Bribery and Corruption: Investigations and Negotiations Across Jurisdictions

Rahman Ravelli

Aziz Rahman

Bribery Allegations

The Legislation

This decade has seen a significant legal change in the prosecution of bribery in the UK; namely the Bribery Act 2010. Nevertheless, it is also important to consider what the situation was before this Act came into effect.

We do this not simply as a historical exercise – but because the legislation that existed before the Bribery Act is still relevant and can still be used today. Even though the Bribery Act came into effect in 2011, the earlier legislation is still available to prosecutors.

The Bribery Act 2010[1] should be seen as the result of a decades-long attempt to reform the law regarding bribery and corruption. It simplified bribery into three offences – offering a bribe, paying one or bribing a foreign official - while introducing a new corporate offence of failing to prevent bribery. Its introduction was, arguably, long overdue.

The Bribery Act replaced the pre-existing law, which was the common law offence of bribery and the statutory offences in the Public Bodies Corrupt Practices Act 1889 (as amended)[2] and the Prevention of Corruption Act 1906 (as amended).[3] Yet the old law cannot be disregarded. It applies to cases where the alleged bribery and corruption was committed before the Bribery Act came into effect on July 1 2011. Section 19 of the Bribery Act makes this clear.

If a company, therefore, is investigated over suspected bribery that occurred before July 2011, any prosecution would be brought under the old law. This is not mere theory. Bribery often comes to light years after it was committed: the case of Rolls-Royce, which we mention later, is a prime example. It is not beyond possibility, therefore, that we may see the old law used regularly as and when allegations that pre-date July 2011 come to light and are investigated and prosecuted. The old law applies to corruption committed within and beyond UK borders, unless it is committed in a foreign jurisdiction by a foreign national normally based in the UK or by a subsidiary of a UK-based company without the authority or involvement of that company. It is also worth noting that the old law, unlike the Bribery Act, does not offer a company the adequate procedures defence; meaning a corporate could be prosecuted for corruption by someone working for it even if it had done everything possible to prevent it.

The old law is still in use. In 2016, for example, printing company Smith & Ouzman Ltd[4] was fined £2.2m under the 1906 Act for making corrupt payments between 2006 and 2010. It is also worth noting that there could be cases which straddle both regimes because the bribery began before July 2011 and continued after that date. It is possible that, in such cases, charges could be brought under both old and new laws, depending on when the individual offences took place. As the UK does not have any time limit on when charges can be brought regarding an offence, it is likely that prosecutions will continue to be brought under the old law.

Prosecutions

We have a situation, therefore, where prosecutions can be brought under a variety of laws. The Serious Fraud Office (SFO), which was founded in 1987, is the specialist authority that investigates and prosecutes bribery and corruption. On such cases, it often works with the National Crime Agency (NCA), whose International Corruption Unit investigates corruption involving developing countries.

The SFO receives information from many sources, which it assesses to see if it is worthy of investigation. If the SFO believes the situation undermines UK financial and corporate interests, it will accept it for investigation, involving the unique range of powers it has under Section 2 of the Criminal Justice Act 1987.[5]

This involves SFO teams of skilled experts investigating and, where necessary, using Section 2 to compel any individual or organisation to provide the SFO with information or documents that it believes are relevant to its investigation. The SFO has even told lawyers that they are not guaranteed a right to accompany a client that is compelled to go in for interview under Section 2. If a lawyer wants to attend a Section 2 interview with their client, they must argue why they should be allowed to attend and even agree to certain restrictions on their role in it. This is an approach that the Law Society, the solicitors' professional body, has called "inappropriate".

When, as part of an investigation into possible bribery and corruption, three senior figures in GlaxoSmithKline were asked to attend for interview by the SFO under Section 2, the trio said they wished to be accompanied by solicitors retained by the company for the investigation. The SFO refused permission for the solicitors to attend. It told the trio that the presence of solicitors that represent GSK in the interviews may prejudice the investigation.

The three men were unsuccessful in their application for a judicial review[6] of the decision, with the High Court of Justice Queen's Bench Division stating that the SFO's stance on Section 2 interviews was in accordance with policy in the SFO's Operational Handbook. The SFO's stance on Section 2, therefore, remains in force.

With its own range of powers and its ability to ask for extra "blockbuster" funding for major investigations, the SFO has all the resources for a thorough investigation.

The fact that Bribery Act convictions are, for the time being at least, scarce should not lull anyone into a false sense of security. Having secured successful outcomes in bribery cases, we can say that there is an appetite for bribery prosecutions, even if that has not yet transformed itself into a string of convictions.

Bribery investigations can be long, drawn-out and complex affairs. If an investigation commences into allegations relating to conduct post-July 2011, it may take months, or most likely years, before a decision is taken regarding whether to press charges. The lack of many charges being brought under the new Act should not, therefore, be taken as a sign that the SFO is not actively pursuing those it believes to be involved in bribery.

Those individuals and companies that the SFO believes are involved in bribery do not, in fairness, need to know the ins and outs of UK bribery legislation. That can be safely left to their legal teams. What they do have to know, however, is the best way to proceed if they believe they are suspected of bribery.

Investigations

If a company finds out, either officially, unofficially or even from its own staff or third parties, that it is suspected of bribery, there is a course of action that it must take. This course, while not complicated, must be commenced the instant any hint of bribery is suspected. An internal investigation has to be conducted immediately – into all aspects of the company's activities. If those within the company are not sure how to proceed they should seek the relevant legal advice. It is only by conducting a well-devised and executed internal investigation that a company can properly assess the extent of any wrongdoing.

Knowing this can help a company respond appropriately to any allegations made by the SFO. Crucially, if an internal investigation produces evidence of bribery before the authorities are aware of it, this gives the company the opportunity to self-report the problem. While this cannot be seen as a magic wand that removes legal difficulties, it is likely that any company that does self-report will receive more lenient treatment from the authorities, who will acknowledge the effort and honesty that has been involved.

The SFO has made it clear, however, that self-reporting is no guarantee that a prosecution will not follow. It will not accept a company's report of wrongdoing at face value and will want to make its own enquiries. Having taken such a stance, however, the SFO has made it clear that it encourages companies to self-report as early as possible. The SFO's approach is understandable and emphasises the fact that self-reporting has to be regarded as much more than an attempt to avoid prosecution by saying nothing illegal happened. The SFO has plenty of scope when it comes to the action it takes against those is suspects of bribery. Self-reporting gives those who believe bribery is being carried out in their name a real opportunity to start a dialogue with the SFO: a dialogue that could achieve that goal of avoiding prosecution.

But the self-reporting has to be based on an internal investigation that has been thorough, methodical and has utilised professionals with the relevant experience and expertise. Such people can include – but are not limited to – investigators, experts in data preservation and analysis, forensic accountants, economists and cultural experts.

Their efforts, as well as all other aspects of the planning and management of the investigation, have to be handled and overseen by lawyers with in-depth knowledge of bribery law, an awareness of how best to deal with the SFO and a realistic approach to the need to identify and rectify the wrongdoing, failings or areas of risk. What must always be borne in mind is that self-reporting is something that has to be done carefully and appropriately. It is a significant step and anyone considering it will need advice from those with both the relevant legal expertise and extensive experience of dealing with the SFO.

Such expertise is necessary in order to carry out the internal investigation properly – and also ensure its findings are handled appropriately. When it comes to reporting the findings, great consideration must be given to how and when they are reported. Any self-reporting carries the risk of giving the authorities the evidence they require for a bribery prosecution: what had been intended by those under investigation as an attempt to avoid prosecution via a DPA by "coming clean" could be used against them if the self-reporting is not handled properly.

There is also the danger that legal developments can rapidly change the scope that a company has for using an internal investigation in support of its interests. The 2017 case of *SFO v ENRC (Eurasian Natural Resources Corporation)* illustrated this perfectly.[7]

The case relates to allegations that ENRC was involved in bribery in Kazakhstan and an African country. The judge, Mrs Justice Andrews DBE, rejected all but one of ENRC's claims that documents it had created during the self-reporting process were subject to legal privilege. The judge's findings severely restricted the circumstances in which documents can be considered legally privileged.

At the time of writing, ENRC has just been granted permission to appeal this decision. It is now likely to be heard by the Court of Appeal, but as it stands, the case is likely to have a major effect on the way that corporate internal investigations are conducted. Without the protection of privilege, companies and their legal representatives will have to proceed with extra caution so as not to simply create material that backs their case, only for it to be taken and used against them by the authorities.

Negotiations

Internal investigations, therefore, must be seen as an essential tool for any company looking to establish if bribery has been committed. They can enable a company to deduce the size of the problem. But they also help shape the company's response to the problem. The findings of an internal investigation can help determine the company's dialogue with the authorities and, crucially, form the start of discussions with the SFO or other agency about the remedies or penalties that may result. The SFO can, obviously, prosecute those it believes have committed bribery. But it is not obliged to. It has the power not to deem an instance worthy of prosecution; either by imposing no punishment at all or by resorting to a deferred prosecution agreement (DPA).

DPAs were introduced under the provisions of Schedule 17 of the Crime and Courts Act 2013.[8] A DPA is an agreement reached (under the supervision of a judge) between a prosecutor and an organisation which could be prosecuted. It allows a prosecution to be suspended for a defined period provided that the organisation meets certain specified conditions. A company must admit the criminal behaviour and agree to work under certain conditions that the SFO or CPS decides to impose. Such conditions include alterations to working practices, staff changes, paying fines or introducing anti-corruption measures. If the company continues to meet these conditions for a set length of time, it avoids prosecution. If it does not meet them, it is prosecuted.

While DPAs are worth a chapter in their own right, it is worth noting here that they are another example of the scope the SFO has when it comes to dealing with bribery. Exactly what course of action the SFO takes regarding each bribery investigation may come down largely to the way a company negotiates with the SFO.

When it comes to negotiation on a bribery investigation, a number of factors are crucial when it comes to enhancing the chances of a successful outcome.

Cooperation: A company failing to self-report the wrongdoing may well have a reduced chance of obtaining the most lenient treatment. But that is not necessarily the case. A company can make up for a lack of self-reporting by cooperating fully with the authorities. In arguably the UK's most high-profile DPA, Rolls-Royce[9] did not report its extensive use of bribery in far-flung countries. But once the SFO was aware of the bribery, the firm went to great lengths to cooperate with it; even to the point of bringing to the authorities' attention wrongdoing that they were not already aware of. This cooperation was highlighted by the judge as a factor in approving the DPA and the lenient penalties within it.

It is vitally important, however, that any offer of cooperation is not just offered to the SFO when it looks like a charge is likely. The judge in the XYZ case[10] stated clearly that if those under investigation did not offer openness when investigations were under way, then they could expect little or no reward. The cooperation has to be there from day one and be genuine and ongoing. By appointing a lawyer with experience and expertise in dealing with the SFO, you can be advised on exactly how to cooperate and what it entails.

Reform: When Standard Bank[11] obtained the UK's first DPA, it did so having immediately reported its wrongdoing and taken a strong, proactive approach to disclosing everything it could. Its cooperation stood it in good stead, as it obtained a DPA instead of being prosecuted. But the leniency shown was in part due to Standard's efforts to swiftly put right the problems that had led to it facing legal trouble. It is no coincidence that all the DPAs that have been granted so far have been made after the corporates under investigation removed senior managers who were either implicated in the wrongdoing or should have been aware of it. The authorities welcome cooperation but they also want to see clear evidence of a corporate's commitment to changing its workplace practices to prevent any repeat problems.

Speaking at the Cambridge Symposium on Economic Crime in 2017, the SFO's General Counsel, Alun Milford, said:

> "Deferred prosecution agreements are pragmatic devices aimed first at incentivising openness leading to the uncovering of financial crimes and secondly at allowing companies to account to a court for those crimes in a way that does not also punish its innocent employees, suppliers and the local community in which it operates."[12]

While his remarks relate specifically to DPAs, they emphasise the SFO's belief – and the belief held by its counterparts in other countries – that companies are best served by self-reporting and the introduction of fit-for-purpose compliance structures. As the SFO looks towards its future, that is what it will be seeking from those looking to avoid prosecution and be treated leniently. Indeed, careful consideration of what reforms need to be made and introducing them while negotiations are ongoing can be a major factor in achieving such a goal.

But change for change's sake will never be enough. Any action to reform a company in the wake of bribery allegations being made proves an awareness of the failings and a determination to change. Corporates being investigated for bribery are battling to minimise the financial and reputational damage that can result, as well as trying to avoid being prosecuted. In such a pressured environment, it is often best to call in outside help to take a considered, impartial look at what and who need to be changed to both prevent repeat problems and convince the authorities of a corporate's determination to "turn over a new leaf".

Across Jurisdictions

We mentioned earlier how bribery investigations can be lengthy and complicated affairs. This is partly due to the often complex nature of trading arrangements. But, in many cases, it is because the deals under investigation have taken place in a number of countries; meaning they could involve investigating authorities from a number of nations – each of which has its own legal system. With such cases, it cannot be over-emphasised how important it is for anyone facing a cross-border investigation to be represented by a firm that has easy and regular access to a network of worldwide legal experts. Any multinational investigation requires a multinational response. It is not exaggerating to say that the outcome in many future bribery cases may hinge on the ability of the defence team to construct and coordinate representation in a number of countries. The bigger the company, the more likely it is to trade in more than one nation. This not only increases the risk of bribery; it places a greater onus on those at the top of the company to be aware of everything that is being done on their behalf anywhere in the world. Relying on representation from a firm whose reach does not extend as far as the allegations do is a high-risk approach. Such allegations can only be tackled by a legal firm that can command and coordinate the services of experts in the relevant countries.

2016–17 Investigations

This is not a theoretical argument. The major cases of 2016–17 have shown the multijurisdictional nature of bribery investigations.

We mentioned earlier the case of ENRC. It is a case that illustrates this. The SFO opened an investigation into ENRC in 2013 over allegations that bribes were paid to win business regarding mineral assets in Kazakhstan and Africa. The SFO investigation followed roughly two years of discussion regarding whether the company should self-report. Since the investigation began, the company has been delisted from the London Stock Exchange and changed its name to ERG. The ENRC case shows the international nature of bribery allegations. But it also shows the potential damage that can be caused if there is even a hint of bribery – and that bribery is not tackled promptly.

The Soma Oil and Gas investigation[13] is another major case that indicates the problems that come with a bribery investigation, regardless of whether it leads to a prosecution. The investigation had been prompted by allegations made by a United Nations body called the Somalia and Eritrea Monitoring Group (SEMG), which claimed that Soma was bribing officials. Soma denied the allegations and was fiercely critical of those who had made them.

In late 2016, the SFO abandoned its bribery investigation into Soma after failing to find enough evidence to prosecute. Following a 17-month investigation, the SFO announced: "Whilst there were reasonable grounds to suspect the commission of offences involving corruption, a detailed review of the available evidence led us to the conclusion that the alleged conduct, even if proven and taken at its highest, would not meet the evidential test required to mount a prosecution for an offence."

Regardless of whether or not the allegations were true, they proved to be the death knell for Soma's attempt to develop an offshore oil industry in Somalia. New funding from investors – including a Russian billionaire – failed to materialise, potential partners (including an Italian energy giant) decided not to become involved and Soma, at one point, was down to its last half a million pounds in cash.[14] A multinational deal fell through because of bribery allegations that were never proven or disproven.

When the SFO confirmed, in May 2017, that it was investigating oil services group Petrofac[15] over its links to Monaco-based consultancy firm Unaoil, the announcement came a year after it had begun bribery investigations into Unaoil's activities on behalf of Rolls-Royce, Halliburton-KBR, ABB, Leighton Holdings and Amec Foster Wheeler.

The Petrofac investigation, therefore, was not unique, even if the company's resulting 14% fall in share value did serve as another warning about the damage that can be caused by bribery allegations. But it was notable for emphasising the importance of a proper internal investigation. The SFO investigation into Petrofac began just months after the company insisted its own investigations had found no evidence that any director of the company was aware of any alleged misconduct regarding Unaoil. A company that comes under SFO investigation after it claims that it has investigated and found no signs of wrongdoing will face an uphill battle to convince the authorities that it has taken the allegations seriously.

Such developments can only re-emphasise how important it is that – as we said earlier – an internal investigation is carried out properly. In cases that span countries, the challenge is all the harder, as it involves a number of jurisdictions and carrying out an internal investigation can be a much lengthier and complex process than it would be if the allegations involved one company site in just one country. The Petrofac case indicates the increased risks or bribery when trading in a number of countries – as do the other cases mentioned here – but it also shows the dangers of not conducting an internal investigation properly.

Commitment

The principles outlined above regarding investigation and negotiation are the only appropriate way for corporates to proceed if they suspect bribery is being committed. There can be no cutting of corners when it comes to taking this course of action. If corners are cut, it is likely that the investigating authority will soon realise this and take a less than charitable view of what has been done. It is understandable that corporates may find the process of investigation and negotiation overwhelming in bribery cases that cross borders. But that cannot be seen as an excuse not to do everything possible to put right the problem.

Certainly, the investigating authorities in any country will expect nothing less than a wholehearted commitment to resolving the problems before they consider any leniency. Mining company Rio Tinto[16] has been investigated by the SFO in 2017 over its involvement in suspected corruption in the Republic of Guinea. It said that it would fully cooperate with the SFO and any other relevant authorities. Tellingly, the SFO investigation came after Rio Tinto had conducted its own internal investigation, having been alerted to emails relating to payments to an unidentified consultant regarding a project to secure an area rich in untapped iron ore deposits.

Rio Tinto even suspended one senior executive, accepted the resignation of another and alerted US and UK authorities about millions in unexplained payments. But such measures will never be a guarantee of avoiding prosecution. If a company is the subject of a multijurisdictional investigation, it has to take advice and be guided as to the best way to proceed by those with expertise in coordinating cases that cross international borders.

One thing that all these multinational cases have in common, apart from allegations of bribery, is that they are all based on the race to secure natural resources. Whether it be oil, gas or materials that are mined, a lot of the major bribery cases involve the race to secure access to and rights to sell natural resources.

As such resources become scarcer and demand increases for them, it is likely that the chances of bribery being used to secure deals could increase. What those who are looking to secure such deals must remember, however, is that the authorities around the world are now a lot more attuned to the potential for bribery and more coordinated in their attempts to tackle it. The onus is on such companies, therefore, to make sure they do nothing that could be seen to be promoting bribery in any way. They are expected to have taken the best legal advice and to have implemented the most appropriate measures to prevent bribery and corruption.

That is the case whatever line of business a company is in, wherever it is based, wherever it trades and however large or small it is.

It is also worth noting that when a company comes under investigation for bribery, it is unlikely that the authorities will impose limits on what they are looking for. If, therefore, a company is investigated for bribery, the authorities are certain to look for evidence of other crimes. If the evidence trail then leads investigators to what appears to be other wrongdoing, those under investigation have to be able to show that they did everything possible to try to prevent it.

This means that any internal investigation must look – as we mentioned earlier – into all aspects of a company. There is little value in conducting an internal investigation solely to seek evidence of possible bribery if that investigation fails to uncover the evidence that exists of other business crime. If that other crime is then discovered by the SFO or other agency, the company will be placed in an extremely difficult position.

Any company coming under investigation can only hope to negotiate a settlement if it is open and honest about its problems – and genuinely determined to put them right.

Endnotes

1. www.legislation.gov.uk/ukpga/2010/23/contents.
2. www.legislation.gov.uk/ukpga/Vict/52-53/69/contents/enacted.
3. www.legislation.gov.uk/1906/34/pdfs/ukpga_19060034_en.pdf.
4. www.sfo.gov.uk/cases/smith-ouzman-ltd.
5. S.2, Criminal Justice Act 1987.
6. *R V Lord Reynolds and Mayger* 2015 EWHC 865.
7. *SFO v ENRC* [2017] EWHC 1017 (QB).
8. Schedule 17, Crime and Courts Act 2013.
9. www.judiciary.gov.uk/judgments/serious-fraud-office-v-rolls-royce.
10. www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa.
11. www.judiciary.gov.uk/wp-content/uploads/2015/11/sfo-v-standard-bank_final_1.pdf.
12. www.sfo.gov.uk/2017/09/05/alun.milford-on-deferred-prosecution-agreements.
13. www.sfo.gov.uk/2016/12/14/sfo-closes-soma-oil-gas-investigation.
14. *The Daily Telegraph*, 14 December 2016.
15. *Unaoil Monaco Sam v SFO* [2017] EWHC 600 (Admin), www.sfo.gov.uk/2017/05/12/sfo-confirms-investigation-petrofac-plc.
16. www.sfo.gov.uk/2017/07/24/sfo-opens-investigation-into-the-rio-tinto-group.

Aziz Rahman
Rahman Ravelli
36 Whitefriars Street
London, EC4Y 8BQ
United Kingdom

Tel: +44 203 947 1539
Email: aziz.rahman@rahmanravelli.co.uk
URL: www.rahmanravelli.co.uk

As founder and senior partner at Rahman Ravelli, Aziz Rahman oversees and directs the firm's expanding bribery and corruption caseload. His specialist knowledge, notable track record and growing reputation have led to his involvement in many of the major corruption investigations and a client list that includes some of the most significant corporations, professionals and high-net-worth individuals. His proactive and robust defence work and his proven ability to assemble and direct defence teams has led to him and his firm becoming the logical choice for many requiring intelligent, astute representation in bribery and corruption investigations.

His ability to swiftly analyse complex issues and then plot the most appropriate tactical approach in even the most complicated international and multi-jurisdictional cases has seen him highlighted repeatedly in both *The Legal 500* and *Chambers and Partners*. His firm has also received the highest rankings in both legal guides.

Mr Rahman is in increasing demand to carry out internal corporate investigations for clients, in order to identify wrongdoing and self-report it. This demand has been especially notable since the introduction of deferred prosecution agreements; of which he already has more experience than most. His carefully-considered but determined approach attracts corporates and individuals who want to secure the best possible outcome to a bribery investigation.

He routinely deals with the Serious Fraud Office (SFO), HM Revenue and Customs (HMRC), the National Crime Agency (NCA), City of London Police, the Financial Conduct Authority (FCA), international bodies such as the FBI, the US Securities and Exchange Commission (SEC), OLAF and Interpol and police and anti-corruption agencies worldwide.

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The firm's national and international caseload continues to grow year on year. It handles the most complex and high-profile cases, which often involve a number of countries.