in the FCA's rulebook – the Handbook - here or in this (marginally more readable) document published in April 2016 here or in this very abbreviated format here.

The point at which the FCA decide to undertake criminal proceedings is explained in Section 12 of the Guide on Prosecution of Criminal Offences. However the guidelines are different for each type of offence. The general guidelines in cases of market abuse for example are set out below:

> The factors which the *FCA* may consider when deciding whether to commence a criminal prosecution for market misconduct rather than impose a sanction for *market abuse* include, but are not limited to, the following:
>
> (1) the seriousness of the misconduct: if the misconduct is serious and prosecution is likely to result in a significant sentence, criminal prosecution may be more likely to be appropriate;
>
> (2) whether there are victims who have suffered loss as a result of the misconduct: where there are no victims a criminal prosecution is less likely to be appropriate;
>
> (3) the extent and nature of the loss suffered: where the misconduct has resulted in substantial loss and/or loss has been suffered by a substantial number of victims, criminal prosecution may be more likely to be appropriate;
>
> (4) the effect of the misconduct on the market: where the misconduct has resulted in significant distortion or disruption to the market and/or has significantly damaged market confidence, a criminal prosecution may be more likely to be appropriate;
>
> (5) the extent of any profits accrued or loss avoided as a result of the misconduct: where substantial profits have accrued or loss avoided as a result of the misconduct, criminal prosecution may be more likely to be appropriate;
>
> (6) whether there are grounds for believing that the misconduct is likely to be continued or repeated: if it appears that the misconduct may be continued or repeated and the imposition of a financial penalty is unlikely to deter further misconduct, a criminal prosecution may be more appropriate than a financial penalty;

(7) whether the person has previously been cautioned or convicted in relation to market misconduct or has been subject to civil or regulatory action in respect of market misconduct;

(8) the extent to which redress has been provided to those who have suffered loss as a result of the misconduct and/or whether steps have been taken to remedy any failures in systems or controls which gave rise to the misconduct: where such steps are taken promptly and voluntarily, criminal prosecution may not be appropriate; however, potential defendants will not avoid prosecution simply because they are able to pay compensation;

(9) the effect that a criminal prosecution may have on the prospects of securing redress for those who have suffered loss: where a criminal prosecution will have adverse effects on the solvency of a *firm* or individual in circumstances where loss has been suffered by *consumers*, the *FCA* may decide that criminal proceedings are not appropriate;

(10) whether the *person* is being or has been voluntarily cooperative with the *FCA* in taking corrective measures; however, potential defendants will not avoid prosecution merely by fulfilling a statutory duty to take those measures;

(11) whether an individual's misconduct involves dishonesty or an abuse of a position of authority or trust;

(12) where the misconduct in question was carried out by a group, and a particular individual has played a leading role in the commission of the misconduct: in these circumstances, criminal prosecution may be appropriate in relation to that individual;

(12A) where the misconduct in question was carried out by two or more individuals acting together and one of the individuals provides information and gives full assistance in the *FCA's* prosecution of the other(s), the *FCA* will take this co-operation into account when deciding whether to prosecute the individual who has assisted the *FCA* or bring market abuse proceedings against him;

(13) the personal circumstances of an individual may be relevant to a decision whether to commence a criminal prosecution.

Co-operation

The boundaries between the respective authorities are not easy to delineate, or summarise precisely. At its simplest the SFO gets involved when something is serious enough for it to be so.

There are several instances where an investigation starts with the FCA but ends with the SFO, or both agencies levy their own punishments according to their specific jurisdictions – for example in the Tesco case.

At other times, action by the FCA is in conjunction with the police, for example the case of the Reading-based Impaired Assets team of Halifax Bank of Scotland (HBOS) which was first investigated by the FCA, then by the Thames Valley police and then, after the police had finished, the FCA investigation was resumed.

A convenient source for the way the various groups operate together can be found in the part of the FCA's Enforcement Guide which deals with prosecutions. This can be found in Appendix 2 of the EG Section of the Handbook. The guidelines cover co-operation amongst the following bodies:

- the Financial Conduct Authority (the *FCA*);
- the Serious Fraud Office (the SFO);
- the Department for Business, Innovation and Skills (BIS);
- the Crown Prosecution Service (the CPS);
- the Association of Chief Police Officers in England, Wales and Northern Ireland (ACPO);
- the Crown Office and Procurator Fiscal Service (COPFS);
- the Public Prosecution Service for Northern Ireland (the PPS);
- the Association of Chief Police Officers in Scotland (ACPO).

From the other side, specific detailed memoranda of understanding between the SFO and other agencies can be found here.

The SFO website states that:

> The SFO works with other law enforcement partners to tackle the challenges faced from serious and organised crime in line with the Government's Serious and Organised Crime Strategy. In particular we work closely with:
>
> - The National Crime Agency's Economic Crime Command, International Corruption Unit and Bribery and Corruption Intelligence Unit
> - The City of London Police, including its Economic Crime Directorate, Action Fraud, and the National Fraud Intelligence Bureau
> - UK police forces and Regional Organised Crime Units, Regional Asset Recovery Teams and Regional Fraud Teams
> - HM Revenue & Customs
> - The Financial Conduct Authority
>
> The SFO also works collaboratively with UK Government departments, including our superintending department, the Attorney General's Office, the Home Office and Ministry of Justice, and with overseas partners, such as the US Department of Justice, on matters where there is a common interest.[15]

[15] SFO website

4. Has the UK government been successful in reducing bribery and corruption?

The answer to this question can always be "no". Finding an agreed level of what is "enough" though is very much harder. Like other types of crime, corporate crime will always exist and periodically there will be revelations to highlight particularly bad cases or concerns about prevalent behaviours, which will prompt renewed government action. The disclosure of reports in March 2017 about the extent of money laundered through London is one such example. The OECD Foreign Bribery Report published in 2014 suggests that the problem of corruption amongst public officials remains severe.

Also it is clear that some aspects of what might be called corruption require greater or lesser degrees of international co-operation to combat them. This co-operation is not always forthcoming or as extensive as it needs to be.

Concerns that the UK government, despite accepting the need for anti-corruption initiatives, has not done 'enough' first surfaced with respect to its record on implementing the OECD Convention on Bribery.

An OECD report into UK compliance in March 2005 gave mixed signals about the UK's efforts:

> Although the recommended legislative changes have not been implemented, the examiners recognise that the UK authorities have made substantial efforts to prepare draft legislation and engage in wide consultations in that regard. Generally, the absence of specific case law on the bribery of foreign public officials in a common law country makes it difficult to evaluate how effectively the current system works (with regard, for instance to the scope of application, relevance and clarity of the terms used, efficiency of sanctions, etc.).
>
> […]
>
> In addition, given the size of the UK economy and its level of exports and outward FDI, along with its involvement in international business transactions in sectors and countries that are at high risk for corruption, it is surprising that no company or individual has been indicted or tried for the offence of bribing a foreign public official since the ratification of the Convention by the UK.[16]

The latest OECD commentary, in March 2017, was more positive, though much remained to do and much rested on the continuing effectiveness of the SFO. It acknowledges that the "UK has made strong progress fighting foreign bribery, but uncertainty over Serious Fraud Office role remains":

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[16] OECD, Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions & the 1997 Recommendations on Combating Bribery in International Business Transactions, March 2005

> The OECD Working Group on Bribery has just completed its Phase 4 evaluation on the UK's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. While the report praises the UK's enforcement efforts and high-level political commitment to fighting foreign bribery, it also calls on the UK to further improve interagency cooperation, and to ensure the independence of investigations and prosecutions.
>
> The Working Group has made further recommendations to improve the UK's fight against foreign bribery, including with respect to:
>
> - Scotland improving its enforcement capacity with respect to foreign bribery, particularly in light of the high concentration in Scotland of companies operating in corruption-sensitive sectors;
> - The UK enhancing its anti-money laundering reporting framework to improve detection of foreign bribery;
> - The UK strengthening engagement with the Crown Dependencies and Overseas Territories regarding the detection and enforcement of foreign bribery; and
> - HMRC conducting a comprehensive review of its methods and capacity to detect and report foreign bribery.[17]

The most recent government initiative was the Anti-Corruption Summit held in London in May 2016.[18]

The Anti-Corruption Summit

The stated aims of the summit were wide-ranging and far-reaching:

> The summit will seek to galvanise a global response to tackle corruption. As well as agreeing a package of actions to tackle corruption across the board, it will deal with issues including corporate secrecy, government transparency, the enforcement of international anti-corruption laws, and the strengthening of international institutions.
>
> It will be the first summit of its kind, bringing together world leaders, business and civil society to agree a package of practical steps to:
>
> - expose corruption so there is nowhere to hide
> - punish the perpetrators and support those affected by corruption
> - drive out the culture of corruption wherever it exists

The summit's outcome was the release of the Global Declaration against Corruption and the summit communiqué. Various other UK government and other announcements were timed to coincide with the summit.

In the Global Declaration against Corruption, governments and others at the summit reiterated their commitment to stamping out corruption. Existing international agreements would be developed and

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17 OECD; *Implementing the OECD Anti-Bribery Convention*; March 2017

18 A lot more detail on the Summit can be found in another Library Paper: Corporate Economic Crime: bribery & corruption

implemented, leaving "nowhere to hide". Action would be focused in three main areas –

- exposing corruption
- pursuing and punishing the corrupt and
- driving out corruption.

The summit communiqué elaborated on how governments and others would work to tackle corruption and covered the usual list of activities including:

- Tax evasion and aggressive tax avoidance
- Beneficial ownership
- Corporate and individual financial crime
- Money laundering
- Corporate secrecy and transparency
- Enforcement of anti-corruption laws
- Establishing an International Anti-Corruption Coordination Centre
- Strengthening international cooperation and
- Corruption in sport

After the summit, many governments, regional and international organisations and other bodies issued statements of support or set out the actions they would be taking. These included the UK government, the United States government, the OECD and the World Bank.

Senior figures from law, accountancy, property and professional services firms also issued a statement lending support. On the eve of the summit, the Law Society also published a statement on behalf of professional bodies concerned with law, tax and accountancy in the UK. This stated that the professions stood united in the fight against corruption.

An excellent resource for following up on the pledges made and their implementation can be found on the Transparency International website. The relevant page can be found here: pledgetracker.

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