Law Society of Scotland

Submission on the Bribery Act 2010

House of Lords Select Committee

Bribery Act 2010

10 August 2018

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee welcomes the opportunity to consider and respond to the UK Government consultation on the post-legislative inquiry into the Bribery Act 2010 (2010 Act). We have the following comments to put forward for consideration.

General Comments

Seven years have passed since the 2010 Act came into force: although some provisions commenced in 2010, the majority came into effect in July 2011. The questions under consideration include judging whether the 2010 Act is effective by assessing that in light of stricter prosecution regimes/higher conviction rates and a reduction in occurrence of the conduct that the 2010 Act addresses. These matters are difficult to evaluate substantively within that timescale for a number of reasons.

The 2010 Act is the first Act of its type that sought to adopt:

> '[an] *international consensus against bribery*…….[which] *was the result of the recognition among statesmen, parliamentarians, international organisations, prosecutors, the legal profession, police forces, the media, civil society and many in the international business community, that bribery had become a substantial global problem. Bribery is a serious crime that has far reaching economic and social consequences. It corrupts the ethical values upon which the operation of our society and institutions are founded and is particularly damaging in developing and emerging*

economies. Bribery hampers economic development, sustains poverty, and challenges the proper rule of law. It is market distorting, creating unfair and expensive barriers for legitimate business[1].

There were four policy objectives of the 2010 Act that included[2]:

- Consolidation and modernisation of the law
- A robust and effective enforcement tool with global reach
- Corporate good governance
- Prosecution policy

As far as consolidation and modernisation of the law is concerned, the laws that were replaced by the 2010 Act were fragmented and outdated. That made any such conduct difficult to prosecute in relation to 21st century corporate and global conduct, whether by common law and/or statute. The review of the existing law[3] is designed at modernising the law. It has allowed for consolidation and provides a basis on which to build the necessary processes to deal with bribery offences. It allows for future development so that the legislation is provides an enforcement tool with global reach. The 2010 Act does appear, at least on paper, to meet the needs of law in that:

- It deals with the reality of up to date corporate UK and global business
- It is in language that can be clearly understood and
- It has the benefit of clarity promoting an understanding of what conduct should be treated as criminal for the purposes of the public, prosecutors and defence.

Whether it is an effective tool is much harder to ascertain, as it will take a considerable amount of time before a rigorous assessment can be made. Inevitably, given the nature of the crimes involved, any investigations and thereafter prosecutions in relation to the 2010 Act are going to be complex and will take a considerable amount of time. Such crimes or conduct must have arisen after the 2010 Act came into force, because it is not retrospective. As far as Scotland is concerned, for prosecutions to have taken place to date, such prosecutions would require having been reported to, considered and marked for prosecution by the Crown Office and Procurator Fiscal Service (COPFS).

Furthermore, judgment as to the effectiveness of the 2010 Act cannot necessarily be determined merely by evidence of successful prosecutions, though it helps in providing deterrence by way of example. We acknowledge that publicity regarding successful convictions is obviously very helpful in raising awareness

1 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/713452/bribery-act-2010-post-legislative-scrutiny-memorandum.pdf

2 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/713452/bribery-act-2010-post-legislative-scrutiny-memorandum.pdf

3 THE LAW COMMISSION LEGISLATING THE CRIMINAL CODE: CORRUPTION http://www.lawcom.gov.uk/app/uploads/2015/04/c145-Corruption.pdf

and promoting the State's ability to enforce the relevant legislation. The fact that the legislation has potentially a global reach is of international importance.

Creating clarity as to the exact nature of the criminal conduct and providing a means to impose appropriate sanctions assists in regulating the conduct of business organisations that are then aware of the law. They require observing the law, undertaking the appropriate reporting mechanisms as well as putting in place the relevant and necessary training and education to ensure their business's compliance and monitoring (the purpose outlined in creating the Deferred Prosecution Agreement (DPA) or civil settlement framework).

There have been successful high-profile prosecutions that have received much publicity. That includes the first conviction[4] under section 7 of the 2010 Act which also provided clarification of how the legislation is to be interpreted (see below). The Serious Fraud Office (SFO) secured a section 7 conviction against the Sweett Group PLC (Sweett) for failing to prevent its subsidiary, Cyril Sweett International (CSI) from paying bribes in the United Arab Emirates from 2012 to 2015. These bribes related to securing a contract for the building of a £63 million hotel in Dubai which as a result, Sweett was fined £2.25 million and its share price value fell by 23 per cent.

Such cases also provide clarification on the interpretation of the 2010 Act in:

Meaning of terms such as 'associated person':[5] Though the term is defined as a person who performs services for or on behalf of the relevant commercial organisation, having a parent and subsidiary relationship is not sufficient to conclude that the subsidiary is performing services for and on behalf of the parent. This case illustrates how the facts and circumstances of the relationship to be considered. What is significant from the Sweett case is that there was no indication that the CSI bribery took place with the knowledge or agreement of Sweett.

Relevance of the defence: The only defence available to an organisation which is being prosecuted under section 7 of the 2010 Act is to establish, on the balance of probabilities, that they had in place at the relevant time 'adequate procedures' to prevent bribery. Sweett had been unable to rely on this defence, since reports on their control framework over CSI's activities had identified numerous weaknesses and failings in its anti-bribery systems and financial controls. The actual issue of adequacy was not tried out in court owing to the plea of guilty.

What the Sweett case does in particular is to highlight the importance of exercising oversight on all third-party companies including subsidiaries (no matter what the exact relationship is) who are involved in performing services for or on an organisation's behalf. It stresses the importance for all businesses to review their dealings with third parties and to be proactive (since inactivity will not avail themselves of the

4 (conviction was on 5 June 2016)

5 section 8(1) of the 2010 Act

defence) to prevent conduct being done on their behalf that may render the organisation liable to prosecution. It is about risk management, in order to minimise the potential risks of being engaged directly or indirectly in acts of bribery and corruption. Organisations must have robust measures in place; the need for which is amply demonstrated by the proliferation of guidance emanating from financial and legal organisations.

We consider corporate good governance and prosecution policy under the various questions below.

Deterrence

Question 1: Is the Bribery Act 2010 deterring bribery in the UK and abroad?

We refer to our answer above with regard to the issues in judging deterrence by prosecutions. The question cannot be answered since previously, bribery prosecutions were extremely rare. There has not been time for the numbers of prosecutions substantially to have increased since the 2010 Act came into force. There will be greater publicity when there have been more successful convictions.

The legislative approach under the 2010 Act, as outlined above, is designed to shift the burden of detection and investigation onto companies, through the provisions of section 7 of the 2010 Act and the accompanying DPA/civil settlement frameworks. This has led to a much greater corporate focus on the types of conduct which the 2010 Act was designed to attack. Though we understand that many companies may have put in place anti-bribery policies, by accepting that there is a business case for anti-corruption, according to the CBI, *'there is still much more to be done in translating that into practical action*[6]'. Eversheds[7] undertook a survey of 500 business leaders worldwide about their approach to business, bribery and corruption, from which only 45 per cent of their respondents though that anti-bribery policy was appropriate for their business and only half thought that the policy had improved in the last five years. Having policies in place is important as this will provide guidance to employees about how to handle the issues when they arise. The effect of internal anti-bribery guidance should be to discourage and prevent such behaviour. If companies do not have anti-bribery policies, such businesses risk not being able to invoke the defences under the 2010 Act.

6 http://www.cbi.org.uk/businessvoice/latest/bribery-is-not-just-a-legal-problem/

7 'Beneath the Surface' https://www.eversheds-sutherland.com/global/en/what/practices/white-collar-and-investigations/publications/bribery-report/bribery-corruption-report.page

However, mere observance in having a policy in place is not sufficient. They must be awareness by employees of such policies through education and training and action taken to ensure that such policies are adequate and capable of being understood.

To the extent that there have not been many convictions, the 2010 Act certainly promotes good practice. The true measure may not arise until a company's anti-bribery policy and practice is tested when an incident arises: how it is handled internally and thereafter in relation to discussion and/or action taken by the enforcement authority.

Enforcement

Question 2: Is the Bribery Act 2010 being adequately enforced? If not, how could enforcement be improved? Do the Serious Fraud Office (SFO) and the Crown Prosecution Service (CPS) have the right approach and the resources they need to investigate and prosecute bribery offences effectively?

This question has been posed from the English and Welsh standpoint.

The COPFS is Scotland's prosecution service. The distinct roles of COPFS and the Procurator Fiscal are not relevant in this context, since we would anticipate that any crimes being prosecuted in relation to the 2010 Act would proceed by way of indictment in the High Court (though competent to proceed of course in the Sheriff & Jury courts) given their serious nature. The SFO and CPS have no jurisdiction in Scotland.

COPFS receives reports about all crimes including those arising in respect of serious organised crime from the police and other reporting agencies. It then decides whether there is sufficient admissible evidence according to the law of Scotland and that prosecution is merited in the public interest.

All cases under the 2010 Act are referred to the Serious and Organised Crime Unit (SOCU) of COPFS, which is a specialist, multi-disciplinary unit including experienced investigators, prosecutors and forensic accountants. SOCU oversee the investigation of such cases by law enforcement and will identify any further enquiries which require to be conducted. SOCU receives many of the most evidentially complex cases that the COPFS has to deal with, involving hundreds of witnesses and thousands of productions.

Such cases are generally investigated by specialist teams within the Economic and Financial Investigation Unit of the Police Service of Scotland. SOCU teams are co-located with police and other law enforcement agencies at the Scottish Crime Campus at Gartcosh. They also work closely with COPFS International Co-operation, Proceeds of Crime and the Civil Recovery Unit (CRU). Decisions in relation to the prosecution of

cases are made by SOCU and experienced Crown Counsel, in accordance with internal guidance for prosecutors issued by the Lord Advocate[8].

COPFS is a party to Memorandum of Understanding[9] with other UK enforcement agencies[10] (such as the SFO, Crown Prosecution Service, Financial Conduct Authority, National Crime Agency, City of London Police and Ministry of Defence Police). It outlines the cross border arrangements for fulfilling the international obligations of the United Kingdom as a party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Bribery Convention), the Council of Europe Criminal Law Convention against Corruption (and its Additional Protocol) and the United Nations Convention against Corruption with regard to the investigation and prosecution of foreign bribery, including Section 7 of the 2010 Act). In effect, COPFS is involved in the regulation of the sharing of information and inter-agency co-operation within the UK to ensure that an effective, joined-up approach is and can be taken to cross-border bribery cases. What is important though is given the global nature of such crimes is the emphasis of the UK Government, which indicated that:

> *'Continued criminal justice cooperation is a critical justice priority for Brexit negotiations: it impacts upon the safety of citizens, of both the UK and the rest of the EU. Cross-border solutions are required to combat the growth of transnational crimes….'*[11].

The occurrence of cross-border cases is by no means uncommon. By way of example, person A, in Glasgow, works for company B, based in Manchester; makes an unlawful payment by bank transfer to person C, in London, who works for company D, based in Berlin, in relation to a contract for work in the Middle East. There is no doubt that the 2010 Act allows for such matters to be prosecuted in the UK. While the 2010 Act provides flexibility as to where such conduct will be prosecuted, in practice, much will depend upon the way in which the matter comes to the attention of the authorities and to which authority. Resources of the authorities may also be a consideration.

Senior COPFS officials regularly attend meetings of the UK Bribery, Corruption and Sanctions Evasion Threat Group and the Foreign Bribery Intelligence Clearing House, both of which are UK-wide multi-agency groups. As regards cross-border cases extending beyond the UK, the COPFS International Co-operation Unit has prosecutors with specialist knowledge and experience in securing cooperation and evidence from international partners. The SOCU make full use of resources such as Eurojust, the European Judicial

8 GUIDANCE ON THE APPROACH OF THE CROWN OFFICE AND PROCURATOR FISCAL SERVICE TO REPORTING BY BUSINESSES OF BRIBERY OFFENCES http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Guidelines_and_Policy/Guidance%20on%20the%20approach%20of%20COPFS%20to%20reporting%20by%20businesses%20of%20bribery%20offences%20JUNE%202017.pdf

9 TACKLING FOREIGN BRIBERY MEMORANDUM OF UNDERSTANDING https://www.fca.org.uk/publication/mou/mou-tackling-foreign-bribery.pdf

10 Paragraph 8.1

11 https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/651/65102.htm- The implications of Brexit for the justice system: Government Response to the Committee's Ninth Report of Session 2016–17

Network, and UK Liaison Magistrates, in order to coordinate investigations and agree questions of jurisdiction in complex international cases. It is unclear, as the Brexit negotiations continue, exactly what our relationship will be with EU Member States, though ensuring the international reach of the 2010 Act will require close co-operation with these countries as with others internationally to combat bribery.

The resources which are required to investigate and prosecute bribery offences will be resource intensive in relation to both time and expertise. Very large cases, such as the Rangers[12] fraud prosecution, may often require provision of additional resources. The experience from the defence perspective is of complex cases can take some time to be progressed at COPFS which is also referred to in the OECD report discussed below. This may indicate that resources from time to time may be pushed.

Another factor which may well contribute to such inevitable delays is the original quality of police investigations and reports that are then assessed by SOCD. Experience has shown that even large fraud cases may be reported by relatively junior police officers. By way of example, the UK's longest trial, a mortgage fraud[13] case that concluded in 2017, was reported to COPFS by a constable. Similar examples have been seen with reports about conduct under the 2010 Act.

The interests of justice require investigations and prosecutions to take place without undue delay. The UK Government's policy intentions under the 2010 Act require this too. Bribery must be seen to be a priority, and conduct for which offenders will be caught and prosecuted successfully. Otherwise the culture behind the 2010 Act may otherwise unravel.

COPFS has successfully prosecuted a number of cases under the 2010 Act and several others are understood to be currently under investigation. Prosecutions to date have taken place for offences in terms of sections 1 (offences of bribing another person) and 2 (offences relating to being bribed). Those who have been prosecuted included a City Council Valuation Officer[14]and a former juror in an organised crime trial (section 2 of the 2010 Act). [15] There have not been any Scottish prosecutions for offences under sections 6 (bribery of foreign public officials) or 7 (failure of commercial organisations to prevent bribery) in Scotland. A number of section 7 offences have been addressed by way of civil settlement under the Lord Advocate's self-report initiative (see below).

All cases which are prosecuted are referred to COPFS Proceeds of Crime Unit for financial investigation to consider confiscation proceedings under Part 3 of the Proceeds of Crime Act 2002. That permits the

12 https://www.bbc.co.uk/news/uk-scotland-glasgow-west-34272273

13 http://www.scotland.police.uk/whats-happening/news/2017/may/two-convicted-of-large-scale-mortgage-fraud

[14] https://www.pressandjournal.co.uk/fp/news/aberdeen/1378243/north-east-official-council-houses-scam-jailed/

15 http://www.scotland-judiciary.org.uk/8/1961/HMA-v-Catherine-Leahy.

seizure of any available assets which are the proceeds of crime. Funds which are recovered are reinvested into Scottish communities through the Scottish Government's CashBack for Communities programme[16].

It is also worth noting that COPFS' roles include both prosecution of the various offences under the 2010 Act and operating civil settlements in relation to the operation of section 7 of the 2010 Act. Inevitably that is resource demanding, especially where there may well be anticipated to be an increase in self-reporting as referred to below.

It is important to note the effect of English cases decisions which while not binding on Scottish courts may can have a persuasive effect on future Scottish cases. Whether to prosecute is of course a matter for COPFS as indicated above.

The recent case of Skansen Interiors Limited was the first UK case where there was a conviction under section 7 of the 2010 Act following a trial. This prosecution took place despite the company's self-report. This contrasts with Sweet which had been a plea. This case may be relevant when considering action in the case of dormant companies. Justification for the prosecution was said to relate to the absence of assets or resources to pay any fines that might have been imposed. The reason why prosecution took place was to send out a message to other small and medium-sized companies about bribery being taken seriously and how appropriate procedures must be put in place regardless of how big or small the company is.

Guidance

Question 3: Is the statutory guidance on the Bribery Act 2010 sufficient, clear and well-understood by the companies and individuals who have to deal with it? Should alternative approaches be considered?

The statutory guidance[17] is both extensive and informative. There are two observations:

- The guidance has been written by the UK Government's Ministry of Justice. It contains only passing reference to the fact that Scotland is a separate jurisdiction[18]. We suggest that the guidance should be revised in this respect.

16 https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdftps://www.gov.scot/Topics/Justice/policies/community-engagement/cashback

17 https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf

18 Paragraph 2 of the Introduction does acknowledge that Scottish Ministers have been consulted regarding the content of this guidance.

- Due to the very limited number of prosecutions that have been brought since the 2010 Act came into force, the guidance has been largely untested by the courts. The guidance explains the UK Government policy which is '*intended to help commercial organisations of all sizes and sectors understand what sorts of procedures they can put in place to prevent bribery as mentioned in section 7(1)* [of the 2010 Act]'[19].

It specifically states that the guidance is designed to be to be of general application and outlines six guiding principles. It is not to be prescriptive, leaving the interpretation to the courts as the issue whether an organisation had adequate procedures in place to prevent bribery, with the onus on the defence to establish it had adequate procedures in place to prevent bribery.

No doubt the courts will have regard to the guidance when considering any matters of interpretation. It is hard to consider that any company that demonstrably complies with the terms of the guidance will face conviction of an offence under the 2010 Act. However, as matters stand, the UK Government has set out what are deemed to be acceptable levels of conduct and until now, as part of this post-legislative scrutiny, without detailed consideration by either Parliament or the judiciary.

Challenges

Question 4: How have businesses sought to implement compliance programmes which address the six principles set out in the Ministry of Justice's guidance on the Bribery Act 2010? What challenges have businesses faced in seeking to implement their compliance programmes? Are there any areas which have been particularly difficult to address?

Question 5: What impact has the Bribery Act 2010 had on small and medium enterprises (SMEs) in particular?

Question 6: Is the Act having unintended consequences?

In relation to Questions 4-6, we believe that it is likely that the 2010 Act has focused corporate attention, but we have not conducted any research in this area. As highlighted above, it is now common for

19 Paragraph 3

companies to have anti-bribery policies in a way that rarely happened before. As a result of prosecutions to date, those advising companies are better placed to comment on the impact of the legislation on small and medium sized enterprises.

Deferred Prosecution Agreements

Question 7: Has the introduction of Deferred Prosecution Agreements (DPAs) been a positive development in relation to offences under the Bribery Act 2010? Have DPAs been used appropriately and consistently? Has their use reduced the likelihood that culpable individuals will be prosecuted for offences under the Act?

The system of DPAs which is in place in England and Wales do not currently apply in Scotland.

Civil settlement regime

Instead, Scotland has a civil settlement regime, which is dependent upon companies self-reporting instances of bribery to COPFS. This self-report initiative (paragraph 1 of the Guidance on the approach of COPFS to reporting of businesses of bribery)[20] has been in place since 1 July 2011, having been introduced by the then Lord Advocate to mark the commencement of the 2010 Act.

Under this initiative, businesses which discover bribery or corruption within their own organisation are encouraged to make a report to COPFS, having identified unlawful conduct and examined it policies and processes which failed to prevent the conduct taking place. Through its solicitors, it submits a full report to COPFS, who will then investigate. The anticipation is that they may avoid prosecution and be referred to the CRU for civil settlement instead. An agreement may be struck with the company to pay a particular sum (reflecting the profit that has been earned from the criminal conduct) in return for not being prosecuted. The CRU acts on behalf of Scottish Ministers and is the enforcement authority for the civil recovery of the proceeds of unlawful conduct under Part 5 of the Proceeds of Crime Act 2002.

There are stringent conditions with which businesses must comply with if they are to be considered appropriate for the self-report initiative. That includes conducting a thorough investigation, disclosing the full extent of the criminal conduct that has been uncovered and by taking robust steps to prevent a

20 http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Guidelines_and_Policy/Guidance%20on%20the%20approach%20of%20COPFS%20to%20reporting%20by%20businesses%20of%20bribery%20offences%20JUNE%202017.pdf

repetition of that unlawful conduct. There is no guarantee that, in making a self-report, this will allow a company to avoid prosecution. Each case is evaluated on its own merits. The SOCU, together with Crown Counsel, consider various factors in assessing the public interest in any prosecution and in deciding whether the civil settlement is appropriate. These factors include the nature and seriousness of the offence, whether senior management were complicit and the adequacy of the anti-bribery systems in place at the time of the unlawful conduct and those introduced subsequently. Detailed guidance is available on the COPFS website for businesses who wish to submit a self-report[21], which outlines the factors to be considered.

If it is in the public interest for criminal proceedings to be considered, SOCU will instruct an independent investigation by law enforcement and the information provided by the business may be used for this purpose. Alternatively, if the matter is referred for possible civil settlement, the CRU will carry out a comprehensive investigation that includes forensic accountancy input. That verifies the information provided by the business and assesses the appropriate level of settlement, i.e. the total value of the benefit which has been obtained by the business through the unlawful conduct. In the event that a settlement is reached with the company, directors and employees may still be prosecuted separately as individuals. Money which is recovered by way of civil settlement is also paid into the CashBack for Communities fund.

To date, five businesses[22] have reached civil settlement in relation to bribery offences since the introduction of the self-report initiative. There are understood to be further cases currently under consideration. Those companies which have reached civil settlements include businesses operating in the oil and gas sector, freight and logistics and shipping industry. These cases have involved the payment of bribes by employees or subsidiaries, often overseas, in order to secure contracts. According to COPFS, the total value of funds to date recovered by way of civil settlement in respect of bribery is in excess of £8.3 million[23].

21 http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Guidelines_and_Policy/Guidance%20on%20the%20approach%20of%20COPFS%20to%20reporting%20by%20businesses%20of%20bribery%20offences%20JUNE%202017.pdf

[22] Abbot Group Ltd - £5.6m: https://www.ft.com/content/a6d7afea-3587-11e2-bd77-00144feabdc0 ;

Braid Group - £2.2m: http://www.heraldscotland.com/news/14401365.Freight_company_pays___2m_to_Crown_Office_after_self-reporting_bribery_cases/ ;

Thomas Gunn Navigation Services (TGNS) Ltd - £138,000;

International Tubular Services (ITS) Ltd - £172,200: https://www.bbc.co.uk/news/uk-scotland-north-east-orkney-shetland-30514824 ;

Brand Rex Ltd - £212,800: http://www.heraldscotland.com/news/13785563.Firm_pays_fine_after_reporting_itself_to_Crown_Office/

[23] COPFS no longer produces annual reports however the figures are included in the UK Bribery Digest: https://www.ey.com/Publication/vwLUAssets/EY-UK-Bribery-Digest-edition-12-March-2018-_table-of-cases/$FILE/EY-UK-Bribery-Digest-edition-12-March-2018-table-of-cases.pdf

Several cases illustrate the use of the Scottish civil settlement procedure:

Brand- Rex Limited

In September 2015, Brand-Rex Limited, a Scottish network cabling company, admitted that the company had failed to prevent bribery and had received an improper benefit between 2008 and 2012 (a contravention of section 7 of the 2010 Act).

The initiative 'Brand Breaks' aimed at distributors and installers, allowing them to qualify for a range of rewards. An agent of Brand-Rex exceeded the terms of the scheme and was in a position to influence purchasing decisions related to cable supplies. The solicitors for Brand-Rex self-reported the violation, accepting that Brand-Rex had failed to prevent the infringing activity when the company was able to do so, accepting responsibility for a contravention of Section 7 of the 2010 Act. The COPFS, in deciding not to prosecute, considered the following factors:

- The nature and seriousness of the offence and the extent of harm caused
- The extent of wrongdoing within the company, including whether or not senior management consented or connived
- Early action was taken by senior management upon discovery of the offence
- The company's previous record for bribery conduct
- The disciplinary action, if any, taken against the wrongdoers
- Whether the company had engaged fully and meaningfully with COPFS
- Whether the company had anti-bribery systems in place
- The impact of prosecution on the company's employees and stakeholders

Brand-Rex agreed to pay £212,800 which was the amount of Brand-Rex's gross profit from the unlawful activity.

Abbot Group Limited[24]

Abbot Group is an Aberdeen based drilling business operating in the oil and gas sector. They were the first Scottish business to enter into a civil settlement under the self-reporting initiative. Abbot Group limited admitted that it had benefited from corrupt payments made in connection with a contract entered into by one of its overseas subsidiaries. In 2012, a civil settlement was reached in the sum of £5.6m, based on the gross profits derived from the contract.

[24] https://www.bbc.co.uk/news/uk-scotland-north-east-orkney-shetland-20462004

The self-report initiative must be reviewed and approved each year by the Lord Advocate. It was recently extended until June 2019[25]. With these cases of bribery being dealt with what can be said is that these may not otherwise have come to light or have involved extensive and lengthy investigations and prosecutions. Lengthy prosecutions have been avoided and significant sums, representing profit gained from bribery, have been recovered and re-invested into Scottish communities. The fact that businesses are required to put in place measures to ensure there is no recurrence of the unlawful conduct is viewed as an effective means of preventing corruption.

Senior officials from COPFS regularly engage with private sector organisations to provide training on the 2010 Act to promote the self-report initiative. Following the conclusion of any civil settlement, COPFS issues a pro-active media release to raise awareness and provide deterrent effect.

Deferred Prosecution Agreements (DPAs)

In England and Wales, a system of DPA operates introduced by the Crime and Courts Act 2013. There are a number of similarities between DPAs and the civil settlement process:

- DPAs deal with a similar range of cases involving corporate economic bribery.
- DPAs are negotiated with the relevant prosecutor. In Scotland, that will be solely COPFS but then approved (our emphasis) by the court. In England and Wales, the court makes the judgment that entering a DPA is in the interests of justice and that its terms are fair, reasonable and proportionate. Effectively the prosecutor's discretion requires endorsement by the court. In Scotland, there is no independent arbiter who decides whether the civil settlement and the proposed penalty is fair. If the company rejects COPFS's assessment, criminal and other sanctions may well follow.
- Where a DPA is to be entered into, the offence(s) will not be prosecuted.
- There exists a DPA Code by the SFO and CPS[26].

In the matter of section 45 of the Crime and Courts Act 2013 between SFO and XYZ Limited[27] the factors that the court considered when assessing the public interest can be seen to be substantially similar to those outlined above in the Scottish case of Brand-Rex above:

- The seriousness of the predicate offence or offences.

25 http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Guidelines_and_Policy/guidance%20on%20the%20approach%20of%20the%20crown%20office%20and%20procurator%20fiscal%20service%20to%20reporting%20by%20businesses%20of%20bribery%20offences%20-%20June%202018.pdf

26 https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/

27 http://www.qebholliswhiteman.co.uk/cms/document/preliminary_redacted.pdf

- The importance of incentivising the exposure and self-reporting of corporate wrongdoing.
- The history (or otherwise) of similar conduct.
- The attention paid to corporate compliance prior to, at the time of and subsequent to the offending.
- The extent to which the entity has changed both in its culture and in relation to the relevant personnel.
- The impact of prosecution on employees and others innocent of any misconduct.

In March 2017, the Organisation for Economic Cooperation & Development (OECD) published a report on the effectiveness of the UK law in relation to bribery and corruption[28]. It noted that there was scope to improve communication between law enforcement authorities from England and Wales and those in Scotland. it suggested that at paragraph 8(b) that:

> *'Scotland consider adopting a scheme comparable to the DPA scheme in the UK to overcome the weaknesses apparent in civil settlements and to achieve consistency across the UK with regard to the tools available to law enforcement authorities for the resolution of foreign bribery cases'*

Bribery, particularly where multiple jurisdictions are involved, is notoriously hard to detect, investigate and prosecute. Investigations are heavily resource-dependent and can depend upon systems of international cooperation. As a result, it is unsurprising that a large proportion of cases come to the prosecution authorities by means of self-report. However, for a system that relies on self-reporting to work, companies have to see the risks involved in failing to do so. There has to be sufficient investment in detection, investigation and prosecution to enable cases to be detected and brought to court without self-reporting. If bribery simply goes undetected, companies may start questioning whether it is in their corporate interest to reveal unlawful conduct to the authorities, thereby opening a door that would otherwise remain firmly shut.

Exactly how self-reports will evolve in the future is not certain. The SFO's Joint Head of Bribery and Corruption Ben Morgan[29] referring to a DPA in the case of Rolls-Royce indicated that:

> *'in this case* [what would] *a prosecution have achieved that the DPA did not? And if you can think of anything, then how much more public money would it have taken to achieve that incremental difference? How much more time would it have taken? How many other cases would have remained un-done while we worked on that? A DPA will not be appropriate in every case; and where it is not we will and do prosecute. But the court was satisfied that it was here'.*

As we indicated above, it will take time before the effectiveness of DPAs and civil settlements can be made. They are clearly evolving with only a handful of cases resolved to date. Companies will need to consider whether to self- report by understanding the problem while making an informed decision on a risk-based approach by applying the law to the facts. They then need to consider the practical implications. The

28 http://www.oecd.org/corruption/anti-bribery/UK-Phase-4-Report-ENG.pdf Phase 4 evaluation on the UK's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments

29 https://www.sfo.gov.uk/2017/03/08/the-future-of-deferred-prosecution-agreements-after-rolls-royce/ March 2017

more details about the use of DFAs and civil settlements will allow companies to assess what is involved financially as any settlement under these agreements should be the same as any fine that would have been court imposed with the advantage of no criminal conviction.

Nevertheless, the Working Group identifies in this report some key issues that may undermine the effective enforcement of foreign bribery laws in the UK. In particular, Scotland's practices and frameworks for foreign bribery enforcement could be brought in line with those in place in England and Wales; there is also scope to improve communication between law enforcement authorities from England and Wales and those in Scotland. Furthermore, the persistent uncertainty about the SFO's existence and budget is harmful, especially given the SFO's prioritisation of foreign bribery cases and its demonstrated expertise in such cases.

International aspects

Question 8: How does the Bribery Act 2010 compare with anti-corruption legislation in other countries? Are there lessons which could be learned from other countries? What impact has the Bribery Act 2010 had on UK businesses and individuals operating abroad?

Question 9: What impact has the Bribery Act 2010 had on UK businesses and individuals operating abroad.

Others are best placed to comment on structures in other countries.

We are aware that there was support for the UK's strong anti-corruption drive which included the organisation of the London Anti-Corruption Summit[30] in 2016, which announced significant legislative reforms to further enhance foreign bribery enforcement. The report highlighted positive achievements by the UK, including efforts to enhance its detection capacity of foreign bribery, notably through intelligence analysis by the SFO, improved whistleblowing channels, and mobilisation of its overseas missions.

We note that the OECD report above at paragraph 8(a) refers to:

30 https://www.gov.uk/government/topical-events/anti-corruption-summit-london-2016

'UK law enforcement authorities, particularly in Scotland, exercise considerable caution in deciding whether to resolve foreign bribery cases through civil settlements to ensure cases result in effective, proportionate and dissuasive sanctions'

How the UK responds to the recommendation is to be made by a written follow-up report within two years on steps taken to implement its recommendations. This follow-up report will also be made publicly available.

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