

UK Bribery Digest

Edition 13

10th Anniversary Edition

March 2019

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Welcome to this special 10th anniversary edition of our UK Bribery Digest, covering the most notable cases and trends observed since we began our analysis of cases in April 2008 just over a decade ago.

It feels like a long time ago when we reflect that in 2008 we were anticipating the UK Bribery Act being introduced and predicting its effects. Since then we have seen three Directors lead the Serious Fraud Office (SFO) and have seen many parts of the world enhance their own anti-bribery laws while the US has continued to evolve its enforcement of the FCPA. It is a different legislative, enforcement and risk landscape that businesses now face.

This Digest has now reported on 86 cases covering the period up to December 2018 with some emerging patterns and trends which we highlight. It has been fascinating to observe and contribute to the changing tides of informed opinion surrounding these cases and anti-corruption compliance efforts more generally, and to note how these have altered the course of the organisations trying to navigate their way through uncertainty.

Since the end of 2018 there have been cases and decisions which have again caused shockwaves – the announcements not to prosecute individuals in some of the SFO's high profile cases, and the admission of a senior sales executive to 11 counts of bribery. We look forward to bringing our commentary to you as these cases develop.

As ever, we dissect and comment upon the recent completed cases and set out an updated table of all the cases previously covered in the Digest.

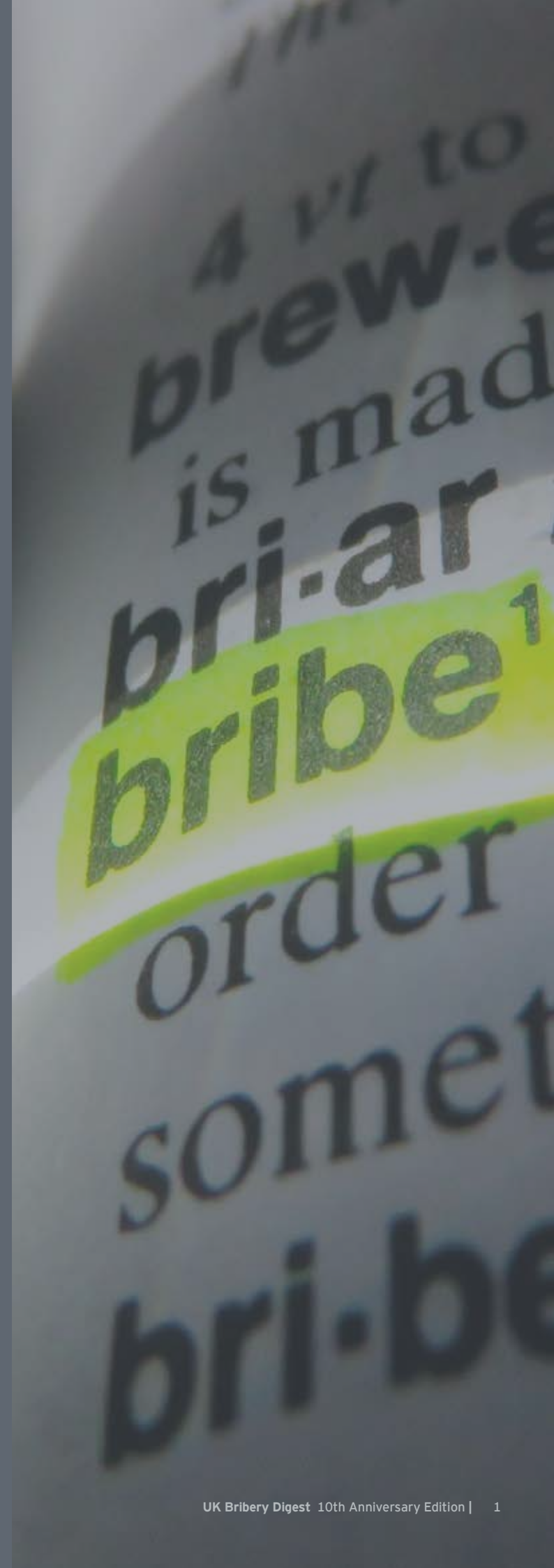
I hope you continue to find the UK Bribery Digest insightful and useful in your work.

Please do not hesitate to contact me if you would like to discuss any of these issues further or make comment.

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The Bribery Act

– enforcement history and trends

England and Wales

The Bribery Act ("the Act") was passed in 2010 and came into force in July 2011. The first case prosecuted under the legislation was in October 2011 and a total of 15 cases have been completed in all. While this is still a relatively small number of cases, there are some notable characteristics and trends we can observe:

The Act has primarily been used against individuals rather than companies

- ▶ Ten of the completed prosecutions have been against individuals (with 18 individuals receiving sentences) and five have been against companies.
- ▶ Only one large company (Rolls-Royce) has been subject to enforcement, by way of a Deferred Prosecution Agreement.

Resolution of corporate Bribery Act cases has been dominated by DPAs

- ▶ Of the five cases involving companies (all involving Section 7 offences), three were resolved by Deferred Prosecution Agreements.

- ▶ The case involving the largest scale bribery was resolved by a Deferred Prosecution Agreement.
- ▶ Only one company has sought to defend itself as having adequate procedures under Section 7 of the Act, but was unsuccessful in doing so.

UK cases still dominate and Section 6 has yet to be used in a prosecution

11 of the 15 cases have involved bribery within the UK.

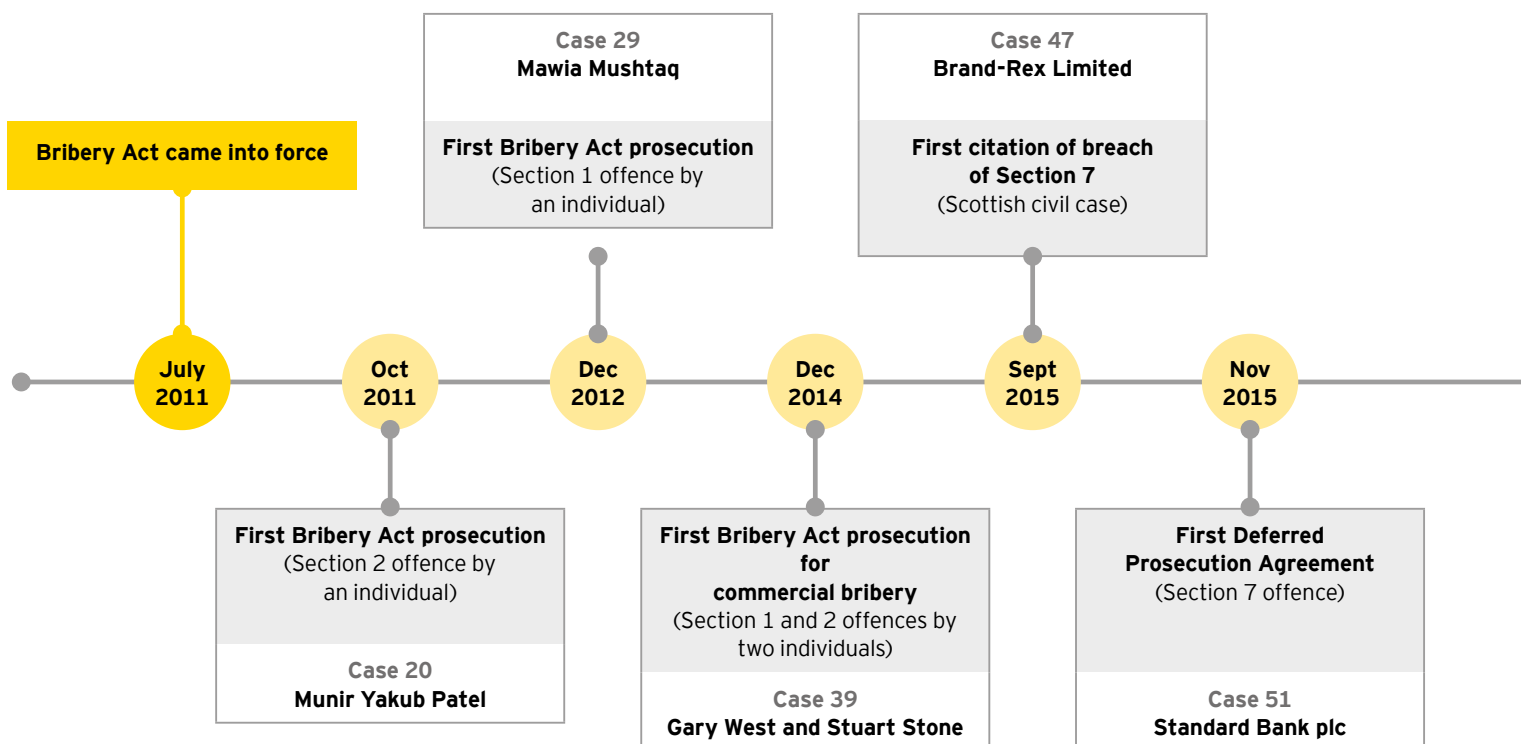
- ▶ There have been no prosecutions under Section 6 of the Act (the specific offence of bribing foreign public officials).
- ▶ The extra-territorial reach of the Act has not yet been applied against non-UK based corporates.

What is still to be defined or tested?

- ▶ The Act had been in force for some three and a half years before the first completed prosecution for commercial bribery (against two individuals) in December 2014 and for almost

The evolution of Bribery Act enforcement 2011 to 2018

A summary timeline of Bribery Act enforcement is set out here:



four and a half years before the first action against a corporate in November 2015.

- We still await a large scale contested case which provides judicial comment on key matters of interpretation of the Bribery Act such as the test of adequate procedures, the definition of associated person, and the ability to prosecute overseas organisations carrying on business or part of a business in the UK.

Scotland

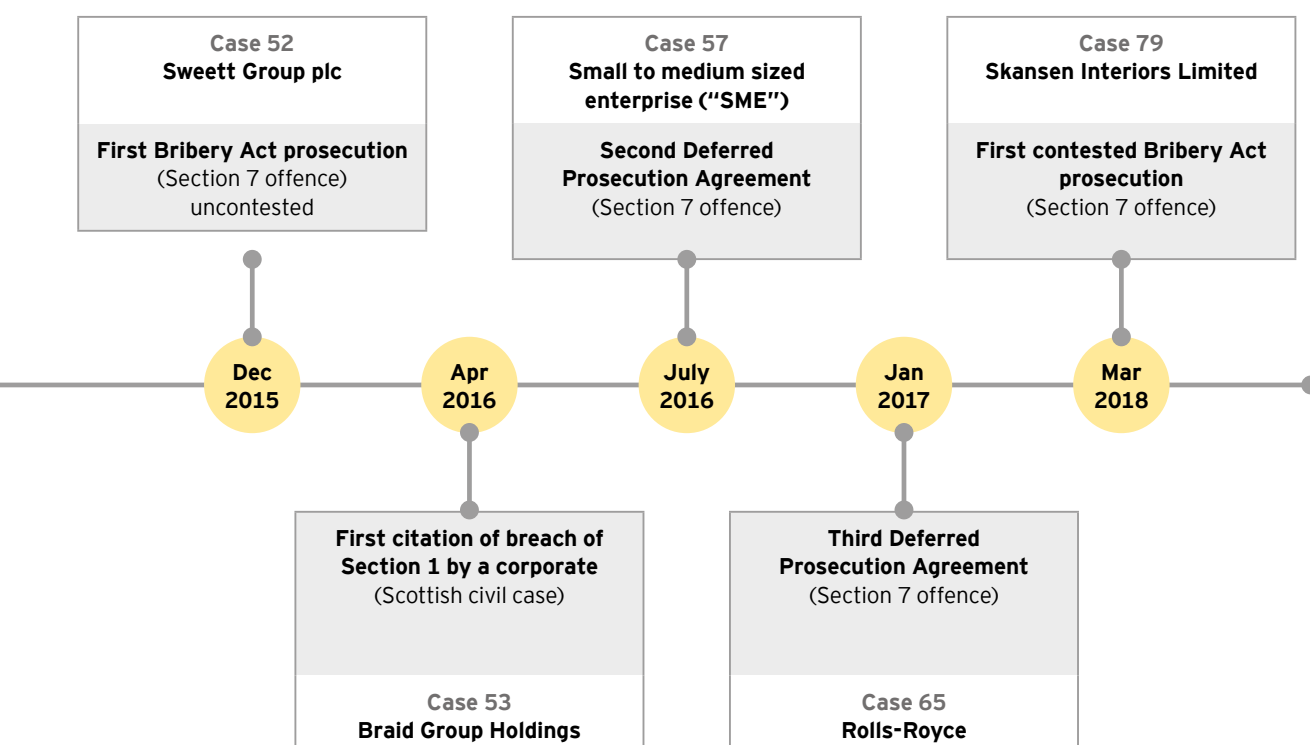
Scotland has adopted a different enforcement regime to England and Wales in respect of corporate commercial bribery, relying on civil remedies under Section 5 of the Proceeds of Crime Act but referencing the Bribery Act to provide the structure for examining activity.

The Scottish authorities have completed two corporate cases since the Bribery Act came into force, both citing the Section 7 corporate offence of failing to prevent bribery and one of them

citing Section 1, the payment of bribes. Both cases have a claim to fame: one was the first ever citation of a Section 7 breach and the other was the first time a corporate was charged with a Section 1 offence.

The OECD Working Group report on UK enforcement issued in March 2017 recommended: that UK law enforcement authorities, particularly in Scotland, exercise considerable caution in deciding whether to resolve foreign bribery cases through civil settlement to ensure cases result in effective and dissuasive sanctions; and that Scotland consider adopting a Deferred Prosecution Agreement regime. These points were noted in the UK Anti-Corruption Strategy published in December 2017.

The Scottish authorities successfully prosecuted an individual under the Bribery Act (for a Section 2 offence) in April 2018. This was in the context of corrupt behaviour on a jury rather than commercial bribery.



Analysis of past Bribery Digest cases

The first case to be captured in the Bribery Digest was a prosecution in April 2008. Since then we have reported on a total of 86 cases with the latest prosecution included in this edition being in December 2018. In the following analysis of these 86 cases we provide our observations on the past 10 years of bribery prosecutions in the UK.



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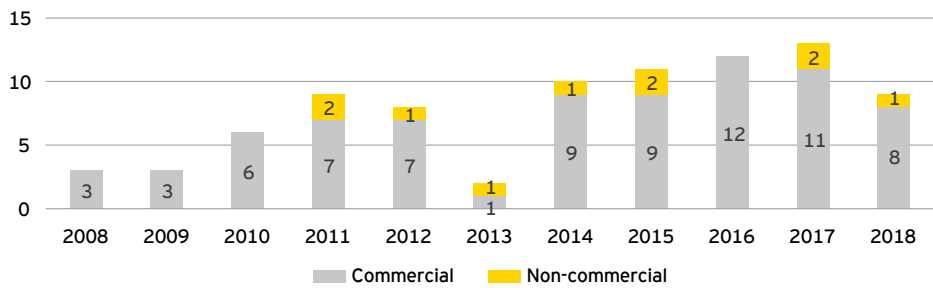
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Volume of enforcement activity

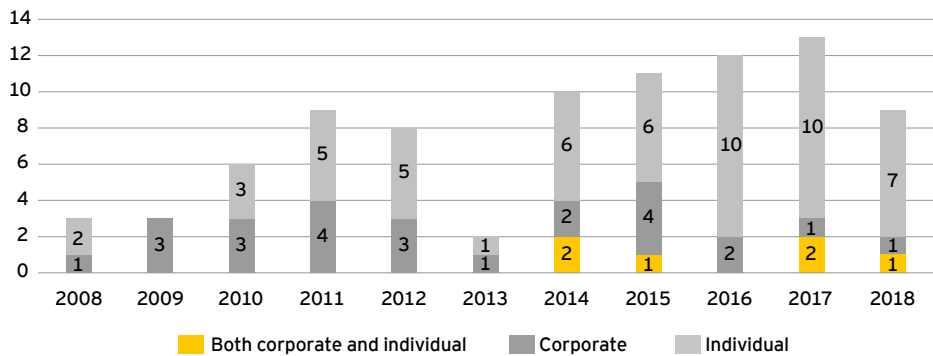
The number of bribery prosecutions completed each year has steadily increased over the past 10 years. While the number of prosecutions can only ever be a crude measure of enforcement activity (for example, it does not consider the complexity of the prosecution or the size and seriousness of the underlying corrupt activity), it does potentially suggest an increasing appetite among the UK enforcement agencies to prosecute bribery offences, both in the period around the introduction of the UK Bribery Act in 2010/2011 and thereafter.

The introduction of the new Bribery Act Section 7 corporate offence into the prosecutors' toolkit in 2011 might have been expected to increase the number of corporates prosecuted for bribery offences. However, it appears that the year on year growth that can be observed in the overall number of completed bribery prosecutions is driven predominantly by an increased number of prosecutions of individuals.

Number of completed bribery prosecutions by year (analysed by type of bribery)



Number of completed bribery prosecutions by year (analysed by who was prosecuted)





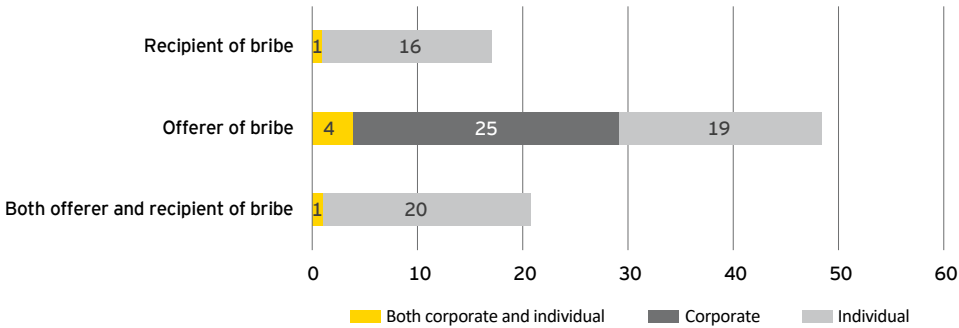
Prosecuted offences

24% of the cases in the past ten years have comprised joint prosecutions of both the persons offering and the persons receiving bribes. However, in the majority of cases (56%) it is only the individual or corporate offering the bribe that has been the subject of the prosecution. In contrast, just 20% of the cases in the past ten years have been prosecutions directed only at the recipients of a bribe.

If we consider only corporate prosecutions the distinction is even more stark. Of the 31 cases where a corporate has been prosecuted*, only one civil prosecution concerned a corporate receiving a bribe. In all other instances corporates have been prosecuted for offering/paying bribes.

* 25 cases where only a corporate was prosecuted and six cases where both an individual and corporate were prosecuted.

Who was prosecuted?

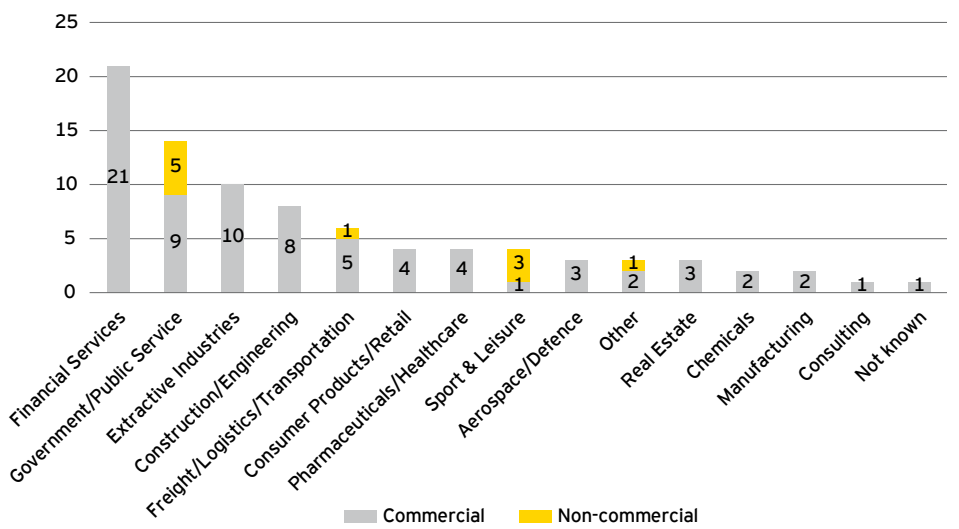


Sector analysis

Analysis of the past UK bribery cases by sector shows that bribery prosecutions have been most prevalent in the financial services sector (21 cases), the government/public sector (14 cases), the extractive industries (10 cases), and the construction/engineering sector (8 cases). These sectors are among those traditionally thought of as highest risk for bribery and corruption.

However, while these four sectors account for more than 60% of the UK cases in the past ten years, in total 14 separate sectors have featured – including sectors such as food retail which would not usually be seen to be prone to corruption risk. This demonstrates that bribery remains a real risk for a broad range of business.

Number of completed bribery prosecutions (analysed by sector)



Nature of the underlying bribery schemes

Our analysis of the reasons behind the bribe payment in each of the 86 UK prosecutions reveals the following:

For the 76 prosecutions of commercial bribery:

- ▶ The overwhelming majority of cases (49 cases) involved bribes being paid for the purpose of winning or retaining business. Of these 49 cases, 10 cases related to securing contracts in the public sector.
- ▶ In nine cases, the bribe was paid in exchange for confidential information.
- ▶ In six cases, the bribe was paid in order to secure funding or gain access to finance.
- ▶ In three cases, the purpose of the bribe was to facilitate advantages for the bribe payer in the context of a sale and purchase transaction.
- ▶ In three cases, bribery allegations occurred alongside complex fraud arrangements.
- ▶ The remaining six commercial prosecutions were prosecutions by the FCA (and its predecessor, the FSA) of financial services companies for failing to have adequate controls to prevent corruption. In four of these cases the prosecution arose from failures to mitigate risks arising from third parties used to win and retain business. In the other two cases the prosecution related to weaknesses in customer due diligence controls.

For the 10 cases which concerned bribery outside of a commercial context:

- ▶ Four cases concerned corruption within the UK judicial system, with the bribe being paid to avoid or reduce a judicial sentence.
- ▶ Three cases concerned corruption within sport, with the bribe being paid to induce match fixing.
- ▶ Two cases involved bribes being offered to falsify the results of a failed test/examination.
- ▶ One case involved bribes being paid to obtain confidential information.

Use of intermediaries

Payments of bribes by agents and intermediaries acting on a company's behalf is one of the most frequently cited bribery risks and is often high on the agenda for anti-bribery compliance professionals.

Our analysis shows that this focus on third party bribery risk is not unfounded. Almost two-thirds (65%) of the bribery cases in the past 10 years which resulted in the prosecution of a corporate involved the use of intermediaries, highlighting the potential bribery risks which arise from association with third parties, and the need for companies to ensure that they have adequate procedures in place to assess and manage this risk.

Gifts and hospitality

Gifts and hospitality is another risk which often comprises a major focus of companies' anti-bribery compliance programmes. However while gifts and hospitality has featured in 9 out of 86 cases in the past 10 years (10%), misuse of gifts and hospitality has never been a central feature of any UK bribery prosecution in the past 10 years*.

- * Brand Rex (case 47) might initially appear to be a case centering on gifts and hospitality, but this was actually a sales incentive scheme that was misused.

Self-reporting

Around one quarter (24%) of all bribery prosecutions in the past 10 years have involved a self-report. This rises to just over half if only prosecutions of corporates are taken into consideration, with 16 out of the 31* bribery cases where a corporate has been the subject of the prosecution featuring a self-report.

Consistent with the SFO's recent messaging that they will look favourably on companies that self-report, our analysis shows that in the majority of corporate cases featuring self-reporting, a criminal prosecution has been avoided.

For the 16 corporate prosecutions where the company has self-reported the bribery to the relevant authorities:

- ▶ Two cases were settled by the SFO via a DPA
- ▶ Six cases resulted in a civil settlement from the SFO
- ▶ Four cases were subject to civil settlements under the Scottish self-reporting regime
- ▶ One case resulted in a regulatory action from the FSA

Only three cases where a self-report was made resulted in a criminal prosecution of a corporate – Mabey & Johnson Limited in 2009 (case 5), F.H. Bertling Limited in 2017 (case 75) and Skansen Interiors Limited in 2018 (case 79).

- * 25 cases where only a corporate was prosecuted and six cases where both an individual and corporate were prosecuted.

Geographical analysis

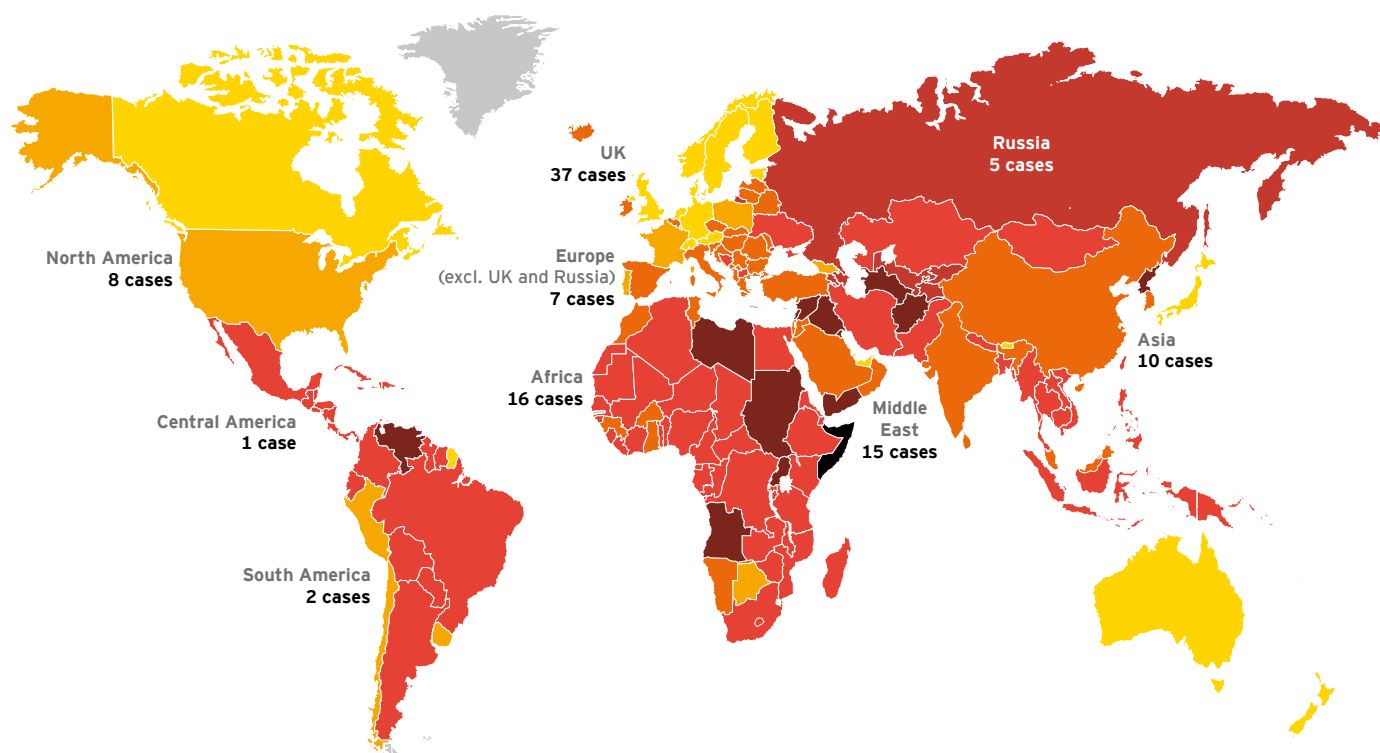
The geographical location of the bribery has been reported for 81 out of the 86 past Bribery Digest cases:

- Although the UK Bribery Act and the older legislation that it replaced have cross-jurisdictional reach, 37 of the UK enforcement cases in the past 10 years (46%) have concerned bribery wholly within the UK. However, these wholly domestic cases tend to involve smaller bribery schemes.
- A further 44 cases (54%) are known to have involved one or more overseas territories.

For these 81 cases, the incidence by region is summarised on the Transparency International Corruption Perceptions Index (CPI) heat map opposite.

Of the 44 cases that involve foreign bribery, it is interesting to note that they involve six countries that are ranked as the top 20 least corrupt countries in the world: US, Singapore, Canada, Austria, Germany, Netherlands. Conversely, of the major economies that score 50 or below in the 2017 CPI index, there have been no UK prosecutions in respect of bribery in the following: Italy, Saudi Arabia, South Africa, Brazil, Mexico.

The fact that there have been no prosecutions involving 5 low ranking major economies and 8 prosecutions involving countries ranked in the top 20, suggests that assessing territorial exposure to bribery and corruption purely by reference to the CPI index has inherent limitations. This analysis needs to be supplemented with more focused analysis of the scope and extent of the exposure for the particular business concerned.



Region	Number of cases	Minimum value of bribe paid (£)	Maximum value of bribe paid (£)
Africa	16	83,000	129,243,000
Asia	10	2,059,000	6,533,000
Central America	1	1,408,000	1,408,000
Europe	7	710,000	8,714,000
Middle East	15	71,000	3,000,000
North America	8	200,000	355,000
Russia	5	161,000	357,000
South America	2	Not reported	Not reported
United Kingdom	37	300	4,900,000

Deferred Prosecution Agreements

We have looked at the timelines of the three bribery cases that have resulted in a DPA and compared these to the average timeline for cases that were resolved by other means (where we have all the relevant information).

One aspect we have looked at is the period of time between the bribe first being paid and the bribery being discovered, as this is an indicator of the exposure the company may have to consider. In the case of Rolls Royce this was an astonishing 23 years. With XYZ plc this was still a substantial period of eight years. In complete contrast

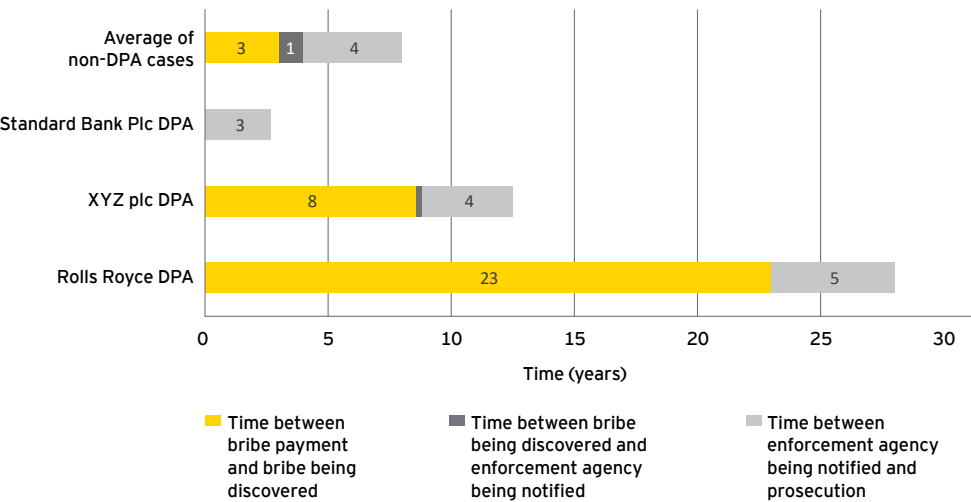
is the case of Standard Bank plc, where the bribe was identified almost immediately. Typically for non-DPA cases, the tail of exposure to bribery is around three years.

In the two DPA cases where there was self-reporting*, the period between the company discovering the bribe and reporting it to the relevant authorities has been relatively short, no more than three months. This contrasts with the average period for non-DPA cases of one year. This is consistent with the requirement of the DPA regime to report promptly.

Perhaps the most remarkable feature of the DPA regime is that the period from the authorities becoming aware of the bribery to resolution (between three and five years for the three DPA cases) is not noticeably any quicker than the average of four years for non-DPA cases. Although three DPAs is obviously not a large enough population to draw conclusions, the initial indication is that the DPA route is no faster than the prosecution route.

* Rolls Royce did not self-report.

Timelines of DPA and non-DPA cases



Size of bribes and financial penalties

The size of the bribery schemes that have been prosecuted in the UK in the past 10 years has varied significantly. Of the 68 prosecutions where the size of the underlying bribe is disclosed, the size of the bribe involved has ranged from £300 (case 29) to around £129 million (case 14). This includes 10 cases where the bribe payment was less than or equal to £5,000 and 29 cases where the bribe payment was more than £1 million. While the bigger bribery cases generally tend to involve overseas corruption, the largest bribe paid in a wholly UK domestic scheme was £4.9 million (case 26). This represents the twelfth largest bribe overall.

Our analysis shows that the bribery schemes have also varied significantly in terms of the size of the business advantage sought from the payment of a bribe. Of the 54 prosecutions where the value of the business advantage is disclosed, this has ranged from £30,000 (case 60) to around £4 billion (case 14).

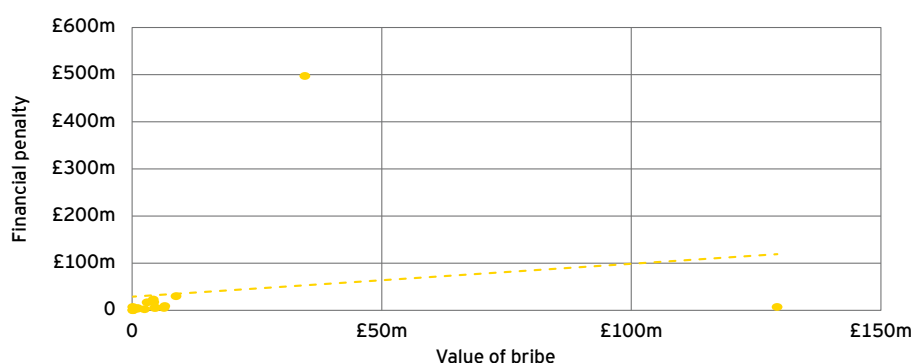
This analysis indicates an appetite amongst the UK authorities to prosecute bribery incidents of all sizes and levels of seriousness.

We also observe a large variation in the fines levied by the prosecuting authorities for bribery offences. The financial penalty

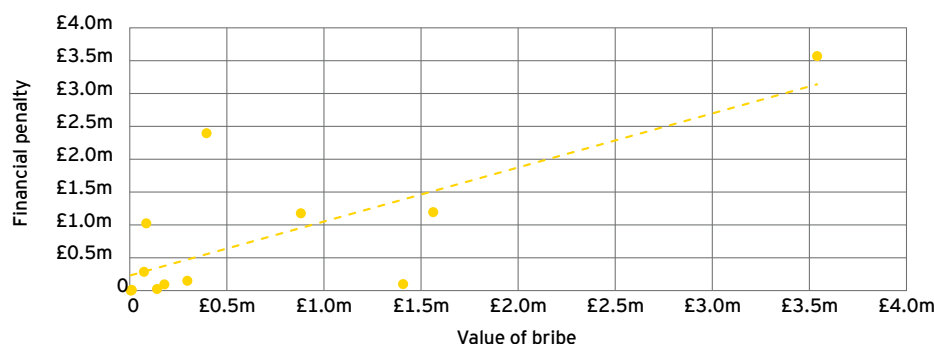
has been disclosed in 43 cases and has ranged from £1,500 (case 74) to £497 million (case 65)*. As might be expected, there appears to be some correlation between the size of the bribe paid and the size of the total financial penalty imposed on the company or individuals involved, with a general trend of larger bribes attracting larger penalties.

* We have included all different components of the financial penalty in this analysis including fines, disgorgement of profit, confiscation orders and other compensation orders, but excluding any contributions towards prosecution costs.

Value of bribe vs financial penalty (£) – Corporates



Value of bribe vs financial penalty (£) – Individuals



Cases in 2018



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78 Chad Oil (March 2018)

In March 2018 the High Court granted the SFO's order to the value of £4.4mn under the Proceeds of Crime Act (2002), representing the sale of 800,000 company shares. This is the first time money has been returned overseas in a civil recovery case. The SFO had first obtained a freezing order in respect of these proceeds in July 2014, since then the order has been subject to appeals on legal grounds.

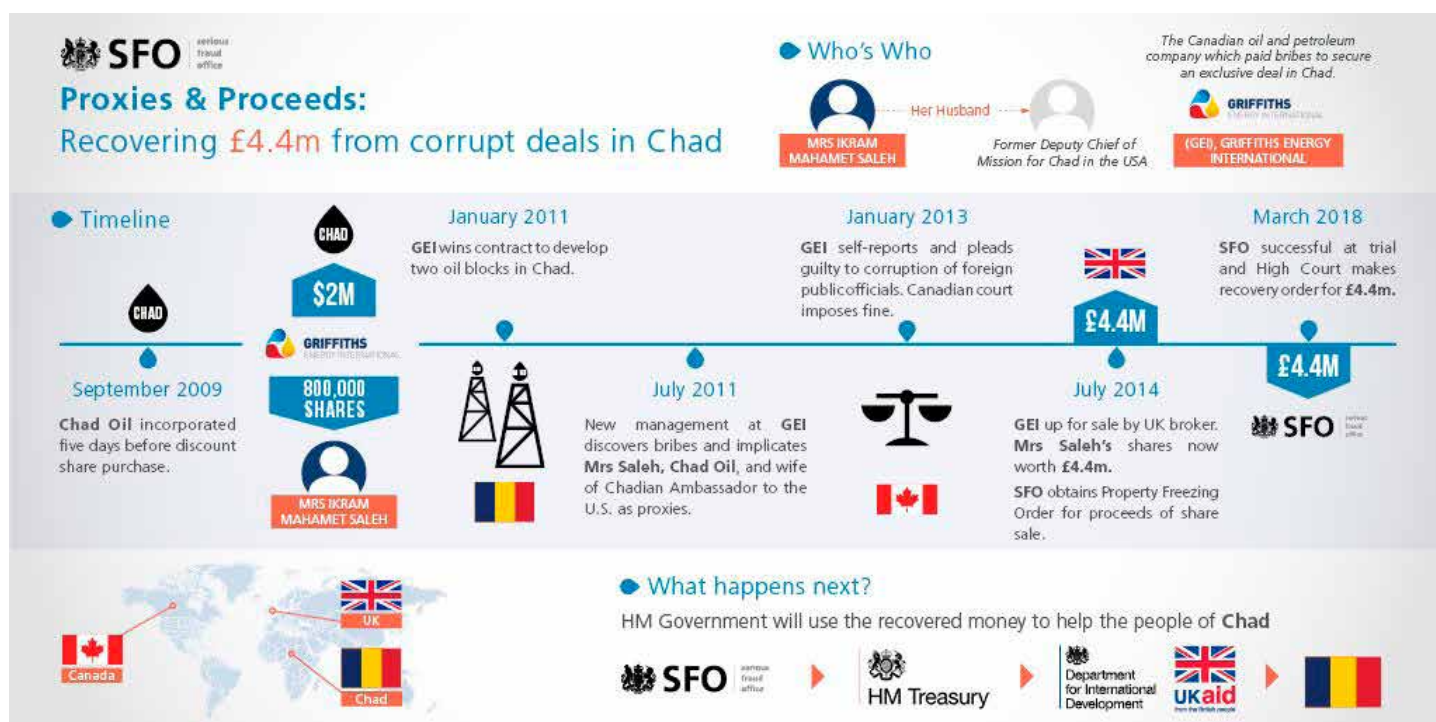
The bribery


Griffiths Energy International Inc ("the Company" registered in Canada) secured exclusive oil development rights in Chad by bribing Chadian diplomats in the United States and Canada, specifically the former Ambassador to the United States and Canada and the Deputy Chief of Mission.

The bribery giving rise to the proceeds subject to the UK order took the form of a discounted share deal. In September 2009, the wife of the Ambassador and the wife of the Deputy Chief of Mission were offered by private placement and subscribed to heavily discounted founder shares in the Company (3.2mn and 800,000 respectively at a nominal price of one Canadian cent each).

The 800,000 shares acquired by the wife of the Deputy Chief of Mission were for a total consideration equivalent to US\$745. On being acquired by another company in July 2014, these 800,000 shares were sold for £5.50 each, producing a profit of £4.4mn. As this share sale was via a UK broker, the corrupt proceeds entered the UK's jurisdiction and the SFO began civil recovery proceedings to secure the proceeds. (The 3.2mn shares in the name of the wife of the Ambassador – not covered by the UK order – were therefore worth £17.6mn at that time.)

The SFO has introduced diagrammatic presentations of the bribery schemes it investigates into its press announcements. We reproduce below the one for Chad Oil (which relates only to the monies recovered in the UK proceedings).





At the same time as the private placement of shares, the Company had entered into a “consultancy agreement” with a US company called Chad Oil, in which the wife of the Ambassador was the sole officer, director and shareholder. Under this agreement Chad Oil received a “consulting fee” of US\$2mn if it secured the development rights to the two oil blocks in Chad. This “consulting fee”, not covered by the UK order, was paid in February 2011.

The recovered money will be transferred to the Department for International Development (“DFID”). DFID has announced that it is working in Chad, investing in humanitarian programmes and supporting safety nets to tackle poverty and will now be working on the details of how these recovered funds can best help its programmes in that country. This follows two earlier SFO cases where funds recovered in bribery and corruption prosecutions were returned and reinvested in the country: Smith & Ouzman (see case 40 in an earlier edition of the Bribery Digest) led to confiscation orders of some £900,000 which paid for seven new ambulances in Kenya; the DPA with Standard Bank (see case 51 in an earlier edition of the Bribery Digest) involved a payment of US\$7mn to the Government of Tanzania.

Red flags

The bribery scheme described above demonstrated a number of red flags:

- ▶ Chad Oil was an entity without commercial substance or relevant history and involved a related party (the wife of the Ambassador). It was established just five days before the transactions described above.
- ▶ The “consultancy agreement” appeared not to describe substantial services to be provided to justify the “consultancy fee” due. It is this consultancy agreement that alarmed the Company’s board during the due diligence.
- ▶ The “consultancy agreement” with Chad Oil was in more or less identical form to a preceding cancelled agreement with a company called Ambassade du Tchad owned by the Ambassador. The Company had received legal advice that it could not deal with him commercially.
- ▶ It was reasonable to suspect why the Ambassador and the Deputy Chief of Mission would be interested in investing in a recently-formed private Canadian oil company unless they were in a position to know about the pending allocation to it of the two Chad oil blocks.
- ▶ The private placement was at a nominal cost per share.

Self-reporting

The bribery had been discovered by the company itself during due diligence for a planned flotation of its shares. The Company voluntarily reported itself to the Canadian authorities and subsequently cooperated with the authorities’ further investigation, including disclosing privileged materials. The Canadian authorities acknowledged that they would not have otherwise unearthed the corruption and therefore offered a plea bargaining arrangement.

Our observations

The bribery schemes adopted in this instance were a mixture of the simple and obvious (the bogus consultancy contract and fee) and the novel and sophisticated (the private share placement). Those monitoring transactions for potential corruption or investigating suspected corruption therefore need to look out for the tried and trusted methods but also think more widely and imaginatively about how the company’s transactions may have been hijacked for corrupt purposes. Given that any significant movement of value out of the business is susceptible to corrupt manipulation, this is a significant challenge.

The involvement of the wives of the Ambassador and the Deputy Chief of Mission in Chad Oil and the private share placement highlights the desirability for due diligence of Politically Exposed Persons to cover family members too. Given that families may be extensive and information on them not readily available, this again is a significant challenge.

79 Skansen Interiors Limited (March 2018)

This might appear to be a ground-breaking case: the first-ever contested Section 7 “failure-to-prevent” case since the UK Bribery Act came into force in 2011. However, it does not quite live up to the billing.

The company was no longer active at the time of the conviction. Despite a guilty verdict against the company, no penalties were imposed: as the company was dormant and had no assets out of which to pay any penalty, it was given an absolute discharge. The Crown Prosecution Service (“CPS”) justified the prosecution of a dormant company with no assets on the basis that a successful conviction would “send a message” to others in the industry about the importance of having adequate procedures in place.

The case sheds some light on what comprises “adequate procedures” under Section 7 of the Bribery Act. But at the same time it is unclear what message this case relays regarding self-reporting.

The bribery

Skansen Interiors Limited (“SIL”) was a small company of some thirty employees that (until it became dormant in 2014) traded as a fit-out refurbishment contractor in London and the South East.

SIL was one of a number of contractors invited by a real estate company to tender for two office refurbishment contracts worth a combined total of £6.4mn. SIL won the tenders in 2013. The prosecution alleged that a project manager at this real estate company (Mr Deakin) had acted improperly during the tender process by passing information to SIL that could have provided it with an advantage over its bidding rivals and/or sought to influence the award of the contracts by expressing a preference to his colleagues that SIL be selected. The prosecution also alleged that this was on the basis of requests for bribes made to SIL’s managing director (Mr Banks). After SIL won the two contracts, it made two payments to the project manager at the real estate company totalling £10,000, while a third payment of £29,000 was offered and requested but was never paid.

The true nature of these payments was concealed and they were made to look genuine. Invoices for the three payments were sent to SIL by a company (GPS) that had been set up for use by the project manager at the real estate company and/or his son. The invoices referred to the provision of “services in respect of final site surveys/drawings and final construction consultancy including CAD drawings and health and safety all as agreed”. No such services had been provided, as indicated by the lack of related documentation. Members of SIL’s senior management

involved in the offending bribe approved the invoices, and when their allocation to the projects was questioned, they instructed the finance team to reallocate the invoices to an unrelated internal cost code.

SIL appointed a new CEO in January 2014. Mr Banks informed the new CEO about the arrangement with GPS, asserting that it was legitimate and that the payments were for genuine services rendered. He explained that a further payment of £29,000 was due on completion of the works under the two fit-out contracts.

Concerned with the explanation that had been provided, the new CEO initiated an internal investigation. He also put in place an anti-bribery and corruption policy as the company did not previously have one. A few days later, Mr Banks attempted to approve and make the third payment of £29,000 to GPS. That payment was stopped before it was made and Mr Banks was dismissed by the new CEO on the basis of evidence suggesting he had paid bribes.


Following the internal investigation, SIL submitted a suspicious activity report to the National Crime Agency and also reported the matter to the City of London Police (CoLP) and Action Fraud asking them to investigate further. The company assisted in CoLP’s investigation, voluntarily furnishing company documents, including confidential and legally privileged reports and advice. Almost two years later, the company was charged under Section 7 of the Bribery Act 2010. SIL’s managing director and the project manager at the main contractor were separately charged with the primary offences under Sections 1 and 2 of the same Act (see case 81 in this edition of the Bribery Digest).

What does this case tell us about adequate procedures?

SIL was defended at trial by the law firm CMS, who were instructed after the company was charged. The managing director of SIL and the project director of the customer company were charged at the same time and pleaded guilty before trial. CMS has published a commentary on the trial. The following summary of the positions taken at trial as regards whether or not SIL had adequate procedures in place is drawn from that commentary.

Defending adequate procedures

SIL defended the prosecution on the basis that, through its various policies and other controls in the company, it had



adequate procedures in place to prevent bribery by an associated person. The defence relied on evidence that:

- ▶ SIL was a very small business operating out of a single open-plan office that was smaller than the courtroom in which the trial took place – a company of that kind did not require substantial and sophisticated documented controls to prevent bribery for them to be adequate.
- ▶ Similarly, SIL's business area was very localised (London and South East); they were not dealing with operations in multiple cities or countries with the cultural and oversight issues that may entail – again indicating limited need for detailed controls.
- ▶ It was common sense that one should not pay bribes and staff did not need a detailed, gold-standard policy to tell them that.
- ▶ The ethos of the company, as exemplified by the junior finance clerk who gave evidence, was that everyone should behave with honesty and integrity, and it was reasonable for her to assume that the senior management of the company would do so.
- ▶ Prior to its adoption of a specific anti-bribery policy (after two of the three bribery counts had occurred), SIL had a number of separate policies that had been in place for many years and which referenced the need for employees to approach their dealings with third parties in an ethical, open and honest manner. These were sufficient – a separate anti-bribery policy was not needed. One such policy was printed on A3 laminated card and stuck to the walls of the office as a reminder to staff.
- ▶ The financial controls, with its system of checks and balances that SIL had in place when approving and settling invoices, were a procedure designed to ensure multiple approval levels before they could be posted on the company's ledgers and/or paid.
- ▶ There were clauses in the contracts to which the bribes related (based on standard Joint Contracts Tribunal contract terms) that prohibited bribery and provided a right of termination of the contract where bribery occurred – therefore senior management were aware of the need to avoid committing bribery offences.
- ▶ Mr Banks, the managing director of SIL (who pleaded guilty to offering/paying the relevant bribes), was specifically familiar with the need to avoid bribery and there was email evidence to demonstrate this.

- ▶ SIL had stopped the largest of the bribe payments before it was paid, which indicated its procedures were in fact effective.

However, the jury were not persuaded that these controls were sufficient to meet the adequate procedures defence under the Bribery Act. While there was no judicial comment on what might constitute adequate procedures and why SIL's procedures may have fallen short, CMS note that the prosecutor's submissions provide some insight into the way in which they may assess and argue the matter and highlight some questions that small (and larger) companies should ask themselves when assessing if their anti-bribery controls are sufficient:

Are all compliance efforts recorded?

Historic offending can bring with it evidentiary challenges – relevant staff may have left the business, people may not remember events in sufficient detail or documents may have been deleted by the time a prosecution is brought. This can leave the company with a gap in knowledge and evidence of what policies and procedures were in place at the time of the offending. In this case, the prosecutor identified that there were few contemporaneous records of SIL's efforts to inculcate a compliance culture or respond to the new offences in the Bribery Act. It is therefore crucial to create and retain records of all compliance-related discussions and activities. Even when it may be easier to have a conversation about such issues, it is advisable to follow up in writing (even in an informal note or email) or to document the fact that those conversations occurred by recording them in calendar entries with sufficiently detailed descriptions to identify their purpose.

Have the company's policies and procedures been properly communicated?

The prosecution noted that while SIL's various non-specific policies were available to all staff on its servers, SIL had not monitored or ensured that all staff had accessed or even read the policies, still less reminded them of the requirements over time. There was no evidence of active communication or training on the policies.

79 Skansen Interiors Limited (March 2018) continued

The prosecution contrasted that approach with sending the policies to all staff by email and requiring them to use voting buttons to confirm their agreement to comply with it (and keeping those responses on staff HR records) – which SIL began doing before the third bribe payment was stopped. Companies should ensure that policies are effectively communicated to all staff and there is a paper trail evidencing that communication and training.

Is someone within the business responsible for compliance?

The prosecution highlighted SIL's lack of any explicit designation of an individual with responsibility for anti-bribery compliance at the time of the offending. Small companies without resource for a specialist compliance or legal function should ensure that there is someone within the business at a senior level tasked with ensuring the company's anti-bribery controls are embedded within the business and complied with, even if it is not feasible to have a compliance specialist in this role. Some record should be kept of that appointment and the appointee should keep records of his activities in that regard.

Is the company reactive to changes in the law or circumstances?

The prosecution noted that SIL had failed to react to the introduction of the Bribery Act at the time by putting in place a specific policy referencing the change in law or any other related processes. Nor was the opportunity taken to circulate reminders to staff about the company's expectations in respect of compliance. In addition, the company did not provide any specific indicators or training on the sort of issues or "red flags" that staff should be alive to in their day-to-day activities. Companies should use changes in law or circumstances (such as entering new territories or introducing new products) to revisit their existing compliance controls and satisfy themselves that they are still fit for purpose. These reviews should be fully documented in case there is any later need to rely on and prove them.

Are reporting and approval lines appropriate?

Staff must feel they are able to raise concerns when red flags are identified. Where the issues relate to the actions of senior members of staff (as they did in this case), this can create a great deal of pressure on more junior staff members either to rely on assurances given by those who may be responsible for the unethical conduct or raise the matter with someone else within the business where that could increase the risk of them being identified as a whistleblower and retaliated against. While not a point heavily relied on by the prosecution, SIL did not have a documented reporting channel that bypassed senior management

when concerns may relate to them. Small companies may wish to ensure the availability and communication of a channel for independent reporting of concerns to non-executive directors, who may be less likely to be involved in approving red flag transactions.

To self-report or not to self-report?

The history of three bribery related deferred prosecutions in the UK since a Deferred Prosecution Agreement ("DPA") was first used in November 2015 (cases 51, 57 and 65 in previous editions of the Bribery Digest) is brief and has involved only the Serious Fraud Office and not the CPS. Subject to this caveat, this history has suggested that a company that self-reports and/or fully cooperates in the subsequent investigation (as SIL appears to have done) might expect to avoid prosecution. However, this case appears to throw this into doubt.


We note that the conviction of SIL is also in contrast with the case of Griffiths Energy International Inc in its recent Canadian proceedings (see case 78 in this edition of the Bribery Digest), even though both companies self-reported and cooperated with the enforcement authorities.

The CPS determined that a DPA was not available in this case as SIL was dormant: it could not pay the penalties required under a DPA and there could be no ongoing benefit that could accrue from a DPA. However, the usual consequences of prosecution could not be realised either: as already noted, SIL was given an absolute discharge.

The prosecution is more remarkable in the light of the fact disclosed by SIL's then CEO that SIL's parent company, Skansen Group, offered to take on the DPA and fulfil its terms for which there is a precedent in a case – see case 57 in an earlier edition of the Bribery Digest.

That SIL was convicted despite its self-report and co-operation is likely to lead other corporates to question the benefits of self-reporting, especially where the case would be handled by the CPS (i.e., smaller matters) rather than the SFO (i.e., serious and complex matters and those of public interest). Inadvertently, the case may therefore influence decision makers of corporates and their advisers on what is a difficult strategic decision regarding whether or not to self-report*.

The Serious Fraud Office has issued guidance on corporate self-reporting. We are not aware of any equivalent guidance issued by the CPS. What is clear in that guidance is that self-reporting is no guarantee that a prosecution will not follow: each case will turn on its own facts. Beyond that, the guidance simply refers the reader



to the Full Code Test in the Code for Crown Prosecutors, the joint prosecution Guidance on Corporate Prosecutions and the Joint Prosecution Guidance of the Director of the SFO and the Director of Public Prosecutions on the Bribery Act 2010.

Fundamentally, under the Full Code Test, a prosecutor must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction, including considering what the defence case may be and how it is likely to affect the prospects of conviction. A case which does not pass this evidential test must not proceed, no matter how serious or sensitive it may be.

In the context of Bribery Act offences, the prosecutor must therefore consider how likely it is that the corporate had in place adequate procedures at the relevant time. A prosecutor will not proceed if the assessment is that there were adequate procedures such that the company has a full defence and, therefore, there is no realistic prospect of conviction.

In considering whether it has committed an offence that should be self-reported, a corporate may follow the same reasoning. If it concludes it had adequate procedures at the time of the offence, then it will likely want to consider whether, in the circumstance, it should self-report.

However, the decision to self-report or not to self-report is not limited to an assessment of whether the corporate believes it has an adequate procedures defence. There are other potential considerations. Each case will turn on its own facts. For example, should a corporate make an early determination that it has adequate procedures, it may nevertheless choose to self-report in order to seek to convince the SFO that it does indeed have adequate procedures and that therefore no formal investigation is required whilst ensuring that, should the SFO disagree with the corporate's determination, it can still avail itself of cooperation credit. Moreover, even if a corporate determines that it does not have adequate procedures, it may well decide not to self-report. If it concludes that it is unlikely to obtain a DPA for other reasons it may choose to risk the SFO becoming aware of the wrongdoing independently.

Thus, the decision whether or not to self-report is far from straightforward and its repercussions are serious. A corporate considering self-reporting ought to get legal advice from a practitioner specialising in white collar crime.

The one message that is clear from this case is the need for businesses of all sizes to have adequate procedures in place. Management should consider carrying out an independent assessment against a recognised standard.

* We are grateful for the assistance of Satnam Tumani of Kirkland & Ellis International LLP for the following analysis of the self-reporting decision.

Cases in 2018 continued/...

80 Catherine Leahy (April 2018)

Mrs Leahy took a bribe during a five-month money laundering and drug trafficking trial. The former classroom assistant was the spokeswoman on a jury which acquitted an alleged drug dealer. Police discovered four payments of £300, £1,000, £1,200 and £330 were made into her accounts between April and June 2016. She was caught after the police received a tip-off.

She was sentenced to six years imprisonment for a breach of Section 2 of the Bribery Act.

The case has a number of points of interest:

Whilst there has been one earlier prosecution for bribery of jurors in England (see case 76 in a previous edition of the Bribery Digest), this case represents the first use of the Bribery Act to prosecute a juror and the first case of its type in Scottish legal history (no jurors have previously been prosecuted in Scotland for corrupt behaviour).

The investigation of Mrs Leahy included the covert bugging of conversations in the juror's home, which provided key pieces of evidence of her discussing the bribery with her son.

The sentence of six years is a reminder of the judiciary's view that bribery offences that corrupt the judicial process are considered to be, in the words of the judge, "...conduct at the most serious end of that contemplated by the provisions of the Bribery Act".

81 Stephen Banks and Graham Deakin (April 2018)

Mr Banks was the managing director of Skansen Interiors Limited ('SIL') and Mr Deakin a project manager at a real estate company. It was found that Mr Banks had paid Mr Deakin £10,000 and promised him a further £29,000 in return for confidential information in 2012 and 2013 and that Mr Deakin had agreed those bribes during the course of his employment at the real estate company that sub-contracted SIL. Mr Banks was intending to use the information to help SIL gain contracts from Mr Deakin's employer. The full background is provided below (see case 79 in this edition of the Bribery Digest). They both pleaded guilty to the offences.

For the Bribery Act Section 1 offence of bribing, Mr Banks was sentenced to twelve months' imprisonment and was disqualified as a director for six years. For the Bribery Act Section 2 offence of being bribed, Mr Deakin was sentenced to 20 months' imprisonment and was disqualified as a director for seven years. Mr Deakin was also ordered to pay £10,697 within three months or face a further seven months in prison.

It is noteworthy that a more stringent sentence was handed down for the Bribery Act Section 2 offence, despite the fact that Mr Banks was the managing director of the entity receiving the confidential information and had actually made/promised the payments to Mr Deakin.

82 Tajana Sanderson (August 2018)

This case relates to the prosecution of Tajana Sanderson's brother, Andrey Ryjenko who in June 2017 was jailed for taking bribes while working at the European Bank for Reconstruction and Development in London (see case 69 in an earlier edition of the Bribery Digest). Sanderson, 39, who suffers with her mental health, had been declared unfit to stand trial with her brother. The jury who convicted him found that she was involved in the corruption as a matter of fact.


She has now pleaded guilty to concealing, converting or transferring criminal property. She had agreed for her name to be used for Channel Islands accounts to help her brother launder more than £2 million in bribes. The Old Bailey was told that she had not touched the funds. The judge told her that she would have been jailed immediately had she benefited financially. She was sentenced to a two-year prison term suspended for two years, noting that she has acute family circumstances.

83 Former employees of Afren plc (October 2018)

Osman Shahenshah and Shahid Ullah, former Chief Operating Officer and Chief Executive Officer respectively of Afren plc, were convicted of fraud and money laundering charges connected with Nigerian oil deals worth US\$300 million. Whilst they were convicted for fraud, the undisclosed payments which form the basis of the case are in the nature of a corruption scheme.

The SFO's investigation focused on oil business deals, with Mr Shahenshah and Mr Ullah both accused of hiding financial transactions relating to those deals from the Afren board of directors. Without the knowledge of the Afren board of directors they created shell companies and agreed a side deal with Afren's oil field partner in Nigeria, Oriental Energy Resources Ltd, from which they anticipated personal gain.

They recommended that the Afren Board agree to a US\$300 million payment to Oriental Energy Resources Ltd. Unknown to the Afren board, Mr Shahenshah and Ullah's side deal led to US\$45 million of the US\$300 million being paid out to a Caribbean shell company controlled by them. Some of the US\$45 million was used to purchase luxury properties in the Caribbean. Some also went to employees of the oil field partner and a close network of Afren staff dubbed "The A Team".



The SFO said Mr Shahenshah and Ullah struck the secret side deal to “increase their pay” after Afren’s shareholders objected to their salaries of £6.6 million (US\$8.5 million) and £3.8 million (US\$4.9 million).

Afren’s own internal investigation uncovered the fraud.

Mr Shahenshah was sentenced to:

- ▶ 6 years jail for one count of fraud, contrary to section 1 of the Fraud Act 2006 (abuse of position)
- ▶ 6 years concurrent for one count of money laundering, contrary to section 329 of the Proceeds of Crime Act 2002
- ▶ 4 years concurrent for one count of money laundering, contrary to section 328 of the Proceeds of Crime Act 2002

Mr Shahenshah has appealed against his conviction and sentence.

Mr Ullah was sentenced to:

- ▶ 5 years jail for one count of fraud, contrary to section 1 of the Fraud Act 2006 (abuse of position)
- ▶ 5 years concurrent for one count of money laundering, contrary to section 329 of the Proceeds of Crime Act 2002
- ▶ 4 years concurrent for one count of money laundering, contrary to section 328 of the Proceeds of Crime Act 2002

84 Mark Evill, Robert Howells and Michael Cope (November 2018)

Mr Evill, 47, worked for the Estates and Property Department of the Powys Teaching Health Board. He was responsible for project management at the Health Board but instead of putting projects out for competitive tender he ensured that his own company, George Morgan Ltd, was chosen. Between November 2014 and August 2015, George Morgan Ltd received almost £708,000 from the Health Board. Mr Evill created fictitious characters called Paul Hewson and David Evans (the real names of Bono and The Edge of the rock band U2) who would seemingly compose emails from the company, signing off quotations.

Mr Howells, 65, an agency project manager in the department, pleaded guilty to fraud after he was accused of endorsing the George Morgan Ltd bids for work despite knowing Evill was secretly its sole director. He received a £1,000 payment from the company and received financial help to buy a car in return for his co-operation.

Another employee, Mr Cope, 44, was found to have received £500 from Mr Evill in return for him helping to pass work to George Morgan Ltd.

Mr Evill’s involvement in George Morgan Ltd came to light after he had left the Health Board. An anonymous allegation was received via the NHS Fraud & Corruption Reporting Line, which stated that

Evill and Howells had misappropriated NHS money by receiving “pay-offs” from external contractors.

Some of the construction work carried out by George Morgan Ltd, which included the children’s wing of Brecon Memorial Hospital, Bronllys Hospital and Welshpool Hospital, was later considered to have “major deficiencies”, with the total cost to the health board estimated to rise to £1,420,604 once remedial works have been completed.

Mr Evill was jailed for seven years for fraud, converting criminal property and transferring criminal property. Mr Howells was jailed for four years and Mr Cope for three years for fraud and acquiring criminal property.

Cases in 2018 continued/....

85 Former employees of F.H. Bertling Limited (November 2018)

F.H. Bertling Ltd was a shipping and freight forwarding services company based in the UK which has now ceased trading. The SFO's investigation began in September 2014, and focused on allegations that F.H. Bertling had paid bribes to secure a ConocoPhillips freight forwarding contract, eventually worth over £16 million, for an oil exploration project in the North Sea (referred to as the 'Jasmine' North Sea oil exploration project).

The SFO's 'Jasmine' case focused on two bribery schemes created to secure a freight forwarding contract dishonestly from ConocoPhillips. The F.H. Bertling executives paid over £350,000 in bribes and facilitation payments in order to:

- ▶ Ensure that their bid for the ConocoPhillips 'Jasmine' shipping contract was successful
- ▶ Obtain assurance that inflated prices F.H. Bertling charged for additional services were waved through by ConocoPhillips staff without complaint. This scheme specifically targeted Christopher Lane (Logistics Lead at ConocoPhillips)

Prior to the trial, Stephen Emler (Chief Financial Officer at F.H. Bertling) and Giuseppe Morreale (Managing Director of F.H. Bertling's London, Caspian and Kazakhstan operations) pleaded guilty to charges of bribery over the 'Jasmine' North Sea oil shipping contract. (It is noteworthy that these two individuals had previously pleaded guilty for their part in a corrupt scheme in Angola worth approximately US\$20 million which was reported as case 75 in the Bribery Digest. Their sentencing for case 75 was deferred pending completion of this bribery case relating to the 'Jasmine' North Sea oil exploration project.)

Christopher Lane (Logistics Lead at ConocoPhillips) pleaded guilty to the related charge involving the inflated prices charged by F.H. Bertling. Colin Bagwell (Managing Director/Chief Commercial Officer at F.H. Bertling) was found guilty by the jury for conspiring with Christopher Lane.

The four individuals convicted in relation to the 'Jasmine' North Sea oil exploration project received the following sentences in January 2019:

Name	Position	Sentence
Giuseppe Morreale	Managing Director of F.H. Bertling's London, Caspian and Kazakhstan operations	Angola investigation: <ul style="list-style-type: none"> ▶ 2 years imprisonment to be suspended for 2 years ▶ £20,000 financial penalty Jasmine investigation: <ul style="list-style-type: none"> ▶ 15 months imprisonment to be suspended for 2 years to be served concurrently with the above
Stephen Emler	Chief Financial Officer at F.H. Bertling	Angola investigation: <ul style="list-style-type: none"> ▶ 18 months imprisonment to be suspended for 2 years ▶ £15,000 financial penalty Jasmine investigation: <ul style="list-style-type: none"> ▶ 12 months imprisonment to be suspended for 2 years to be served concurrently with the above
Christopher Lane	Logistics Lead at ConocoPhillips	Jasmine investigation: <ul style="list-style-type: none"> ▶ 6 months imprisonment to be suspended for 2 years ▶ 28 days electronic curfew order
Colin Bagwell	Managing Director/Chief Commercial Officer at F.H. Bertling	Jasmine investigation: <ul style="list-style-type: none"> ▶ 9 months imprisonment to be suspended for 2 years ▶ £5,000 fine

In total, the F.H. Bertling bribery cases relating to the 'Jasmine' North Sea oil exploration project and the Angola scheme resulted in twelve individuals being charged, eight of whom were convicted

alongside the company itself. These convictions were as a result of the SFO's criminal investigation into corruption at F.H. Bertling which began in September 2014.

86 Alstom UK companies and former employees (December 2018)

In December 2018 the SFO announced the outcome of several related investigations concerning the Alstom Group, in particular Alstom's UK companies. These investigations had commenced in 2009 as a result of information provided by the Office of the Attorney General in Switzerland.

The charges brought against the companies and individuals across all these related cases were conspiracy to corrupt, contrary to Section 1 of the Criminal Law Act 1977 and Section 1 of the Prevention of Corruption Act 1906.

Lithuania

Four convictions relate to a conspiracy to bribe officials of a Lithuanian power station and senior Lithuanian politicians in order to win two contracts worth €240 million. Between them, the

Alstom companies paid more than €5 million in bribes to secure the contracts. The individuals involved also falsified records to avoid checks in place to prevent bribery.

Alstom Power Limited (which pleaded guilty) was ordered to pay a total of £18,038,000 comprising:

- ▶ A fine of £6,375,000
- ▶ Compensation to the Lithuanian government of £10,963,000
- ▶ Prosecution costs of £700,000

The sentences against the individuals in the Lithuania case were as follows:

Name	Position	Sentence
Nicholas Reynolds	Global Sales Director for Alstom Power Limited's Boiler Retrofits Unit	<ul style="list-style-type: none">▶ 4 years and 6 months imprisonment▶ £50,000 in costs
John Venskus	Business Development Manager at Alstom Power Limited	<ul style="list-style-type: none">▶ 3 years and 6 months imprisonment
Göran Wikström	Regional Sales Director at Alstom Power Sweden AB	<ul style="list-style-type: none">▶ 2 years and 7 months imprisonment▶ £40,000 in costs

Tunisia

Alstom Network UK Limited was found guilty of one count of conspiracy to corrupt for making corrupt payments to win a tram and infrastructure contract in Tunisia. In return for its work in securing the €85 million contract, Alstom Network UK Limited paid €2.4 million to a consultancy company called Construction et Gestion Nevco Inc, which Alstom Network UK Limited itself acknowledged was a front for corruption when it decided not to make the final payment of €240,000. The SFO's Press Release describes how "staff within the Alstom Group helped the consultants produce paperwork to satisfy internal compliance checks, cobbling together 'evidence' of the services provided, which at best were of a nominal nature because the company was, in reality, just a conduit for bribes".

Alstom Network UK Limited is due to be sentenced at a later date. The company is appealing the conviction.

India, Poland and Hungary

Alstom Network UK and a further five Alstom Group employees were found not guilty in connection with charges relating to alleged corruption to win contracts in India, Poland and Hungary.

We comment as follows:

- ▶ One aspect of these bribery schemes worthy of highlighting to compliance officers and investigators is that staff within the Alstom Group helped produce documentation to satisfy or avoid internal compliance checks. The fact that documentation may have been manipulated or even fabricated makes the job of compliance officers and investigators even more difficult and highlights the need for a heightened level of professional scepticism.
- ▶ Whilst he was acquitted, it is noteworthy that the Senior Vice President for Ethics and Compliance within the Alstom International Network (who was also a Director of Alstom Network UK) was subject to investigation, highlighting the risk attaching to the compliance function.
- ▶ The SFO's investigation demonstrates the level of international co-operation it is now able to achieve: the investigation involved more than 30 countries including France, Canada, Hungary, Denmark, Austria, Slovakia, Czech Republic, Lichtenstein, Cyprus, Singapore, Seychelles, India, Sweden, Lithuania, Switzerland and Tunisia.

Abbreviations

CLA	Criminal Law Act 1977
CoLP	City of London Police
COPFS	Crown Office & Procurator Fiscal Service
CPS	Crown Prosecution Service
CRO	Civil Recovery Order
DoJ	US Department of Justice
DPA	Deferred Prosecution Agreement
FCA	Financial Conduct Authority
FSA	Financial Services Authority (former name of the FCA)
FSMA	Financial Services and Markets Act 2000
NCA	National Crime Agency
OECD	Organisation for Economic Co-operation and Development
PCA	Prevention of Corruption Act 1906
POCA	Proceeds of Crime Act 2002
SAR	Suspicious Activity Report
SFO	Serious Fraud Office
SOCA	Serious Organised Crime Agency

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