GETTING THE DEAL THROUGH

Anti-Corruption Regulation

in 50 jurisdictions worldwide

2013

Contributing editor: Homer E Moyer Jr

Published by
Getting the Deal Through
in association with:

Advokatfirman Delphi
Afridi & Angell
Anagnostopoulos Criminal Law & Litigation
Anderson Mōri & Tomotsune
Andreas Neocleous & Co LLC
Angara Abello Concepcion Regala & Cruz Law Offices (ACCRALAW)
Ashurst
Astigarraga Davis
AZB & Partners
Badri and Salim El Meouchi Law Firm
BDO AS
Bennett Jones LLP
Carey
CR&F Rojas – Abogados
Dr Kai Hart-Hoenig Rechtsanwälte
ELIG, Attorneys-at-Law
Greenberg Traurig SC
Grinberg, Cordovil e Barros Advogados
Guillermo Jorge & Asociados
Hoet Peláez Castillo & Duque
Horn & Co Law Offices
Ivanyan & Partners
Kensington Swan
Kim & Chang
Kleyr Grasso Associés
K&L Gates LLP
Koep & Partners
Kruk and Partners Law Firm
Lampert & Schächle Attorneys at Law Ltd
The Law Firm of Salah Al-Hejailan
Lebray & Associés
Makarim & Taira S
Mamić Perić Reberski Rimac
Marić & Co Law Firm LLC
Matheson
Mboya Wangong'u & Waiyaki Advocates
Miller & Chevalier Chartered
Morgan & Morgan
Nicolette M Doherty Attorney-at-Law
Norton Rose (Asia) LLP
OECD
Oliva-Ayala Abogados
Peters & Peters
Price Sanond Prabhas & Wynne Ltd
PRK Partners s.r.o. Attorneys at Law
Schellenberg Wittmer
Sfera Legal
Sjöcrona Van Stigt Advocaten
Sofunde, Osakwe, Ogundipe & Belgore
Studio Legale Pisano
Transparency International
Vasil Kisil & Partners

GETTING THE DEAL THROUGH®

Anti-Corruption Regulation 2013

Contributing editor
Homer E Moyer Jr
Miller & Chevalier Chartered

Business development managers
Alan Lee
George Ingledew
Robyn Horsefield
Dan White

Marketing manager
Rachel Nurse

Marketing assistants
Megan Friedman
Zosia Demkowicz
Cady Atkinson
Robin Synnot

Administrative assistants
Parween Bains
Sophie Hickey

Subscriptions manager
Rachel Nurse
Subscriptions@GettingTheDealThrough.com

Head of editorial production
Adam Myers

Production coordinator
Lydia Gerges

Senior production editor
Jonathan Cowie

Production editor
Jo Morley

Chief subeditor
Jonathan Allen

Senior subeditor
Caroline Rawson

Editor-in-chief
Callum Campbell

Publisher
Richard Davey

Anti-Corruption Regulation 2013
Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910

First published 2007
Seventh edition 2013
ISSN 1754-4874

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Law Business Research

CONTENTS

Global Overview Homer E Moyer Jr *Miller & Chevalier Chartered*	3
2012 – the advent of collective action Monty Raphael QC *Transparency International UK*	9
A year of milestones Nicola Bonucci and Patrick Moulette *OECD*	11
Antigua & Barbuda Edward H Davis Jr and Arnoldo B Lacayo *Astigarraga Davis* and Nicolette M Doherty *Nicolette M Doherty Attorney-at-Law*	12
Argentina Fernando Basch & Guillermo Jorge *Guillermo Jorge & Asociados*	16
Australia Jane Ellis and Rob Smith *Ashurst*	23
Bolivia Pablo Rojas *CR&F Rojas – Abogados*	31
Bosnia & Herzegovina Lea Škrbo, Selma Šehović and Anisa Tomić *Marić & Co Law Firm LLC*	36
Brazil Carlos Amadeu Bueno Pereira de Barros *Grinberg, Cordovil e Barros Advogados*	40
Canada Milos Barutciski *Bennett Jones LLP*	45
Chile Marcos Ríos and Solange González *Carey*	52
China Amy L Sommers and Cecillia Dai *K&L Gates LLP*	58
Costa Rica Robert C van der Putten and Paola Montealegre S *Sfera Legal*	65
Croatia Natalija Perić *Mamić Perić Reberski Rimac*	70
Cyprus Panayiotis Neocleous and Costas Stamatiou *Andreas Neocleous & Co LLC*	74
Czech Republic Radan Kubr and Jan Vařecha *PRK Partners s.r.o. Attorneys at Law*	79
France Stéphane Bonifassi *Lebray & Associés*	86
Germany Kai Hart-Hoenig *Dr Kai Hart-Hoenig Rechtsanwälte*	92
Greece Ilias G Anagnostopoulos and Jerina (Gerasimoula) Zapanti *Anagnostopoulos Criminal Law & Litigation*	97
India Aditya Vikram Bhat and Richa Roy *AZB & Partners*	102
Indonesia Richard Cornwallis and Farida Yuliasari *Makarim & Taira S*	111
Ireland Bríd Munnelly, Carina Lawlor and Michael Byrne *Matheson*	116
Israel Yuval Horn, Ohad Mamann and Alon Harel *Horn & Co Law Offices*	124
Italy Roberto Pisano *Studio Legale Pisano*	130
Japan Kenichi Sadaka and Kei Akagawa *Anderson Mōri & Tomotsune*	137
Kenya Godwin Wangong'u and CG Mbugua *Mboya Wangong'u & Waiyaki Advocates*	143
Korea Kyungsun Kyle Choi and Liz Kyo-Hwa Chung *Kim & Chang*	149
Lebanon Jihad Rizkallah, Marie-Anne Jabbour and Sarah Fakhry *Badri and Salim El Meouchi Law Firm*	154
Liechtenstein Siegbert Lampert and Rudolf Schächle *Lampert & Schächle Attorneys at Law Ltd*	161
Luxembourg Rosario Grasso *Kleyr Grasso Associés*	166
Mexico Luis Rubio Barnetche, Bertha Alicia Ordaz Avilés and Héctor Cuevas González *Greenberg Traurig SC*	172
Namibia Peter Frank Koep and Hugo Meyer van den Berg *Koep & Partners*	178
Netherlands Enide Z Perez and Max JN Vermeij *Sjöcrona Van Stigt Advocaten*	182
New Zealand Hayden Wilson *Kensington Swan*	188
Nigeria Babajide O Ogundipe and Chukwuma Ezediaro *Sofunde, Osakwe, Ogundipe & Belgore*	195
Norway Erling Grimstad *BDO AS*	199
Panama Omar Rodriguez & Rodolfo Palma *Morgan & Morgan*	204
Philippines Francisco Ed Lim and Chrysilla Carissa P Bautista Angara *Abello Concepcion Regala & Cruz Law Offices (ACCRALAW)*	209
Poland Jarosław Kruk, Beata Chmielewska and Aleksandra Matwiejko-Demusiak *Kruk and Partners Law Firm*	215
Russia Vasily Torkanovskiy *Ivanyan & Partners*	221
Saudi Arabia Robert Thoms and Sultan Al-Hejailan *The Law Firm of Salah Al-Hejailan*	229
Singapore Wilson Ang *Norton Rose (Asia) LLP*	233
Spain Laura Martínez-Sanz and Jaime González Gugel *Oliva-Ayala Abogados*	241
Sweden Peter Utterström and Sofia Karlsson *Advokatfirman Delphi*	246
Switzerland Peter Burckhardt, Paul Gully-Hart and Roland Ryser *Schellenberg Wittmer*	252
Thailand Douglas Mancill and Wayu Suthisarnsuntorn *Price Sanond Prabhas & Wynne Ltd*	259
Trinidad & Tobago Edward H Davis Jr, Arnoldo B Lacayo and Sunita Harrikissoon *Astigarraga Davis*	266
Turkey Gönenç Gürkaynak and Ç Olgu Kama *ELIG, Attorneys-at-Law*	272
Ukraine Yaroslav Teklyuk, Viacheslav Pieskov and Valeriia Tryfonova *Vasil Kisil & Partners*	279
United Arab Emirates Charles Laubach *Afridi & Angell*	286
United Kingdom Monty Raphael QC *Peters & Peters*	293
United States Homer E Moyer Jr, James G Tillen, Marc Alain Bohn and Erik B Nielsen *Miller & Chevalier Chartered*	309
Venezuela Fernando Peláez-Pier and Gerardo Briceño *Hoet Peláez Castillo & Duque*	317
Appendix *Transparency International*	322

United Kingdom

Monty Raphael QC
Peters & Peters

1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

The United Nations International Convention against Corruption was signed on 9 December 2003 and ratified on 9 February 2006. UK ratification extended to the British Virgin Islands in 2006.

The United Nations Convention against Transnational Organized Crime was signed on 14 December 2000 and ratified on 9 February 2006.

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) was signed on 17 December 1997 and ratified on 14 December 1998. UK ratification extended to the Isle of Man in 2001.

The Council of Europe Criminal Law Convention on Corruption (Criminal Convention) was signed on 27 January 1999 and subsequently ratified on 9 December 2003. The UK made a number of reservations in accordance with article 37 of the convention; these are available for examination on the Council of Europe's website.

The additional protocol to the Criminal Convention was opened for signature in May 2003. The protocol entered into force on 1 February 2005 and has been ratified by the UK. The Group of States against Corruption (GRECO) is responsible for monitoring the implementation of the convention and the additional protocol.

The Council of Europe Civil Law Convention on Corruption (Civil Law Convention) was signed on 8 June 2000 but is not yet ratified.

The EU Convention on the Protection of the Financial Interests of the Communities and Protocols entered into force on 17 October 2002, having been ratified by all member states.

The Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union (Convention on EU Officials) was adopted by the member states on 26 May 1997 and ratified by the UK in April 1999.

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

The Bribery Act 2010 came into force on 1 July 2011, sweeping away all that came before it. It replaced that statutory and common law regime with two general offences of bribery (giving and receiving), a third specific offence of bribing a foreign public official and, finally, a new corporate offence of failing to prevent bribery by not having adequate procedures in place. The act is not retrospective; and as such, a working knowledge of the old law will be required for the foreseeable future, with many cases likely to straddle both the new and the old regimes.

The current law can therefore be found in sections 1, 2, 6 and 7 of the Bribery Act. See www.legislation.gov.uk/ukpga/2010/23/contents.

Section 1 creates an offence of 'active' bribery with the section engaged where a person offers, promises or gives a financial or other advantage to another person with the intent to induce or reward improper performance of a relevant function or activity.

Section 2 created the passive offence where a person requests, agrees to receive or accepts financial or other advantage. The offence can be committed without the recipient knowing or believing that their performance would be improper.

Section 6 criminalises the act of bribing a foreign public official where a person directly or indirectly offers, promises or gives an advantage to a foreign public official in an attempt to influence them in their official capacity attempting to retain or obtain business or a business advantage.

Section 7 creates a corporate offence of a commercial organisation's failure to prevent bribery. The offence is one of strict liability – there is no need to demonstrate the accused company's knowledge or authorisation of the payment in order to establish guilt. The section does contain a possible defence that adequate anti-bribery procedures were in place within the organisation and its commercial relationships.

These offences are further discussed in the sections below. The Ministry of Justice published guidance about 'adequate procedures' in March 2011 which aims to assist organisations to understand the systems they need to ensure are in place to minimise the risk of bribery by their employees or associates.

Previous common law and legislation

The law governing all actions and behaviour prior to 1 July 2011 remains a mixture of the common law bribery offence and a series of statutory offences. The key offences relating to bribery of public officials are outlined below. (All legislation referred to in this chapter can be found at www.legislation.gov.uk.)

Common law

There is a common law offence of bribery that is generally quoted and accepted to be:

> *The receiving or offering [of] any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity. (Russell on Crime,* 1964, p 381)

The common law offence of bribery is limited to public sector corruption and depends on the bribee holding a 'public office'. It is an indictable-only offence with no statutory limit in terms of imprisonment.

The Public Bodies Corrupt Practices Act 1889 (the 1889 Act)

The UK has prosecuted the crime of bribery under the common law (unwritten) for many centuries. The crime of corruption only entered statute law (written) in 1889 when Lord Randolph Churchill MP

introduced a private members' bill outlawing the bribery of public officials.

The 1889 Act makes the active or passive bribery of a member, officer or servant of a public body a criminal offence. The act prohibits a person covered by the act (see question 22), whether by him or herself, or in conjunction with any other person, from corruptly soliciting or receiving, or agreeing to receive, for him or herself, or any other person, any gift, loan, fee, reward or advantage whatever as an inducement to, or reward for, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the public body is concerned.

A person may also not corruptly promise or offer any gift, loan, fee, reward or advantage whatsoever to any person, whether for the benefit of that person or of another person, as an inducement to or reward for doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed; in which the public body is concerned.

Both the 1889 and 1906 acts require the defendant to have acted 'corruptly', but neither provides a definition. The question of whether dishonesty is required has been the subject of conflicting authorities in the past. The current position, favoured by most recent appellate authorities, is that proof of intent to corrupt is required without needing dishonesty.

The Prevention of Corruption Act 1906 (the 1906 Act)

A report published in 1898 by the Secret Commissions Committee of the London Chamber of Commerce called for the law of corruption to be extended into the private sector. In 1906 a new act was introduced making it a crime to bribe any 'agent'. An agent is anybody employed by or acting for another, whether in the public or private sector. This act makes it an offence for:

- an agent to obtain consideration as an inducement or reward for doing any act, or showing favour or disfavour to any person, in relation to his or her principal's affairs;
- any person to give consideration to an agent to induce him or her to do an act in relation to his or her principal's affairs; or
- any person or agent to knowingly falsify receipts, accounts or other documents with the intent to deceive the principal.

The Prevention of Corruption Act 1916 (the 1916 Act)

Under the provisions of the 1916 Act, if any person, or agent of a person, holding or seeking to obtain a contract gives a gift to a public official, that gift shall be presumed to be corrupt unless the accused person can prove otherwise. The Law Commission recommended the abolition of the presumption and its use has been abandoned by the Crown Prosecution Service (CPS), given concerns about its compliance with the Human Rights Act 1998, which incorporates the European Convention of Human Rights into UK domestic law. The government has previously stated that it would repeal this law but has yet to do so. In its most recent consultation, the Law Commission also questioned whether such a presumption is necessary or desirable.

The definition of a public body was amended by the 1916 Act to include: 'local and public authorities of all descriptions' (section 4(2)).

The Anti-Terrorism, Crime and Security Act 2001

The Anti-Terrorism, Crime and Security Act 2001 introduced new provisions to give UK courts jurisdiction over crimes committed abroad by UK nationals and UK companies. Part 12 extended the laws against bribery to cases where the 'functions of the person who receives or is offered a reward have no connection with the United Kingdom and are carried out in a country or territory outside the United Kingdom'. It extended the laws against corruption to make prosecutions possible for 'acts [that] would, if done in the United Kingdom, constitute a corruption offence'. In summary:

- section 108 renders it immaterial for the purposes of any common law offence of bribery if the functions of the person who receives or is offered a reward have no connection with the UK and are carried out in a country or territory outside the UK; and
- section 109 applies where a UK national or a body incorporated under the law of any part of the UK does anything in a country or territory outside the UK, and the act would, if done in the UK, constitute a corruption offence (whether by virtue of the common law, or by statute). In such a case, the act constitutes the offence concerned and proceedings for the offence may be taken in the UK.

It is noteworthy that part 12 was intended to be a temporary measure, pending the introduction of comprehensive corruption legislation.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

The Bribery Act 2010

Section 6 of the Bribery Act has introduced a 'bespoke offence' of bribing foreign public officials. For the purposes of section 6, 'a person (P) who bribes a foreign public official (F) is guilty of an offence if P's intention is to influence F in F's capacity as a foreign public official. P must also intend to obtain or retain business, or an advantage in the conduct of business'.

Unlike the general bribery offences in sections 1 and 2, the offence of bribery of a foreign public official only covers the offering, promising or giving of bribes, and not the acceptance of them. Also, unlike the general offence of bribing another, culpability is not premised on any intention to elicit 'improper performance'.

It is important to note that, for the purposes of the general offences in sections 1 and 2, a function or activity is a 'relevant function or activity' even if it has no connection with the UK, and is performed outside the UK. Pursuant to section 12 of the act, the offences in sections 1 and 2, as well as the section 6 bespoke offence, will be committed even if no acts or omissions forming part of the offences take place in the UK, provided a person whose acts or omissions constitute the offences has a 'close connection' with the UK as defined in section 12(4).

What must a person do in order to commit this offence?

The conduct element of the section 6 offence is the direct or indirect offer, promise or gift by a person (P) of any financial or other advantage to a foreign public official (F) or another person. Where the advantage is offered, promised or given to a person other than F, the offence will only be made out if these acts are done at F's request, assent or acquiescence. Section 6(3)(a) makes clear that it is irrelevant whether the offer, promise or gift is made directly to the official or through a third party.

In addition, the written law applicable to F must not permit or require him to be influenced in his capacity as a foreign public official by the offer, promise or gift. Where the performance of F's functions would not be subject to the law of a part of the UK, the 'written law' is either the applicable rules of a public international organisation, or the law of the country or territory in relation to which F is a foreign public official as contained in its written constitution, provision made by or under legislation or judicial decisions that are evidenced in writing.

The Law Commission had originally proposed a defence for any person who mistakenly, but reasonably, believed that a foreign public official was required or permitted to accept an advantage under the official's local law. The government decided not to include this defence in the act following objections from the OECD. Its Working Group considered that such a defence would be open to abuse and

would contradict the general stance of the UK legal system, under which mistake of the law is no excuse. The OECD's legal director, Nicola Bonucci, highlighted the danger of abuse by stating 'it is not difficult […] to get bad legal advice if you want it'. The secretary of state for justice stated that removing the defence represented the 'correct balance' between being fair to defendants and providing 'so many rabbit holes' that they could unduly escape conviction. He highlighted that prosecutorial discretion and the good sense of jurors could be trusted to ensure that genuine mistakes were not punished by conviction.

What must a person 'intend' in order to commit this offence?

There are two fault elements to the offence. First, P must intend to influence F in his capacity as a foreign public official. This means influencing F in the performance of his functions as an official, including any omissions to exercise those functions and any use of F's position outside of his lawful authority.

Second, P must also intend to obtain or retain business or an advantage in the conduct of business. Subsection 8 clarifies that the term 'business' includes a trade or profession.

Other legislation

For actions prior to 1 July 2011 the framework outlined in question 2 applies.

Part 12 of the Anti-Terrorism, Crime and Security Act 2001 extends the scope of the UK law on bribery to 'foreign' bribery. It does this by providing that the existing bribery offences are also offences if they are committed outside the UK or if they involve either foreign agents or principals having no connection to the UK or holders of a foreign public office or officials of foreign bodies or authorities which are the equivalent in the country concerned of those covered by the domestic offence. In other respects the elements of the offences remain unchanged; the act makes it clear, however, that the existing presumption of corruption in respect of the statutory offences is not correspondingly extended. Part 12 of the act also provides for jurisdiction over UK nationals or bodies incorporated in the UK who commit one of the offences as now redefined, no matter where outside the UK the offence is committed.

4 Definition of a foreign public official

How does your law define a foreign public official?

Section 6(5) of the Bribery Act defines a 'foreign public official' as an individual who holds a legislative, administrative or judicial position, whether appointed or elected; or who exercises a public function for or on behalf of a foreign country; or who exercises a public function for a public agency or enterprise in a foreign country.

The definition also covers officials or agents of public international organisations, meaning organisations whose members are any of the following:

- countries or territories;
- governments of countries or territories;
- other public international organisations; or
- a mixture of any of the above.

Under the old regime, when the corruption law was extended in 2001 to criminalise the bribery of foreign public officials (on the basis of nationality), the legislation added a 'foreign' component to existing definitions of 'agent', 'principal', 'public office', 'public body' and 'public authorities'.

The expression 'public body' means any council of a county or city or town, any council of a municipal borough, also any board of commissioners, select vestry or other body which has power to act under and for the purposes of any act relating to local government or the public health or to poor law or otherwise to administer money raised by rates in pursuance of any public general act and includes any body which exists in a country or territory outside the UK and is equivalent to any body described above. In the 1916 Act and in the Public Bodies Corrupt Practices Act 1889, the expression 'public body' included, in addition to the bodies mentioned in the last-mentioned act, local and public authorities of all descriptions, including authorities existing in a country or territory outside the UK.

The expression 'public office' means any office or employment of a person as a member, officer or servant of such public body.

The expression 'agent' includes any person employed by or acting for another; and the expression 'principal' includes an employer. Further, a person serving under the Crown or under any corporation or any borough, county or district council or any board of guardians is an agent within the meaning of the 1906 Act.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

We have no specific legislation or rules regarding the giving of gifts, travel expenses, meals or entertainment to foreign officials. Most UK companies would have a zero-tolerance policy or a policy restricted to no gifts, modest and necessary travel expenses for the official only (ie, no family or entourage), modest shared meals and no entertainment.

The Bribery Act 2010 does not prohibit *bona fide* hospitality and promotional expenditure that is proportionate and reasonable and undertaken in good faith, but there may be instances where such expenditure could form the basis of offences under sections 1, 6 and 7.

The government and the SFO has openly recognised that corporate hospitality is an accepted part of modern business practice and made plain that it is not seeking to penalise expenditure on corporate hospitality for legitimate commercial purposes. However, as lavish corporate hospitality can also be used as a bribe to secure advantages, the offences in the act must be capable of penalising those who use it for such purposes.

New guidance relating to business expenditure was issued by the SFO in October in October 2012. It offers relatively little direction or guidance:

> *Bona fide hospitality or promotional or other legitimate business expenditure is recognised as an established and important part of doing business. It is also the case, however, that bribes are sometimes disguised as legitimate business expenditure.*
>
> *Whether or not the SFO will prosecute in respect of a bribe presented as hospitality or some other business expenditure will be governed by the Full Code Test in the Code for Crown Prosecutors and the Joint Prosecution Guidance of the Director of the SFO and the Director of Public Prosecutions on the Bribery Act 2010. Where relevant, the Joint Guidance on Corporate Prosecutions will also be applied.*
>
> *If on the evidence there is a realistic prospect of conviction, the SFO will prosecute if it is in the public interest to do so. In appropriate cases the SFO may use its powers under proceeds of crime legislation as an alternative (or in addition) to prosecution; see the Attorney General's guidance to prosecuting bodies on their asset recovery powers under the Proceeds of Crime Act 2002.*

The Ministry of Justice Bribery Act Guidance remains in effect. It states:

> *[…] in cases where hospitality, promotional expenditure or facilitation payments do, on their face, trigger the provisions of the Act prosecutors will consider very carefully what is in the public interest before deciding whether to prosecute.*

The Joint Prosecution Guidance of the director of the SFO and the Director of Public Prosecutions (DPP) also issued in March 2011, states that:

The more lavish the hospitality or expenditure (beyond what may be reasonable standards in the particular circumstances) the greater the inference that it is intended to encourage or reward improper performance or influence an official. Lavishness is just one factor that may be taken into account in determining whether an offence has been committed. The full circumstances of each case would need to be considered. Other factors might include that the hospitality or expenditure was not clearly connected with legitimate business activity or was concealed.

This guidance provides that the following public interest factors tending in favour of and against prosecution are likely to be relevant.

Factors tending in favour of prosecution:

- a conviction for bribery is likely to attract a significant sentence;
- offences will often be premeditated and may include an element of corruption of the person bribed;
- offences may be committed in order to facilitate more serious offending; and
- those involved in bribery may be in positions of authority or trust and take advantage of that position.

Factors tending against prosecution:

- the court is likely to impose only a nominal penalty;
- the harm can be described as minor and was the result of a single incident; and
- there has been a genuinely proactive approach involving self-reporting and remedial action.

The new director of the SFO, David Green QC, withdrew all other and previous guidance pertaining to corporate hospitality and in an interview in the Independent in November 2012 said:

I am sceptical of guidance notes. I suspect the motives of those that want absolutely precise guidance, because I suspect they want to wait round the corner and hit you over the head with it, and say, you are acting contrary to your guidance. The criminal law covers an endless multitude of possibilities and possible sets of facts. It is very hard to be specific. On corporate hospitality, it rather depends on the motive and the context and the timing and the value. You can't just say, Wimbledon tickets are OK. They'll say that you said, 'Wimbledon tickets are all right'.

See www.justice.gov.uk/downloads/guidance/making-reviewing-law/bribery-act-2010-guidance.pdf and www.sfo.gov.uk/media/167348/bribery%20act%20joint%20prosecution%20guidance.pdf.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

A 'facilitation payment' refers to the practice of paying a small sum of money to a public official (or other person) as a way of ensuring that they perform their duty, either more promptly or at all.

The current position

Facilitation payments have always been unlawful in the UK: no regime, be it statutory or founded in the common law, has distinguished them from any other form of bribery.

The UK government has publicly stated that it is difficult to envisage circumstances in which the making of a small facilitation payment, extorted by a foreign official in countries where this is normal practice, would of itself give rise to a prosecution in the UK. The Law Commission reiterated in the consultation paper that the government has made clear that, although committed to facilitation payments remaining criminal, it is unlikely that the making of such payments would result in prosecution. However, the new guidance issued in October 2012 was far more vague about the prosecution of facilitation payments:

Whether or not the SFO prosecutes in relation to facilitation payments will always depend on (a) whether it is a serious or complex case which falls within the SFO's remit and, if so, (b) whether the SFO concludes, applying the Full Code Test in the Code for Crown Prosecutors, that there is an offender that should be prosecuted.

If the requirements of the Full Code Test are not established, the SFO may consider civil recovery as an alternative to a prosecution.

The Law Commission's recommendations

In its final report, the commission reiterated that it is generally agreed that, on broad social grounds, a culture in which facilitation payments are regular and accepted is undesirable and that such payments should be discouraged. The commission went on to recognise 'degrees of desirability', identifying situations in which, for example, a payment is made as a matter of local courtesy, as situations unlikely to engage the new provisions. Examples of situations that would be covered, although not necessarily prosecuted, include:

- where the official, if not paid, either will not fulfil the duty at all or will do so only after a seriously damaging delay;
- where the official generally fulfils the relevant duties correctly, but accepts payment for dealing with a particular matter with exceptional despatch or effort; and
- where the official fulfils the relevant duties correctly, but a payment made is part of his or her reason for so doing.

The Joint Committee's observations

The Joint Committee agreed with the government that facilitation payments should continue to be criminalised. A specific defence, they said, risks legitimising corruption at the thin end of the wedge. At the same time the committee recognised that business needs clarity about the circumstances in which facilitation payments will be prosecuted, particularly given the difficult situations that can arise. Therefore, the basic principles of prosecution policy, which the committee expected to adhere firmly to the concept of proportionality, must be made clear. In so concluding, the committee noted that:

[t]here are undoubtedly difficult and unanswered dilemmas facing business, as Lord Robertson illustrated: 'stevedores on the docks of a country say they will not unload your ship unless a payment is made to their union or to their corporate organisation, what do you do? You say, "No. We will just let our ships lie there"[?]'.

The parliamentary passage of the act saw considerable debate on the issue of facilitation payments. A full exploration is outside of the scope of this work. The Ministry of Justice guidance notes that facilitation payments could trigger either the section 6 offence or, where there is an intention to induce improper conduct, including where the acceptance of such payments is itself improper, the section 1 offence, and therefore potential liability under section 7.

The prosecution guidance issued by the director of the SFO and the director of public prosecutions lists the following public interest factors tending in favour of and against prosecution.

Factors tending in favour of prosecution

- Large or repeated payments are more likely to attract a significant sentence.
- Facilitation payments that are planned for or accepted as part of a standard way of conducting business may indicate the offence was premeditated.
- Payments may indicate an element of active corruption of the official in the way the offence was committed.
- Where a commercial organisation has a clear and appropriate policy setting out procedures an individual should follow if facilitation payments are requested and these have not been correctly followed.

Factors tending against prosecution

- A single small payment likely to result in only a nominal penalty.
- The payment(s) came to light as a result of a genuinely proactive approach involving self-reporting and remedial action.
- Where a commercial organisation has a clear and appropriate policy setting out procedures an individual should follow if facilitation payments are requested and these have been correctly followed.
- The payer was in a vulnerable position arising from the circumstances in which the payment was demanded.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

Sections 1(5) and 6(3) of the Bribery Act unambiguously clarify that it does not matter whether an advantage is offered, promised or given by P directly or through a third party for the purposes of the sections 1 and 6 offences. Section 7 creates a responsibility for companies to ensure that third parties and intermediaries, such as joint venture partner's approved local agents or suppliers, are fully aware of their anti-bribery and corruption policies, otherwise the adequate procedures defence will not be available to them in the instance of a third party or intermediary offering bribes on their behalf.

The previous regime had caused a concern that was raised in the report of the OECD Working Group on Bribery on the UK's Implementation of the OECD Anti-Bribery Convention: were bribes paid through an intermediary covered? The 1906 Act and the body of case law creating the common law offence, and therefore the law that governs any action before 1 July 2011, do not expressly refer to an offer, etc, being made through an intermediary.

Under the offence in the 1906 Act, a person who gives or offers, etc, a bribe to a foreign public official with the assistance of an intermediary would be guilty of an offence as well as the intermediary because the offence is aimed at any person who corruptly 'gives or agrees to give or offers any gift or consideration to any agent'.

The use of an agent (innocent or otherwise) by an offender will not allow the offender to escape criminal liability. The wide ambit of section 1 of the 1906 Act is demonstrated by the passive provisions, which explicitly state 'for himself or for any other person'.

In its final report the Law Commission noted the SFO's comments that cases of bribery where payments are made through intermediaries are frequent and difficult to investigate and prosecute. The SFO also emphasised that it should make no difference that the beneficiary of the corrupt transaction is a third party, which could be commonplace where multiple companies are involved. It could be suggested that there has been an attempt to address these in the width of drafting of the section 7 offence of the Bribery Act where commercial organisations can be guilty of failure to prevent bribery where action has been taken that fulfils the requirements of the section 1 or 6 offences (bribing and specifically bribery of a foreign public official) by an associated person who need have no close connection to the UK nor be a British citizen of company or any type. However, this does not solve the problem since it solely allows for the commercial organisation to be pursued: it would have to be proven that the intermediary also fulfilled the close connection requirements in section 12(4) of the Bribery Act if there were to be any attempts to prosecute them.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Subject to certain exemptions below, both companies and individuals may be liable for bribery of a foreign official under the current law and the Bribery Act.

The Queen, foreign sovereigns or heads of state, their families and their private servants are all immune from criminal jurisdiction by virtue of the State Immunity Act 1978. Furthermore, the Diplomatic Privileges Act 1964 gives immunity to diplomatic agents, members of the staff of a diplomatic mission and their families.

In 2004, a private application for an extradition warrant against President Robert Mugabe was refused by the Bow Street Magistrates' Court. That court stated that 'while international law evolves over a period of time, international customary law, which is embodied in our common law, currently provides absolute immunity to any head of state'.

For a discussion of the application of the immunity provisions for former heads of state, see the House of Lords' decision in *Ex parte Pinochet Ugarte* (No. 3) [1999] 2 All ER 97.

The current position

Section 7 creates a novel offence of failing to prevent bribery which can only be committed by a 'relevant commercial organisation', an umbrella term that encompasses bodies incorporated in the UK, together with partnerships formed under UK law, irrespective of where business is carried out, and bodies and partnerships, wherever formed or incorporated, who conduct business in the UK. The offence is committed where a person (A) who is associated with the commercial organisation (C) bribes another person with the intention of obtaining or retaining business or an advantage in the conduct of business for C.

'Bribery' in the context of this offence relates only to the offering, promising or giving of a bribe contrary to sections 1 and 6 (there is no corresponding offence of failure to prevent the taking of bribes). Applying ordinary principles of criminal law, the reference to offences under sections 1 and 6 include being liable for such offences by way of aiding, abetting, counselling or procuring (secondary liability). Subsection (3) also makes clear that there is no need for the prosecution to show that the person who committed the bribery offence has already been successfully prosecuted. The prosecution must, however, show that the person would be guilty of the offence were that person to be prosecuted under this act. Finally, subsection (3)(b) makes clear that there is no need for A to have a close connection to the UK as defined in section 12; rather, so long as C falls within the definition of 'relevant commercial organisation', that should be enough to provide courts in the UK with jurisdiction.

Section 12(5) clarifies that for the purposes of the offence in section 7 it is immaterial where the conduct element of the offence occurs.

Section 7(2) provides that it is a defence for the commercial organisation to show it had adequate procedures in place to prevent persons associated with C from committing bribery offences. According to the Ministry of Justice guidance, the standard of proof which the commercial organisation would need to achieve to discharge the burden of establishing a defence, in the event it was prosecuted, is the 'balance of probabilities'.

The guidance on 'adequate procedures' provides six flexible and outcome-focused principles, 'allowing for the huge variety of circumstances that commercial organisations find themselves in'. The six principles are:

- proportionate procedures;
- top-level commitment;
- risk assessment;
- due diligence;
- communication (including training); and
- monitoring and review.

Section 14 of the act provides that the senior officer or person (as well as the body corporate or partnership) is guilty of the offence, and liable to be proceeded against and punished accordingly, if an

offence contrary to sections 1, 2 or 6 is proven to have been committed by a body corporate or a Scottish partnership with the consent or connivance of:

- a senior officer of the body corporate or Scottish partnership, or
- a person purporting to act in such a capacity.

For a 'senior officer' or similar person to be guilty, he or she must have a close connection to the UK, for the meaning of which see section 12(4). It should be noted that the body corporate and the senior manager are both guilty of the main bribery offence; this section does not create a separate offence of 'consent or connivance'. Nor does the section apply to the corporate offence under section 7, and the government has confirmed that there is no possibility of individual liability arising under section 14 where the section 7 offence has been committed.

For action taken under the old regime, corporate liability would be found in the application of the 'identification principle'. The principle allows 'the acts and state of mind' of those who represent the 'directing mind and will' to be imputed to the company. *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 restricts the application of the 'identification principle' to the actions of 'the board of directors, the managing director and perhaps other superior officers who carry out functions of management and speak and act as the company'.

A more detailed assessment of the principles underpinning corporate criminal liability in the UK is beyond the scope of this work. The Guidance on Corporate Prosecutions (issued in December 2009 by the director of public prosecutions and the director of the Serious Fraud Office, and agreed by the attorney general) provides the necessary particulars. It is sufficient to note that the 'identification principle' places an exceptionally arduous burden on the prosecution to establish corporate criminal liability where a corruption offence is committed by an employee of a large, decentralised, corporation. The UK Law Commission has been tasked with reconsidering the whole law of corporate criminal liability.

9 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

For criminal enforcement please see questions 3 and 16.

Victims of bribery, for example, businesses whose employees have been bribed, may have a cause of action to recover damages from both the briber and the bribee. Until, or if, there is a prosecution under the Bribery Act, it is uncertain as to whether unsuccessful competitor businesses will try to seek financial redress for loss caused by uncompetitive and corrupt business practices.

10 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

The SFO has been designated the lead agency in the handling of foreign bribery allegations and investigations. It was established in 1988 with the responsibility for the detection, investigation and prosecution of serious fraud. The director of the SFO has the discretion to prosecute Bribery Act offences as per section 10 of the Bribery Act. The DPP as the head of the Crown Prosecution Service (CPS) and the director of Revenue and Customs prosecution (incorporated into the CPS) also have this power. The SFO has the responsibility for assessing each allegation of bribery and, if an investigation is merited, allocating cases to the investigative agency best suited to deal with it. The Financial Services Authority (FSA) may refer its intelligence from an investigation to one of the agencies that has the power to prosecute if they deem it necessary.

The City of London Overseas Corruption Unit was created in 2006 as a dedicated team for investigating international corruption, including money laundering in the UK by corrupt politicians from developing countries and bribery by UK business overseas.

Pursuant to section 10 of the Bribery Act the consent of the attorney general is no longer required to commence proceedings under the act. For proceedings in England and Wales the consent of the director of public prosecutions, the director of the Serious Fraud Office and the director of Revenue and Customs prosecutions will be sufficient. However, section 10(4) makes clear that the issue of consent must be exercised by the relevant director personally, subject to a narrow exception where the director concerned is unavailable. In such circumstances the function may be discharged by another person nominated for this purpose by the relevant director in writing.

11 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

On 9 October 2012, the new director of the SFO, David Green QC, published new guidance from the Serious Fraud Office on the topics of facilitation payments, business expenditure and self-reporting. This guidance superseded previous SFO policy and restates the SFO's primary purpose. The accompanying note explained that revised guidance was being published to:

- restate the SFO's primary role as an investigator and prosecution of serious and/or complex fraud, including corruption;
- ensure there is consistency with the approach of other prosecuting bodies; and
- take forward certain OECD recommendations.

The SFO's primary role is to investigate and prosecute. The revised policies make it clear that there will be no presumption in favour of civil settlements in any circumstances.

This represents a movement away from the position under the previous director and the guidance published in 2009, which stated that although there were no guarantees and that every case must be considered separately, the SFO intended to settle cases where possible if it finds self-reporting and adequate cooperation.

The 2012 Guidance seems to have a slightly different emphasis:

> *If on the evidence there is a realistic prospect of conviction, the SFO will prosecute if it is in the public interest to do so. The fact that a corporate body has reported itself will be a relevant consideration to the extent set out in the Guidance on Corporate Prosecutions. That Guidance explains that, for a self-report to be taken into consideration as a public interest factor tending against prosecution, it must form part of a "genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice". Self-reporting is no guarantee that a prosecution will not follow. Each case will turn on its own facts.*

The accompanying notes state 'the SFO encourages corporate self-reporting, and will always listen to what a corporate body has to say about its past conduct; but the SFO offers no guarantee that a prosecution will not follow any such report… it is not the role of the SFO to provide corporate bodies with advice on their future conduct.'

The notes highlighted that the only change to the DPP–SFO joint prosecution guidance was that the reference to the fact that the SFO's former policy on self-reporting had been removed.

Under sections 71 to 73 of the Serious Organised Crime and Police Act 2005 certain 'specified prosecutors' have powers to grant immunity from prosecution to cooperating offenders; to provide undertakings regarding use of evidence against cooperating offenders; and to enter into an agreement for the defendant to provide assistance to the prosecutor in relation to an offence, with powers

given to the courts to take that into account when determining what sentence to pass on the defendant. The 'specified prosecutors' for the purposes of the act are:

- the DPP;
- the director of Revenue and Customs prosecutions;
- the director of the SFO;
- the director of public prosecutions for Northern Ireland;
- the FSA; and
- the secretary of state for business, innovation and skills, acting personally.

See question 16 for discussion of *Dougall v R* [2010] EWCA Crim 1048, where these powers were exercised.

12 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

Some recent SFO investigations of overseas corruption have concluded without a trial by means of plea agreements or civil recovery orders. Prosecutors may also opt not to pursue certain investigations in the exercise of prosecutorial discretion in accordance with the Code for Crown Prosecutors (www.cps.gov.uk/publications/code_for_crown_prosecutors).

There is a desire both within government and the Serious Fraud Office to increase the use of plea agreements and settlements in bribery and other corporate economic crime cases.

The government published its response to the consultation on deferred prosecution agreements (DPAs) and its proposals for legislating for this enforcement option in October 2012. The government reaffirmed its commitment to treating economic crime as seriously as other crime and noted that while prosecution can effectively punish commercial organisations, it can also have a number of detrimental effects on innocent third parties, and the potentially damaging effect of a criminal prosecution to shareholders and the public purse. Its objective is that DPAs 'will allow prosecutors to hold offending organisations to account for their wrongdoing in a focused way without the uncertainty, expense, complexity or length of a criminal trial.'

It has been proposed that DPAs should be used to deal with economic crime, in particular, bribery (specifically offences under the BA), and money laundering. Individuals will *not* be eligible for the DPA process, regardless of whether they have undertaken crimes themselves or actions on behalf of their organisation.

The government has defined a DPA as 'a voluntary agreement between a prosecutor and a commercial organisation whereby, in return for complying with a range of tough and stringent conditions including, for example, the payment of a substantial penalty, requirements to make reparation to victims and participate in monitoring for a set period, the prosecutor will defer a criminal prosecution'.

DPAs may be entered into in relation to corruption offences, cheating the revenue, theft and a number of related offences. The full list can be found at Part 2 of Schedule 16 of the Crime and Courts Bill.

It is proposed that the DPP and the director of the SFO will issue a statutory DPA Code of Practice for prosecutors. This would be publicly available and would set out the circumstances in which a prosecutor may consider entering into a DPA, the principles applying to such a decision, and any factors that might suggest a DPA was unsuitable.

Whether a particular case is appropriate for the use of a DPA will be subject to judicial approval. The test that will be applied is a two-part test: first whether allowing the organisation to enter into a DPA would be in the 'interests of justice', and second, whether the proposed terms are 'fair, reasonable and proportionate'.

In the proposed process, the initial hearing would be conducted in private to allow the prosecutor and the organisation to lay out the proposed terms before the court without any fear of jeopardising future prosecutions. The government has suggested that factors that could be taken into account by the judiciary at this stage would be those such as whether the investigation and subsequent proceedings had arisen from self-reporting, the extent of the dishonest and unlawful behaviour, the impact upon third parties, the financial resources of the company, and whether any remedial action has been taken.

A finding by the court that a DPA was appropriate in principle would not bind the judge to approval of the agreement at the final hearing.

If the DPA is refused at this first hearing, there will be no right to seek judicial review of the refusal (as it is being treated as a charging decision), nor to propose any right of appeal. Whether the parties will be allowed to return for another initial hearing with a tweaked proposal has not yet been clarified.

The final agreement hearing would be held in open court, with the final agreement being published by the prosecutor, as well as any interim rulings (subject to any necessary protections in respect or current or future investigations or prosecutions). At the same time as this formal approval, the laying of the charge would take place.

If the draft DPA is not approved at this hearing, it has been suggested that the prosecutor might need to be given time to reflect on whether to bring a prosecution instead and, if so, on what basis. Any court judgments or rulings would, during that period, remain confidential. The interaction between the judge and the prosecutor regarding directions, whether the prosecutor would be allowed to adjust the DPA (although one imagines that this should have been taken care of in any interim hearings), etc, has not been defined or explored.

DPAs would contain (as per schedule 16, section 5 of the Crime and Courts Bill):

- a time period for the duration of the agreement of between one and three years;
- a statement of facts negotiated by the prosecutor and the commercial organisation; the organisation would undertake not to contest these admissions or agreed facts during any subsequent proceedings (there would be no need for an admission of guilt in the statement of facts, although in the light of recent judicial comment and action in the *Citigroup* case in New York, this may come under some pressure); and
- the terms and conditions would be specific to each instance, however, they would include some or all of the following:
  - a financial penalty (this must broadly reflect the fine that a court would have imposed on conviction following a guilty plea);
  - disgorgement of profits or benefit;
  - compensation to victims;
  - charitable or third party donations;
  - cooperation with investigations
  - disclosure obligations;
  - providing access to documents and witnesses;
  - obligations regarding replacing implicated individuals and pulling out of markets where wrongdoing has been admitted;
  - requirements regarding anti-corruption and anti-fraud policies, procedures and training; and
  - payment of reasonable costs.

The government has noted that there will not be an exhaustive list set out in legalisation, solely example terms.

Any money received by a prosecutor under a DPA will be paid into the Consolidated Fund (ie, to the Treasury). Fines will be subject to a reduction of up to one-third based on cooperation and early reporting.

Concerns have been raised about the protection of individuals under DPAs, especially as there are no plans to offer individual immunity within the DPA process. This, coupled with the breadth

of the proposed access provisions, have led to unease with regards to possible prejudicing of future proceedings.

If, at the end of the deferral period, the prosecutor is satisfied that the organisation has fulfilled its obligations, there would be no prosecution on the charges laid. If, on the other hand, it was felt that the requirements had not been met, the option of prosecution would still be available.

The proposed timetable for DPAs is that the draft clauses would be in the Crime and Courts Bill that should, hopefully, receive royal assent in March or April 2013. The Sentencing Guidelines and draft Code of Practice that will be used to manage the DPA process, including guiding the decision as to whether to enter into one or not, would be published towards the end of 2013, with DPAs coming into action at the beginning of 2014. There has not yet been any guidance from the government as to what the position is for those companies who discover corruption and self-report in the intervening period.

The Sentencing Council will be tasked with producing guidelines containing fines for each offence (ie, the unlawful behaviour) that would have triggered self-reporting and could lead to instigation of the DPA process. The government says that each circumstance under which a DPA will be entered into will be treated strictly on its individual facts. There has as yet been no indication , however, as to how this will be reflected in the fine.

The response also outlined how DPAs and the evidence that was contained within them would interact with other civil and criminal proceedings. Any material that forms part of the investigation that led to a concluded DPA will be admissible in the criminal trial of either an individual or a company. A statement of facts will only be admissible in any criminal proceedings against the company, but if the statement of facts is made public on the completion of the DPA, the fair trial of any individual may not be able to be guaranteed when all of the information is in the public domain where, despite the best efforts of the judiciary, jurors can easily access it. The human rights implications of DPAs are also yet to be explored.

The DPA and the statement of facts would be treated as hearsay evidence in civil proceedings and be subject to the usual determinations of the court as such. Where a DPA has not been concluded, the confidentiality of the process should mean that any civil claimants are unaware of possible disclosable material. If they become aware, they should only receive disclosure if there is a legal obligation so to do (such as under the terms of a court order).

It is important to be clear that entering into a DPA will not remove other grounds on which to refuse disclosure such as legal professional privilege, and existing law and practice on this matter will continue to apply. The government does not intend to make it a condition of the DPA that the commercial organisation should waive privilege. The principle that an accused's right to refuse to disclose information subject to legal professional privilege will continue to apply in its current form.

The attorney general's office has issued guidelines to prosecutors encouraging early discussions about guilty pleas in fraud trials, and introducing more transparency into the process. Practitioners interested in charting the progress of the practice should consult the attorney general's website, www.attorneygeneral.gov.uk. The three relevant guidelines are:

- attorney general's guidelines on plea discussions in cases of serious or complex fraud (March 2009);
- attorney general's guidelines on the acceptance of pleas (revised 2009); and
- attorney general's guidance to prosecuting bodies on their asset recovery powers under the Proceeds of Crime Act 2002 (November 2009).

13 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

There has been an increase in the prosecution of individuals, often directors or executives of companies, and the imposition of custodial sentences if they are convicted of bribery offences. In these prosecutions, there has been an increased use of SOCPA agreements. Under section 73 of the Serious and Organised Crime and Police Act 2005 (SOCPA), a defendant who pleads guilty to an offence and has, under the terms of a written agreement with the prosecution agency, assisted or offered to assist the prosecution or investigation of the same or any other offence may be eligible to a reduction in their sentence that reflects that extent and nature of assistance given. These agreements, being entered into by one or a group of individuals accused of bribery and corruption, are becoming more commonplace.

There has not been any great increase in enforcement action in relation to foreign bribery in 2012.

The FSA has become more assertive in its pursuit and punishment of companies that are not fulfilling their anti-money-laundering and anti-bribery obligations, or have underdeveloped and ineffective systems in place to counter the threat of money laundering and corruption. In 2012, fines were Imposed upon Turkish Bank (UK) for breaches of the Money Laundering regulations 2007, and Habib Bank AG Zurich for money laundering control failings. In this area, the most high-profile action was taken against Coutts in March 2012. It was fined £8.75 million for failing to take reasonable care to establish and maintain effective anti-money laundering systems and controls relation to high-risk customers, including 'politically exposed persons'.

In 2013 the FSA will be split to allow for the formation of the Financial Conduct Authority and the Prudential Regulation Authority. The enforcement role will be inherited by the FCA: one of its statutory objectives is reducing the risk that the financial system is used for the purposes of economic crime. The director of enforcement and financial crime, Tracey McDermott, explained that the FCA would seek to be more interventionist, more proactive and be more keen to intervene in matters at an earlier stage.

The City of London Police Economic Crime Directorate incorporates the Overseas Anti-Corruption Unit and the National Fraud Investigation Bureau. These units have become very active in the fight against bribery and corruption and have registered a series of successes in the past two years (see question 16).

14 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

The Bribery Act 2010 may have significantly widened the jurisdictional reach of the UK in the prosecution of bribery offences.

Section 7 of the Bribery Act, the corporate offence of failing to prevent bribery, has a broad extraterritorial reach. The offence applies to a 'relevant commercial organisation', defined to include entities formed or incorporated outside the United Kingdom but that carry on a business, or part of a business, in any part of the United Kingdom. The act does not specify what 'carrying on a business in the UK' entails. As the Ministry of Justice guidance acknowledges, the courts will be the final arbiter as to whether an organisation carries on a business in the United Kingdom, taking into account the particular facts in each case.

In the guidance, the government anticipates that the courts will adopt 'a common-sense approach' meaning that organisations that do not have 'a demonstrable business presence' in the United Kingdom would not be caught. In particular, the government does not expect companies solely admitted to the UK Listing Authority's

Official List, without more, to qualify as carrying on a business or part of a business in the United Kingdom; nor does it expect parent companies that have a UK subsidiary, without more, to fall within the definition.

Caution should be exercised if relying on this part of the Ministry of Justice guidance. The prosecution guidance states clearly that prosecutors must only take into account the ministry's guidance when considering the adequacy of procedures. The prosecution guidance states that where the government's guidance provides explanations of the particular concepts relevant to the application of sections 1, 6 and 7 (ie, policy statements) prosecutors 'may find this helpful' when reviewing cases involving commercial bribery. There is no obligation to take the policy explanations into account.

In March 2011, the then-director of the SFO noted the ambiguity of the term 'carries on business in the UK' as follows:

> *The test is expressed in very simple terms. Are you carrying on your business or part of your business in the UK? What does that mean? What about subsidiaries? What about raising finance? What about providing services over the Internet, or indeed in other ways? We shall have to see. Ultimately our courts will apply that test to particular circumstances. Do not be surprised though, if the Serious Fraud Office takes a wide view of this phrase so that we can ensure that the policy objective of ensuring competitiveness is complied with.*

Therefore, hypothetically, if the UK subsidiary of a foreign company was engaged in business relationships outside the UK where there was evidence of bribery, the UK subsidiary could be prosecuted and the parent company might also find itself subject to investigation and proceedings.

15 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

The penalties of the Bribery Act are found in Section 11:

(1) An individual [natural person] guilty of an offence under section 1, 2 or 6 is liable –
- *(a) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both,*
- *(b) on conviction on indictment, to imprisonment for a term not exceeding 10 years, or to a fine, or to both.*

(2) Any other person guilty of an offence under section 1, 2 or 6 is liable –
- *(a) on summary conviction, to a fine not exceeding the statutory maximum,*
- *(b) on conviction on indictment, to a fine.*

(3) A person guilty of an offence under section 7 is liable on conviction on indictment to a fine.

For convictions under the previous regime the penalties for foreign and domestic bribery are the same. Under the 1889 Act and the 1906 Act they are as follows: on summary conviction, a maximum of six months' imprisonment or a fine to the statutory maximum, currently £5,000; on indictment, seven years' imprisonment, an unlimited fine or both. The common law bribery offences have no prescribed or maximum penalties, although generally sanctions for comparable statutory offences can guide the courts. Penalties for attempt and conspiracy are the same as for the related offence. There is no mandatory minimum sentence for any bribery offence.

Other sanctions

Generally, the UK courts may not impose any administrative or civil sanctions on persons convicted of bribery; however, the Company Directors Disqualification Act 1986 allows the application of a civil or administrative sanction in the form of disqualification of directors for general misconduct in connection with companies.

The Proceeds of Crime Act 2002 (POCA) entered into force on 24 March 2003. It punishes money-laundering, including the proceeds of corruption, and established a hierarchical regime of 'asset recovery' (extending through criminal confiscation, civil forfeiture and taxation). Furthermore, an 'enforcement authority' may apply to the High Court for a civil recovery order under part 5 of the POCA 2002. An enforcement authority may be the director of the SOCA, the DPP, the director of the RCPO or the director of the SFO. If the enforcement authority proves to the civil standard the existence of 'property obtained through unlawful conduct' ('recoverable property') or property that represents it, the court may make an order vesting the property in a trustee for civil recovery.

Debarment

In different jurisdictions different offences attract different sanctions. Debarment is one of the more severe sanctions posing high risk of loss of business. Needless to say the possibility of debarment will feature prominently in considerations on how to structure a settlement in multi-jurisdictional investigations. Of particular concern is the Public Procurement Directive (2004/18/EC) (the Directive). Article 45 of the Directive provides: 'Any candidate or tenderer who has been the subject of a conviction by final judgment of which the contracting authority is aware for one or more of the reasons listed below shall be excluded from participation in a public contract'.

The following offences are on the list:

- participation in a criminal organisation, as defined in article 2(1) of Council Joint Action 98/733/JHA;
- corruption, as defined in article 3 of the Council Act of 26 May 1997 and article 3(1) of Council Joint Action 98/742/JHA respectively;
- fraud within the meaning of article 1 of the Convention relating to the Protection of the Financial Interests of the European Communities; and
- money-laundering, as defined in article 1 of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money-laundering.

Owing to the concern raised about the possibility of a conviction under section 7 of the Bribery Act permanently debarring companies from all totally EU and partially EU-funded projects, in March 2011 the secretary of state for justice announced that the corporate offence would only be a ground for discretionary, not mandatory, debarment.

16 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

Civil settlements and regulatory actions

In November 2012, the Aberdeen based oil and gas company Abbot Group agreed to make a payment of £5.6 million to the Civil Recovery Unit of the Crown Office and Procurator Fiscal Service (the Crown Prosecution Service equivalent in Scotland). This represented a fine for corrupt payments made in 2007 (under a contract signed in 2006), when the company was under different ownership and management. This payment was said to represent the profits made from the overseas deals in question. The unlawful actions had been identified after routine enquires by an overseas tax authority and Abbot Group (by then under new management) self-reported to the Procurator Fiscal in July 2012.

A number of SFO investigations were concluded in 2012 by the employment of civil recovery orders.

In July 2012 the SFO recovered more that £1.8 million from Oxford Publishing Limited (OPL), a subsidiary of Oxford University Press (OUP), whose international division entity OUP East Africa had self-reported irregular tendering practices involving

its education business in that region. OPL received income that had been derived from the unlawful conduct of its subsidiary, and after a thorough internal investigation OPL and the SFO were in a position to determine the value of this benefit and a civil recovery order was achieved. OUP has also introduced enhanced compliance procedures and submitted to a monitor who will report to the SFO and the World Bank (the projects were partially World Bank-funded).

In February 2011 the SFO recovered more than £7 million from MW Kellogg (MWKL), the UK subsidiary of Kellogg Brown and Root LLC, after MWKL used the self-referral mechanism to highlight its concerns about its receipt of funds that had been generated through the criminal activities of its associates. MWKL was the expectant recipient of share dividends from a company that it partially owned which had been awarded contracts for a liquefied natural gas project In Nigeria. The SFO decided that the removal of the funds was the most appropriate approach because MWKL was not a willing participant in the corruption and had been used by its parent company (which had acknowledged to the DoJ that it used MWKL to distance itself from the consequences of the FCPA 1977).

In April 2011 DePuy International Ltd, a subsidiary of DePuy Incorporated, agreed to pay £4.829 million plus costs in recognition of unlawful conduct relating to the sale of orthopaedic products in Greece between 1998 and 2006. This investigation was undertaken because of an investigation undertaken by Johnson & Johnson after an internal complaint, it being the owners of DePuy Incorporated and all subsidiaries. The DoJ made a referral to the SFO after Johnson & Johnson had reported its findings to the authorities in the United States. The SFO sanction was determined in the light of the global nature of the settlement where both the SEC/DoJ and the Greek authorities had imposed fines and/or restrained assets.

In July 2011 an order was made against Macmillan Publishers Limited (MPL) in excess of £11 million in recognition of sums received that were generated through unlawful conduct related to its education division in east and west Africa. The investigation originated from a report by the World Bank and the involvement of the City of London Police. In March 2010 MPL reported to the SFO and commenced the investigation procedure of the SFO protocol in dealing with overseas corruption. The SFO determined that financial recovery would be an appropriate resolution because of MPL's continued cooperation with the SFO and other authorities, its debarment by the World Bank and its withdrawal from the educational sector in east and west Africa.

The FSA imposed a fine on Willis Limited, insurance brokers, in July 2011 for failings in its anti-bribery and corruption systems and controls. These failings created 'an unacceptable risk' that payments made by Willis to overseas third parties could be used for corrupt purposes. Between January 2005 and December 2009 Willis made payments totalling £27 million to overseas third parties who assisted it in winning and retaining business overseas, particularly in high-risk jurisdictions. Failure in due diligence procedures, establishing and recording an adequate commercial rationale for payments, staff monitoring and senior management engagement in assessing bribery and corruption risks were all issues identified by the FSA and that Willis had taken significant steps to address. Willis's cooperation allowed it to qualify for a 30 per cent discount under the FSA's settlement discount scheme.

The FSA seems to be taking a very assertive stance in this area, as can be seen in the comments of the acting director of enforcement and financial crime at the conclusion of the Willis investigation:

> *Willis Limited failed to take the appropriate steps to ensure that payments it was making to overseas third parties were not being used for corrupt purposes. This is particularly disappointing as we have repeatedly communicated with the industry on this issue and have previously taken enforcement action for failings in this area.*
>
> *The involvement of UK financial institutions in corrupt or potentially corrupt practices overseas undermines the integrity of the UK financial services sector. The action we have taken against Willis Limited shows that we believe that it is vital for firms not only to put in place appropriate anti-bribery and corruption systems and controls, but also to ensure that those systems and controls are adequately implemented and monitored.*

Plea agreements with corporates

There has been a notable absence of SFO plea agreements in 2011 and 2012 , which could be attributed to the judicial response to the Innospec, Dougall and BAE agreements of 2010 and the fear that any plea agreement or non-prosecution would be struck down by the courts.

The first company to be prosecuted by the SFO for overseas corruption was Mabey & Johnson Ltd (M&J), a supplier of steel bridging based in Twyford, Berkshire. In September 2009 the company was sentenced to fines and penalties totalling over £6 million before paying its own costs and those of the SFO. M&J made a voluntary disclosure to the SFO after carrying out an internal investigation that followed allegations of a culture of bribery at the firm. The allegations surfaced in civil proceedings brought by M&J against its employees. M&J cooperated with the SFO and indicated its intention to plead guilty at a magistrates court hearing in July 2010.

The case is more notable, however, for the absence of several factors that would prove to be the stumbling blocks for the SFO in its subsequent plea agreements with corporates. First, because the bribes were authorised at director level the attribution of fault to the company was uncomplicated. Second, it appears M&J conducted little of its business in the EU and was therefore unlikely to be materially affected by possible debarment. Third, there were no parallel criminal proceedings in the US.

In January 2012 the SFO obtained a civil recovery order of £131,201 against the shareholders of M&J in recognition of sums received through share dividends derived from contracts won through unlawful conduct. It marks the opening of a new front by the SFO – recovery from investors. Richard Alderman, the then-director of the SFO, said:

> *[s]hareholders who receive the proceeds of crime can expect civil action against them to recover the money. The SFO will pursue this approach vigorously… shareholders and investors in companies are obliged to satisfy themselves with the business practices of the companies they invest in. This is very important and we cannot emphasise it enough. It is particularly so for institutional investors who have the knowledge and expertise to do it. The SFO intends to use the civil recovery process to pursue investors who have benefited from illegal activity. Where issues arise, we will be much less sympathetic to institutional investors whose due diligence has clearly been lax in this respect.*

Concerns have been raised as to the impact of this policy on investment in the UK since it creates an uncertainty and a fear that dividends could be deemed proceeds of crime for action that is far beyond the control of investors. Due diligence obligations now must be met to ensure that investors, especially institutional ones, do not leave themselves open to dividends being claimed, and any subsequent legal action from their customers.

Criminal proceedings against individuals

In June and July 2012, Paul Jennings, a former Innospec CEO, pleaded guilty to three counts of conspiracy to corrupt, namely that he gave or agreed to give corrupt payment to public officials and other agents of the governments of Indonesia and Iraq in order to both secure supply contracts, and to rig governmental product test results. He is currently awaiting sentencing.

In January 2012 Dr David Turner, the former Innospec global sales and marketing director, pleaded guilty to three counts of conspiracy to corrupt related to corrupt payments made to officials and agents of the governments of Indonesia and Iraq. Dr Turner

will be sentenced after the conclusion of the other executives' trial (Miltos Papachristos and Dennis Kerrison) which is due to start in May 2013.

In January 2012 four individuals who had been hired by a UK company to undertake procurement services for a series of high-value engineering projects in the oil and gas engineering industry in Iran, Egypt, Russia, Singapore and Abu Dhabi were convicted of conspiring to corruptly obtain payments by supplying confidential information to bidders in return for illegal monetary reward. Upon conviction they were sentenced respectively to five years' imprisonment, three years and six months' imprisonment, three years' imprisonment and a 12-month suspended sentence with a 300-hour unpaid work requirement (the new term for community service).

On 10 February 2011, Southwark Crown Court jury found Charles Forsyth and David Mabey, former directors of Mabey & Johnson Ltd, guilty of inflating the contract price for the supply of steel bridges in order to provide kickbacks to the Iraqi government of Saddam Hussein. Another company sales executive admitted his involvement and gave evidence for the prosecution. On 23 February 2011, Charles Forsyth was sentenced to 21 months' imprisonment, disqualified from acting as a company director for five years, and was ordered to pay prosecution costs of £75,000. David Mabey was sentenced to eight months' imprisonment, disqualified from acting as a company director for two years, and was ordered to pay prosecution costs of £125,000.

In October 2011, two former chief executives of Innsopec, Dennis Kerrison and Paul Jennings, were charged with a number of corruption and conspiracy-related offences surrounding alleged corrupt payments to gain public contracts in Indonesia and Iraq. They are expected to enter a plea in April 2012.

Older individual prosecutions

In October 2010 Julian Messent, a former director of London-based insurance business PWS International Ltd, was sentenced to 21 months' imprisonment after admitting making or authorising corrupt payments of almost US$2 million to Costa Rican officials in the state insurance company, Instituto Nacional de Seguros (INS), and the national electricity and telecommunications provider, Instituto Costarricense de Electricidad (ICE). The sentencing judge made it clear that Messent's guilty plea, cooperation with the SFO and the mitigation offered had allowed him to reduce the sentence from the potential four to five years to the 21 months. He was ordered to pay £100,000 compensation within 28 days to the Republic of Costa Rica or serve an additional 12 months' imprisonment if he failed to do so. He was also disqualified from being a company director for a period of five years.

Earlier that year, former DePuy executive Robert John Dougall received a suspended sentence after admitting his involvement in making £4.5 million of corrupt payments to medical professionals within the Greek state healthcare. Mr Dougall had cooperated fully with the SFO, giving full and frank answers and agreeing to assist law enforcement here and overseas. He also signed a plea agreement pursuant to the attorney general's guidelines on plea discussions in cases of serious and complex fraud. In the agreement the director of the SFO submitted that in return for the assistance the court should impose a suspended sentence.

At first instance, the agreement was ignored and Mr Dougall was sentenced to 12 months' imprisonment. The Court of Appeal overturned this, but not without considerable caution. It held that the SFO had erred in agreeing what Mr Dougall's sentence should be because, although the prosecution was entitled to keep the court fully informed about circumstances which might affect sentencing, '[r]esponsibility for the sentencing decision in cases of fraud or corruption is vested exclusively in the sentencing court' and there are 'no circumstances in which it may be displaced'.

Nevertheless, the court allowed Mr Dougall's appeal noting that, should he have pleaded not guilty, his sentence would have been two years' imprisonment, of which he would have served no longer than 12 months. By entering into the agreement and taking on the consequent burdens, Mr Dougall's sentence was halved such that he would serve 12 months and be released after six. The result of his cooperation, therefore, would be only a few months less in custody, and so his reward for cooperation was relatively small compared to the burdens he assumed. However, the court was keen to stress that allowing Mr Dougall's appeal had nothing to do with the sentencing agreement, and that it was not saying that in similar circumstances a suspended sentence should always be ordered.

Financial record keeping

17 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

In the UK, companies are not required to monitor and report on the effectiveness of their internal control mechanisms, although in the financial services sector there are statutory requirements as to compliance mechanisms and internal controls. Specifically, financial service providers must comply with statutory requirements for internal controls and listed companies have a 'comply or explain' duty in respect of the effectiveness of internal mechanisms under the UK Combined Code on Corporate Governance.

The 2007 Money Laundering Regulations require each business or profession to maintain, inter alia:

- identification procedures;
- record keeping procedures; and
- internal reporting procedures.

The Companies Act 2006 was a major overhaul of company law. Some provisions came into force on 1 October 2007, and others on 6 April 2008; however, these are too numerous to quote here. The company law provisions of the 2006 act restate almost all of the provisions of the Companies Act 1985, together with the company law provisions of the Companies Act 1989 and the Companies (Audit, Investigations and Community Enterprise) Act 2004. Of particular interest to practitioners will be part 15, relating to accounts and records, and the offences contained therein for those who fail to comply with the duty to keep accounting records. Annex A to the SFO's Guidance on Corporate Prosecutions contains a list of possible offences under the Companies Act 2006 for the prosecutors' consideration when reviewing a case against a company.

Businesses regulated by the FSA are subject to disciplinary procedures where they have failed to meet the FSA's regulatory requirements, which could include a failure to have effective anti-corruption procedures in place. Please see question 16 for the discussion of the FSA's action against Willis Limited.

18 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

The Bribery Act contains no obligation for reporting any instances of bribery and corruption. This is consistent with existing company law and accounting standards, neither of which set out specific requirements in respect of the recognition, measurement, presentation or disclosure of matters relating to bribery offences. If a transaction involving a bribery offence were material to the reporting entity, it would probably fall within the definition of an 'exceptional item' as defined in the Financial Reporting Standards on Reporting Financial Performance, which is required to be disclosed separately, along with an adequate description to enable its nature to be understood.

As regards internal company controls and the role of company directors, companies are not obliged to maintain or report on the effectiveness of internal controls. Directors are under no obligation to declare that the company complies with UK legal and regulatory requirements or that there are no errors or irregularities contained in the financial information. However, the broad spread of liability in the section 7 corporate offence may result in greater self-reporting of irregularities.

The anti-money laundering provisions contained within sections 327 to 329 and sections 330 to 332 of the Proceeds of Crime Act 2002 provide for possible disclosure of such violations.

19 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

Yes, they have been. The controversial settlement with BAE Systems announced by the SFO and the US Department of Justice (DoJ) incorporated an agreement between the SFO and BAE that the company would plead guilty to an offence under section 221 of the Companies Act 1985 of failing to keep accurate accounting records in relation to its activities in Tanzania. The company agreed to make a £30 million ex gratia payment for the benefit of the people of Tanzania, less any financial orders imposed by the court. In the US, however, BAE pleaded guilty to a criminal charge of misleading the US government and was fined $400 million.

On 21 December 2010, Mr Justice Bean sentenced BAE to a £500,000 fine and ordered it to pay £225,000 towards the prosecution's costs. However, the judge came close to halting the process for lack of evidence before him:

> *I could not, without hearing evidence, accept any interpretation of the basis of plea which suggested that what BAE were concealing by the section 221 offence was merely a series of payments to an expensive lobbyist. Such evidence might, for example, have involved witnesses who could testify, if it really is the case, that legitimate lobbyists could be paid 30 per cent of the value of a $40 million contract simply as recompense for their time and trouble. Neither side sought to call evidence, although I indicated that I was prepared to grant an adjournment for them to do so.*
>
> *I asked Mr Temple what should have been in the accounting records instead of the phrase 'provision of technical services'. He replied that something along the lines of 'public relations and marketing services' would have been a more accurate description. If that had been a true and accurate description of the services which Mr Vithlani was going to provide then I question whether it would have been appropriate to prosecute at all. Certainly the section 221 offence would have been suitable for being sentenced in the magistrates court. I would myself have imposed a fine of at most £5,000.*

His lordship also expressed surprise to find the prosecution granting blanket immunity for all offences committed prior to February 2010 whether disclosed or otherwise; and that no individuals were being charged despite the opening of the case by the SFO submitted that the BAE offence 'was the result of a deliberate decision by one or more officers'. The judge conceded, however, that he had no power to vary or set aside the settlement agreement.

Section 221 has been replaced by an identical section – section 386 – in the Companies Act 2006.

20 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

Penalties applicable to company officers for fraudulent accounting under the Companies Act 1985 carry on summary conviction a maximum term of six months' imprisonment or a £5,000 fine or both, and on conviction on indictment, a maximum term of two years' imprisonment or a fine with no upper limit or both. Where a company has failed to keep books as prescribed under section 722 of the Companies Act 1985, the company and company officers are liable to a fine with no upper limit or a daily default fine.

Practitioners should refer to the various sections of the Companies Act 2006 for penalties applicable under that legislation (see question 15).

In the BAE criminal proceedings Mr Justice Bean, having observed that under section 221 of the Companies Act 1985 he normally would have imposed a fine of £5,000, sentenced the company to £500,000 fine on the basis that:

> *… by describing the payments in their accounting records as being for the provision of 'technical services' the Defendants were concealing from the auditors and ultimately the public the fact that they were making payments to Mr Vithlani, 97 per cent of them via two offshore companies, with the intention that he should have free rein to make such payments to such people as he thought fit in order to secure the Radar Contract for the defendants, but that the defendants did not want to know the details.*

21 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

Although no specific provision exists prohibiting the deductibility of bribe payments to foreign public officials, section 1304 of the Corporation Taxes Act 2009 and section 55 of the Income (Trading and Other) Act of 2005 provides that tax deductibility is denied for any payment the making of which constitutes the commission of a criminal offence in the UK. Additionally, the Finance Act 2002 has ensured that the prohibition also applies to payments that take place wholly outside the jurisdiction of the UK. Although deductibility of bribe payments is clearly prohibited within the UK, some of the Crown dependencies and overseas territories are not in compliance with provisions of the OECD Council Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials.

Domestic bribery

22 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

Current position

Sections 1 and 2 of the Bribery Act set out two active and four passive bribery scenarios (cases) that describe conduct of the payer or the recipient that will constitute a bribery offence.

Section 1 defines the offence of bribery as it applies to the person who offers, promises or gives a financial or other advantage to another. That person is referred to in the section as P – he or she is the payer.

Section 1 provides that P is guilty of an offence if one of two scenarios applies to him or her:

Case 1

Case 1 is where –

(a) P offers, promises or gives a financial or other advantage ['Financial or other advantage' is left to be determined as a matter of common sense by the tribunal of fact] to another person, and

(b) P intends the advantage –

(i) to induce a person to perform improperly a relevant function or activity, or

(ii) to reward a person for the improper performance of such a function or activity.

It does not matter whether the person to whom the advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the function or activity concerned.

Case 2

Case 2 is where –

(a) P offers, promises or gives a financial or other advantage to another person, and

(b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.

In neither case does it matter whether the advantage is offered, promised or given by P directly or through a third party.

Section 2 defines the offence of bribery as it applies to the recipient or potential recipient of the bribe, who is called R. It distinguishes four cases, for which it does not matter whether R does or will request, agree to receive or accept the advantage directly or through a third party or whether the advantage is (or is to be) for the benefit of R or another person.

Case 3

Case 3 is where R requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly (whether by R or another person).

Case 4

Case 4 is where –

(a) R requests, agrees to receive or accepts a financial or other advantage, and

(b) the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity.

In this scenario, it does not matter whether R knows or believes that the performance of the function or activity is improper.

Case 5

Case 5 is where R requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance (whether by R or another person) of a relevant function or activity.

Again, in this scenario as with case 4 above, it does not matter whether R knows or believes that the performance of the function or activity is improper.

Case 6

Case 6 is where, in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly either by R, or by another person at R's request or with R's assent or acquiescence.

Not only does it not matter whether R knows or believes that the performance of the function or activity is improper, but in this scenario, where a person other than R is performing the function or activity, it also does not matter whether that person knows or believes that the performance of the function or activity is improper.

Conduct occuring prior to 1 July 2011 falls under the previous regime with the possible offences being:

- the common law offence of bribery;
- the two offences in section 1 of the Public Bodies Corrupt Practices Act 1889; and
- the first two offences in section 1(1) of the Prevention of Corruption Act 1906.

All these offences address the gift or receipt of bribes (or corrupt advantages), but they differ in their application depending upon who is the recipient. The common law applies where the person who receives the bribe holds any public office; the 1889 Act applies where he or she is a 'member, officer or servant' of any local or public authority and the 1906 Act applies where he or she is an 'agent' – which includes persons working in the private sector as well as persons serving under the Crown and other public authorities.

These offences were amended by the Prevention of Corruption Act 1916, which introduced the presumption of corruption. Section 2 of the 1916 Act provides that where money or any 'consideration' is received by a public official from a person seeking to obtain a public contract, it shall be presumed to have been corruptly received unless the contrary can be proved.

23 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

The Bribery Act, in sections 1 and 2, very clearly prohibits the paying and the receiving of a bribe respectively.

The giving, promising or offering of a financial or other advantage whatsoever to any person, whether for the benefit of that person, or of another person, as an inducement to or reward for doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed in which the public body is concerned are offences under the Bribery Act, punishable with a maximum of 10 years' imprisonment.

24 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

The Bribery Act makes no distinction in domestic law between the bribery of public officials and private individuals. Under sections 1 and 2 the bribe must be connected to an improper performance (or non-performance) of a 'relevant function or activity'. Thus, 'relevant function or activity' is defined in section 3 as being:

- any function of a public nature;
- any activity connected with a business;
- any activity performed in the course of a person's employment; and
- any activity performed by or on behalf of a body of persons, whether corporate or not.

These functions or activities must meet one of the following three conditions in order to qualify as 'relevant' function or activity:

- a person performing the function or activity is expected to perform it in good faith;
- a person performing the function or activity is expected to perform it impartially; and
- a person performing the function or activity is in a position of trust by virtue of performing it.

Previous regime

The Court of Appeal decision in *Whitaker* [1914] 3 KB 1283 provides the most widely cited definition concerning who is to be regarded as a public officer for the purposes of common law bribery. Under the definition a public officer is 'an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public'.

As originally enacted, the 1889 Act was concerned only with local public bodies (such as bodies that have power to act under and for the purposes of any act relating to local government, or the public health, or otherwise to administer money raised by rates in

pursuance of any public general act). Section 4(2) of the 1916 Act extended this definition to encompass 'local and public authorities of all descriptions'. This however, does not include the Crown or a government department. Schedule 11, paragraph 3 of the Local Government and Housing Act 1989 makes provision for including companies 'under the control of one or more local authorities', but this provision is not in force.

The 1906 Act, in extending the law of corruption into the private sector, defined 'agent' as meaning 'any person employed by or acting for another'. Section 1(3) of the act further clarified that 'a person serving under the Crown or under any corporation or any […], borough, county, or district council, or any board of guardians, is an agent within the meaning of this Act'.

25 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

The development of effective codes of conduct regulating those who are involved in public life has been accepted as being essential in reducing the prevalence of corruption in society. The codes that have been developed contain detailed rules of conduct tailored to the requirements of the office holders concerned and the risks they are likely to encounter. The rules include requirements to declare and register interests and to avoid conflicts of interest and situations that may create a perception of conflict of interest.

The Committee on Standards in Public Life is an advisory non-departmental public body of the UK government. Its first general recommendation, in May 1995, was that the principles underpinning standards in public life should be restated. These principles as formulated by the committee have come to be known as the Seven Principles of Public Life and have come to be regarded as the 'touchstone for ethical standards across the public sector generally' (Sixth Report). Their second recommendation was that all public bodies should draw up codes of conduct incorporating these seven principles.

The Principle of Selflessness states that: 'Holders of public office should take decisions solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family, or their friends.'

The Principle of Integrity states that: 'Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might influence them in the performance of their official duties.'

By way of example, the Ministerial Code states that ministers must ensure that no conflict arises, or appears to arise, between their public duties and their private interests, financial or otherwise.

Ministers customarily place their family assets in blind trusts during the currency of their ministry.

26 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

The new offence of corporate bribery in section 7 of the Bribery Act applies to both domestic and foreign officials: the offence is the failure to prevent bribery. Therefore, besides the codes of conduct that public officials and many private employees are subject to, in response to the section 7 offence many companies have re-evaluated their guidelines and restrictions for corporate hospitality and business expenditure, which would encompass business relations with domestic officials. The principles upon which the section 7 guidance is based highlight the importance of ongoing training and monitoring that it must be assumed will encompass this area.

The new guidance, as mentioned in question 5, also applies to domestic business expenditure.

It is a well-established and recognised rule that no minister or public servant should accept gifts, hospitality or services from anyone who would, or might appear to, place him or her under an obligation. The same principle applies if gifts, etc, are offered to a member of their family. See clauses 7.20 to 7.24 of the Ministerial Code.

In February 1997 Michael Allcock, a senior tax inspector in the Special Compliance Office, was convicted on six counts of corruptly accepting money and other benefits from taxpayers, between 1987 and 1992, in return for favourable treatment of their tax affairs. He was sentenced to five years' imprisonment.

27 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

There are no specific guidelines or permitted items contained in legislation; however, there has been a large amount of guidance. Cases of this nature will turn on their facts in the context of all the guidance that exists. Basically businesses should wherever possible avoid gifts and gratuities to anyone who can influence the obtaining/sustaining of business advantage, or that would induce improper performance.

The convictions in the Sainsbury's potato buyer corruption case, which concluded in May 2012 (please see question 31 for further detail), provide assistance in judging the line between acceptable corporate hospitality and outright bribery, as well as the concept of inducement and improper conduct or performance. The buyer received hospitality and gifts from Greenvale, which supplies potatoes to the supermarket, including:

- a stay at Claridge's costing a total of £200,000;
- a luxury 12-day excursion to the Monaco Grand Prix in 2007, at a cost to Greenvale of around £350,000; and
- lump-sum payments, via an account in Luxembourg, in the amount of £1.5 million (supposedly for the storage of potatoes in Spain and other bogus activities).

28 Private commercial bribery

Does your country also prohibit private commercial bribery?

The Bribery Act makes no distinction between public official and private commercial bribery. It is therefore prohibited under sections 1 and 2 of the Bribery Act (see question 22). Under sections 1 and 2 the bribe must be connected to the improper performance of a 'relevant function or activity'. This has been defined very widely (see question 24) and can be (among others) an activity connected with a business, in the course of employment or performed by or on behalf of a group of persons. This easily encompasses private commercial relationships and thus prohibits private commercial bribery.

International law on bribery within the private sector is somewhat undeveloped. In essence, two conventions (Council of Europe and UN) and a Framework Decision of the EU contain requirements for the criminalisation of the giving or receiving of undue advantages in the course of business activities for actions which represent a breach of duty. The provisions in the conventions are in effect optional: reservations may be made on articles 7 and 8 in the Council of Europe convention, and article 21 of the UN convention only requires parties to 'consider' such an offence.

Previous regime

The UK, in 1906, was the first country to legislate on private-to-private bribery. UK courts will also hear cases in which elements of the offence of private-to-private bribery involving UK nationals or companies have occurred abroad. This applies both to the public and private sectors. Please see question 2.

Update and trends

In December 2012, Rolls-Royce plc announced that they had passed information to the SFO relating to concerns about 'bribery and corruption' of intermediaries in Indonesia and China. Further media reporting alleges that the company under investigation for allegedly paying a US$20 million bribe to Tommy Suharto, the son of the former Indonesian president, for his assistance in winning a large contract: supplying 700 engines to the Indonesian national airline Garuda.

John Rishton, the chief executive of Rolls-Royce, has said: 'I want to make it crystal clear that neither I nor the board will tolerate improper business conduct of any sort and will take all necessary action to ensure compliance. This is a company with exceptional prospects and I will not accept any behaviour that undermines its future success.'

In January 2013, further allegations of bribery were reported in the media in relation to contracts won in the Chinese aviation market. It was also reported that the SFO has yet to launch a formal investigation into Rolls-Royce.

It is expected that any wrongdoing that may be investigated will predate the coming into force of the Bribery Act. Press surrounding the investigation has recently highlighted that despite this scandal and the coming into effect of the Bribery Act, the solicitation of bribes by Indonesian bureaucrats and members of the armed forces is still routine and causes many business difficulties for UK firms.

On the 17 December 2012, four British former employees of Swift Technical Energy Solutions Limited, a Nigerian subsidiary of the Swift Group, were charged with two offences of conspiracy to corrupt. The employees held the position of former CFO, former tax manager, former financial controller and former area director for Nigeria. The charges relate to alleged bribes totalling £180,000 made to agents of the Rivers State Board of Internal Revenue and the Lagos State Board of Internal Revenue, both in Nigeria, allegedly to avoid, reduce or delay tax payments on behalf of workers placed by Swift. Swift Group provides personnel for the oil and gas industry, with over 3,000 contractors in 35 countries. As the alleged bribes were paid in 2008 and 2009, the Bribery Act has not been engaged.

The common law offence of bribery is limited to public sector corruption.

29 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

The penalties for foreign and domestic bribery are the same.

30 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

A facilitation payment is given to an official as encouragement to do something that in any case would fall within the official's functions. Facilitation payments are not exempt under UK law: common law and UK legislation have never distinguished 'facilitation payments' from other bribes. The Bribery Act has made no change to the law.

See also question 6.

31 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

The Sainsbury potato buyer case (as referred to in question 27) concerned the discovery by Greenvale, a company supplying approximately 45 per cent of Sainsbury's potatoes, of corrupt practices being engaged in by its finance director Andrew Behagg, and accounts manager David Baxter, and the Sainsbury's potato buyer John Maylam. As outlined above, John Maylam received hotel stays, luxury trips to prestigious sporting events and large amounts of cash: it was estimated that the total amount that he accepted amounted to £4.9 million. These funds were directly taken from Sainsbury's £8.7 million overpayment on the inflated contract over which the three defendants had colluded.

Maylam admitted corruption and acquiring criminal property and was imprisoned for four years. Baxter admitted the same charges and was imprisoned for 30 months. Behagg was convicted on corruption charges at Croydon Crown court and received a three-year sentence.

A long-running investigation into the corruption of civil servants in Northern Ireland concluded in February 2012 with four people admitting being involved in a corrupt scheme centring around the awarding of CCTV contracts for Ministry of Defence locations in the region. James McGeown, the owner of the CCTV company, pleaded guilty to 16 counts of corruption involving payments to MoD employees totalling over £85,000 in order to obtain contracts worth £16.2 million. Two MoD employees pleaded guilty to corruption and money-laundering charges. A fourth defendant, the sisters of one of the civil servants, admitted an offence of obstructing a police officer in the execution of his duty in conducting financial transactions for her brother through a bank account in her own name.

A number of investigations have arisen out of the *News of the World* phone-hacking scandal. One of these is Operation Elveden: an investigation into alleged corrupt payments to police and public

PETERS & PETERS

Monty Raphael QC **montyr@petersandpeters.com**

15 Fetter Lane
London EC4A 1BW
United Kingdom

Tel: +44 20 7822 7777
Fax: +44 20 7822 7788
www.petersandpeters.com

officials, which has led to (at 12 Febuary 2013) 60 arrests. While this investigation is still ongoing, to date, eight people have been charged. Two (Andy Coulson and Clive Goodman) have been charged with two counts of conspiracy to commit misconduct in a public office. Three other people (Rebekah Brooks, John Kay (former *Sun* chief reporter) and MoD employee Bettina Jordan-Barber) have been charged with one count of conspiracy to commit misconduct in a public office regarding payments totally £100,000 allegedly made to Ms Jordan-Barber for information. Plea and case management hearings will take place in March 2013.

On 22 January 2013, the *Sun* newspaper's defence editor Virginia Wheeler, and a former Metropolitan Police (Met) officer, Paul Flattley were charged with conspiracy to commit conduct in public office. It is alleged that between 25 May 2008 and 13 September 2011 (when Wheeler was promoted to defence editor), Flattley – who was serving in the Met – was paid at least £4,000 in the form of cheques and £2,450 in cash by the *Sun* in exchange for information.

The SFO is currently undertaking investigations into the actions of a UK subsidiary of EADS and of the circumstances surrounding the Qatar Sovereign Wealth Fund's investment in Barclays Bank.

Mawia Mushtaq became the second individual to be convicted under the Bribery Act in December 2012, after attempting to bribe a licensing officer to obtain a private taxi licence. When he failed a driving test in October 2012, he offered the officer bribes of up to £300 to change the result. The examiner refused and reported the matter to his manager who further informed the police of the incident. Mushtaq was sentenced to a two-month suspended sentence and a two-month curfew.

Munir Patel, a court clerk, had the dubious honour of being the subject of the first prosecution under the Bribery Act. He was charged in August 2011 with bribery offences under both section 2 of the Bribery Act and with misconduct in a public office under the previous regime. The section 2 offences was the requesting and receipt of a £500 bribe for offering to 'get rid' of a speeding charge for someone in the course of his employment at Redbridge Magistrates Court in London.

Mr Patel pleaded guilty to bribery and misconduct in public office. He was sentenced in November 2011 on the basis of conduct between February 2009 and August 2011, in which time it was believed that he had earned at least £20,000 for helping 53 offenders. He was sentenced to three years' imprisonment for bribery and six years' imprisonment for misconduct in public office, to be served concurrently. Patel appealed his sentence in May 2012, and the Court of Appeal ruled that for 'a young man of previous good character who pleaded guilty at the first available opportunity' the overall sentence of six years was excessive. It was reduced to four years.

The author thanks Joanna Williams, of Peters & Peters Solicitors LLP, for her assistance.

Published by Getting the Deal Through
in association with Transparency International

TRANSPARENCY INTERNATIONAL UK
fighting corruption worldwide