UK Bribery and Corruption Enforcement: 10 Reflections from 10 Years of the UK Bribery Act

September 2021

In July 2021, the UK Bribery Act ("**UKBA**") turned 10 years old - marking the end of a decade that has revolutionised bribery and corruption compliance and enforcement in the UK and globally.

When the UKBA came into force, the legal landscape and enforcement record in respect of bribery and corruption in the UK was, at best, patchy and inconsistent. While its enforcement record remains far from perfect, the Serious Fraud Office ("**SFO**") has used the UKBA to secure a number of high-profile resolutions with household-name companies. The organisation celebrated the 10 year landmark by securing its tenth Deferred Prosecution Agreement ("**DPA**"), with the company Amec Foster Wheeler.[1] This was shortly followed by two further DPAs with anonymous companies in relation to UK contracts.

To mark this 10 year birthday, we have collated what we consider to be 10 key learnings, trends and takeaways from a decade of the UKBA.

This article has been prepared to accompany Baker McKenzie's virtual Annual Compliance Conference (you can register for the conference here), with multiple webinars taking place over September and October 2021, covering key global compliance issues affecting clients. The Conference includes sessions on anti-bribery and corruption; antitrust; customs and Brexit; supply-chain, product compliance and ESG; and trade sanctions and export controls. For more information on the Conference please contact Kate Bullard.

1. Enforcement driven by the section 7 offence and the introduction of DPAs

Looking back at the last 10 years of UKBA enforcement, it is clear that enforcement is becoming more frequent. While it took a number of years for the first corporate enforcement cases under the UKBA to materialise, corporate resolutions are now much more common. The key catalyst of this uptick in enforcement has been the combination of the section 7 offence of failure to prevent bribery - which provides a way around the roadblock that otherwise inhibits corporate prosecutions for bribery - and the introduction of the DPA regime, which came into effect in the UK in February 2014, through the Crime and Courts Act 2013. The first DPA was agreed in November 2015 with Standard Bank PLC, and DPAs are now a fundamental part of the SFO's toolkit for reaching resolutions with corporates.

Since the appointment of Lisa Osofsky as SFO Director in September 2018, DPAs have been particularly prominent - with two DPAs secured in 2019, three in 2020, and three to date in 2021. This increased use of DPAs has also been supported by an outcome-driven focusing of resources, with the SFO demonstrating a willingness under Osofsky's leadership to close both long-running investigations and also investigations that

[1] The first 10 DPAs secured by the SFO were for (i) Standard Bank PLC, (ii) Sarclad Ltd; (iii) Rolls-Royce plc; (iv) Tesco Stores Ltd (not bribery-related); (v) Serco Geografix Ltd (not bribery-related); (vi) Güralp Systems Limited; (vii) Airbus SE; (viii) G4S Care and Justice Services (UK) Ltd (not bribery-related); (ix) Airline Services Limited; and (x) Amec Foster Wheeler Energy Limited.

had only been opened by the SFO comparatively recently. In its three most recent Annual Reports, the SFO has indicated that it has closed 31 investigations without charge - and has opened only 24 criminal investigations in the same period. While closures of some investigations have prompted criticism, the SFO's rationalisation of its case pipeline has arguably allowed it to focus resources on securing successful enforcement outcomes in the cases where it considers that it has the best chance of doing so.

Whilst the SFO now has an established track-record of securing enforcement outcomes by way of DPA, the same cannot be said in terms of its criminal prosecution of corporate wrongdoing and the individuals accused of being involved in that wrongdoing. Whether that outcome is problematic or not from an enforcement/public policy perspective depends very much on the view taken of DPAs as an effective enforcement tool.

2. Jurisdictional assertiveness of the SFO

The broad jurisdictional reach of the UKBA (and the accompanying adequate procedures defence) has been fundamental in driving companies to assess their bribery and corruption risk profile and the implementation of compliance measures across the globe.

A key factor in the broad jurisdictional scope of the UKBA has been the section 7 offence of failure to prevent bribery committed by an associated person. Companies can fall under the jurisdictional scope of this offence if they are UK-incorporated or deemed to be carrying on a business, or part of a business, in the UK. Associated persons can be based anywhere in the world and still trigger liability for the company - prompting companies to enhance compliance policies and procedures in respect of engagements with such associated persons, particularly third parties (including agents, distributors, consultants and other intermediaries) globally.

The SFO took an expansive approach towards the concept of carrying out business in the UK in the *Airbus* DPA, with Airbus accepting that it fell within scope of the section 7 offence on account of it directing strategy of the UK business and overseeing the operations of two UK subsidiaries. That is despite the facts that (i) Airbus is a French / Dutch domiciled company, and (ii) the bribery conduct in question took place overseas through overseas subsidiaries (with only one count being connected to subsidiaries in the UK). Whilst this position was not challenged by Airbus, the fact that Dame Victoria Sharp (the judge who oversaw and ultimately approved the DPA) was willing to accept the position as part of her approval of the terms of the DPA indicates that companies should continue to take a broad view of the UKBA's application.

This broad reach of the UKBA has also been a key influence on bribery and corruption laws that have been introduced by other countries seeking to reform their own legal frameworks. In many respects, including its broad jurisdictional reach, the UKBA has become a "gold standard" in bribery legislation over the last 10 years.

3. Third parties as a key risk area

The engagement of third party intermediaries (such as agents, distributors, introducers and consultants) remains a key risk factor for companies - particularly where such third parties are based or operate in jurisdictions or sectors that are higher risk from a bribery and corruption perspective. Many of the investigations and DPAs secured by the SFO are a direct illustration of this reality. This has led to a widespread review by UK corporates of their use of third parties and the risks they give rise to - resulting in many companies reducing their reliance on such relationships and increasing controls over those relationships which remain.

However, it is important not to overlook the role of employees in many UKBA issues in the last 10 years, whether as direct conspirators or through a failure to ensure the full and consistent implementation of control frameworks established by corporates to manage such risks. This is particularly so regarding employees based overseas, who, just as with third party intermediaries, may be more removed from the central corporate control framework and the cultural messages that are intended to support it.

Another lesson to be taken from the DPAs is that third party intermediaries are not the only route through which to move funds out of an organisation for improper purposes. The DPAs also include examples of sports sponsorship, charitable donations, and educational funds being used to effect acts of bribery and corruption.

4. Key sectors and corporate enforcement profile

Enforcement of the UKBA to date has indicated that, whilst certain profiles of corporate may be at greater risk of enforcement action, a wide range of companies have been targeted by the SFO. The SFO's enforcement has ranged from blockbuster cases against household name companies, too much smaller cases against SMEs.

UKBA enforcement cases and the SFO's case pipeline indicate that certain high-risk sectors are at greater risk of being targeted, including the Energy Mining & Infrastructure (EMI), Aerospace and Financial Institutions (FI) industry sectors. Whilst enforcement in the Healthcare sector has not been as expected given its risk profile and the levels of enforcement against the sector by the US Department of Justice in the same period, the COVID pandemic may create fertile ground for cases to develop.

Some of the highest profile enforcement cases have been against public companies (including subsidiary companies within public company groups), but private companies have been targeted too - including Sarclad Ltd, Güralp Systems Limited, and Airline Services Limited. And while the majority of cases have involved overseas conduct (e.g. under the section 7 offence), the recent DPAs against two companies operating in the UK serve as reminder that domestic conduct is still subject to enforcement by the SFO.

5. Continued challenges for the SFO in respect of enforcement of individuals

While the SFO has secured positive outcomes in its enforcement against corporates with increasing regularity (as discussed above), it has continued to encounter challenges in its enforcement against individuals. In relation to the DPAs secured by the SFO to date, no individuals have been successfully convicted - despite 19 prosecutions having been brought. This has prompted sustained criticism from some commentators, particularly given the level of corporate cooperation with the SFO that is inherent to the DPA process - and the degree of information relating to employee conduct that is likely to be passed from the corporate to the SFO in this context. If nothing else, it is further evidence of the difficulties of securing convictions in complex, multi-jurisdictional corruption cases.

The SFO has evolved its approach in respect of naming individuals and publishing certain information about corporate enforcement cases, pending the outcome of enforcement action against implicated individuals. In the *Tesco Stores Limited* DPA in April 2017, a number of individuals were named and prominently identified in the Statement of Facts as being involved in misconduct - but these individuals were subsequently acquitted at trial. In more recent DPAs, the SFO appears to have taken a more cautious approach. For example, the DPAs and related materials for two UK companies have not yet been published, pending enforcement cases against implicated individuals.

6. Weighing up voluntary disclosure

There is no positive duty on companies to self-report wrongdoing under the UKBA. Instead, companies that identify wrongdoing (or potential wrongdoing) within their operations will face a decision as to whether to notify the SFO and/or any other authorities about the conduct.

Self-reporting of misconduct has long been considered as a key factor in whether a company will be able to secure a DPA instead of a criminal prosecution - although more recent enforcement cases have indicated that failure to self-report is not an absolute bar to obtaining a DPA (with self-reporting instead now arguably being considered as a factor of cooperation more broadly).

The decision for a Board of whether or not to self-report conduct to the SFO (and at what stage to do so) is undoubtedly a difficult one. Board decisions are subject to increasing scrutiny from external stakeholders.

Furthermore, company auditors are playing an increasingly prominent role in driving investigations into potential misconduct.

The pressure placed on Boards is illustrated by Lord Justice Edis' criticism of the legacy Foster Wheeler Board in the *Amec Foster Wheeler* case for its failure to self-report bribery conduct. Lord Justice Edis put his view in the following terms:

> *"This material suggests to me that the main Board of FWL was primarily concerned to minimise the adverse consequences of the offending for the Group. In my judgment the proper course for it to have adopted, not as a matter of legal duty, but as a matter of ethical corporate governance was to report the known facts to the SFO."*

Notwithstanding this criticism, the current Board of Amec Foster Wheeler was still able to secure a DPA for the company, illustrating the complexity of the decision making and the need for the decision to taken in each case on the specific facts at play.

7. SFO collaboration with other enforcement authorities

Enforcement cases in the last 10 years have shown the increasing willingness of the SFO to work alongside other authorities (both in the UK and overseas), to investigate and resolve cases. The SFO's collaboration with other authorities from an investigatory perspective has in some cases been extensive - for example, with the French Parquet National Financier (PNF) in the *Airbus* case.

In *Airbus*, the fine of €991 million imposed by the SFO formed part of a larger global settlement of €3.6 billion - with Airbus also agreeing to pay French authorities a total penalty of approximately €2.1 billion, and US authorities a total penalty of approximately €526 million. More recently, the SFO's DPA with Amec Foster Wheeler formed part of a number of coordinated global resolutions relating to the company's conduct in Brazil - with settlements also being agreed by US and Brazilian authorities.

While the SFO has experienced a set-back in respect of its ability to obtain evidence from overseas (following the UK Supreme Court's Judgment on the scope of SFO's powers under section 2 of Criminal Justice Act 1987 in *R (KBR, Inc) v Director of the Serious Fraud Office*[2]), the ruling will not deter ongoing cross-agency cooperation. The SFO has indicated that it will leverage its strong relationships with other international authorities and make use of the Mutual Legal Assistance framework to obtain evidence from overseas - and in any event companies will continue to feel the pressure to provide such documentation voluntarily, in order to secure cooperation credit.

8. M&A continues to be a key factor in enforcement cases

A number of the SFO's UKBA enforcement cases to date have involved M&A-related issues - highlighting the ongoing compliance risks that M&A presents. For example, historic compliance issues connected to a target / acquired company may be identified in the context of an M&A transaction, or post-acquisition (e.g. as part of the compliance integration of the target into the acquiring group). The acquiring company can, effectively, inherit compliance issues brought about by historic misconduct, as well as any continuing misconduct. The transaction may also expose parties involved to risks in respect of dealings with the proceeds of crime.

The DPAs in respect of *Standard Bank*, *Sarclad* and *Amec Foster Wheeler* each provide illustrations of the risks arising from M&A activity. The UKBA cases to date relating to M&A therefore underline the importance of conducting thorough M&A due diligence, and putting in place effective contractual protections from a compliance perspective.

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2 [2021] UKSC 2

Stakeholders and financing parties in M&A transactions (e.g. banks and/or warranty and indemnity insurance providers) are also increasingly demanding enhanced due diligence, and regular updates on issues identified - including the scope and results of any investigation carried out into these issues.

9. Impact of 'adequate procedures' guidance, and impact across other compliance areas

The introduction of the UKBA (particularly the section 7 offence and its related adequate procedures defence), and the accompanying profile of SFO enforcement, has had a transformational effect on awareness of, and organisational focus on, bribery and corruption compliance over the last decade, both in the UK and globally. In-house legal and compliance teams have been able to drive organisational change and compliance enhancements in ways that may not have been possible prior to the implementation of the UKBA.

The guidance on 'adequate procedures' published by the UK Ministry of Justice ("**MOJ**") in 2012 has played a central role in shaping organisational approaches to compliance, by providing companies with a structured framework for assessing their compliance programmes. Whilst not everyone approves of its risk-based principles approach - and there is no doubt that aspects of the broader commentary included within the guidance by the MOJ are open to criticism - it is clear that no further guidance will be provided by the MOJ. The limited number of corporate prosecutions (rather than DPAs), particularly public or other large corporations, also means that there is likely to be limited precedent established regarding the application of the adequate procedures defence.

The impact of the MOJ Guidance also continues to be felt in other compliance areas beyond just bribery and corruption - and the 'six principles' set out in the MOJ Guidance[3] was largely followed in guidance prepared by HMRC on 'reasonable prevention procedures' under the corporate offence of failure to prevent the facilitation of tax evasion, under the Criminal Finances Act 2017.

More broadly, the need for companies to conduct thorough diligence on their third parties and supply chains from a bribery perspective has also influenced systems and controls that companies are increasingly putting in place to assess other supply chain-related compliance risks, such as ESG risks and human rights / forced labour issues.

10. Focus on compliance remediation and group-wide compliance undertakings

A key feature of recent DPAs has been the securing of broad, forward-looking compliance undertakings from group parent companies, where a DPA is entered into with a particular subsidiary (see *Serco*, *G4S* and, more recently in a UKBA context, *Amec Foster Wheeler* and the two recent anonymous DPAs). Such undertakings have been framed as key factors in the Court finding that the DPA in question is in the 'interests of justice'.

Companies in engagement with the SFO around potential DPAs should therefore expect that such group-wide compliance undertakings will be demanded as the new normal moving forward.

[3] (i) Proportionate procedures; (ii) top-level commitment; (iii) risk assessment; (iv) due diligence; (v) communication, and (vi) monitoring and review.

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