

# EFFECTIVE MEASURES TO COMBAT AND PREVENT CORRUPTION IN THE UK AND THE CURRENT SITUATION ON ENFORCEMENT OF THE BRIBERY ACT 2010

*David Green\**



## I. OUTLINE OF LECTURES

### A. Hand-outs

- A: Lecture outline (this document)
- B: Understanding Bribery and Corruption (slides)
- C: The Bribery Act 2010 (slides)
- D: SFO powers
- E: The Bribery Act 2010 (commentary)
- F: Deferred Prosecution Agreements (DPAs) (flow-chart)

## II. LECTURE 1

### A. General

- Brief outline of the criminal justice system in England and Wales
- The problem of fraud in the UK context

### B. The SFO

- Origins of the SFO: the Fraud Trials Committee (Roskill) 1983
- The Criminal Justice Act 1987: establishing the SFO
- The Roskill model
- The size and organisation of the SFO
- SFO jurisdiction
- SFO powers
- The SFO and Mutual Legal Assistance (MLA)
- SFO funding
- Recent restatement of the SFO's mission and purpose

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\*Director, Serious Fraud Office, United Kingdom.

- Self-reporting of criminal activity to the SFO by corporates
- Why investigations are lengthy
- Framing charges
- Examples of contemporary SFO investigations and prosecutions

#### **C. The SFO and Other UK Agencies in Economic Crime**

- National Crime Agency
- Police
- Crown Prosecution Service
- Her Majesty's Revenue and Customs (HMRC)
- Financial Conduct Authority (FCA)
- Office of Fair Trading (OFT)
- Competition and Markets Authority

#### **D. Practical Problems Facing the SFO in Investigation and Prosecution**

- obstructions in the way of obtaining evidence
- electronic data: uploading and searching
- execution of SFO MLA requests abroad
- the need to keep investigations and prosecutions focused
- media attention
- court delays

### **III. LECTURE 2**

#### **A. The Bribery Act 2010**

- Hand-outs C and D
- Background to the Act
- Legislation before the Bribery Act
- Examples of cases before the Bribery Act
- OECD criticisms
- Distinctive features of the Bribery Act 2010
- Act in force from 1/7/2011; not retrospective
- S1 Active bribery

- S2 Passive bribery
- S6 Bribery of foreign public officials
- S7 Corporate liability for failure to prevent bribery
- Statutory defence to an offence under S7
- Territorial application
- Business entertainment
- Facilitation payments
- Ministry of Justice published Guidance
- Joint DPP/DSFO published Guidance
- Sentencing
- SFO enforcement

**B. Deferred Prosecution Agreements (DPAs)**

- What are DPA's?
- When might they be used?
- Hand-out F: DPA flow chart
- DPA Application process
- DPA compliance and oversight
- DPA breach and variation
- Key differences from US practice on DPAs
- Corporate criminal liability in English law

**C. Investigation, Prosecution and Confiscation**

- How information comes to the SFO
- Intelligence
- Self-reporting
- Whistle-blowing
- Evaluation
- Investigation by the SFO
- Domestic documentary evidence
- Mutual legal assistance

- Witness evidence
- Prosecution and asset recovery



B

## Understanding Bribery & Corruption



## Defining Corruption

- No single definition
- Transparency International's working definition states that 'Corruption is the abuse of entrusted power for private gain'



## World Bank Institute

- How much does the World Bank estimate is paid in Bribes each year?

- A. US \$1 Billion
- B. US \$10 Billion
- C. US \$ 100 Billion
- D. US \$ 1,000 Billion



## Defining Corruption

### Petty Corruption

- 'small payments routinely solicited by low ranking officials in the public sector'



# Defining Corruption

## Grand Corruption

'Large payments often made to more senior officials to secure significant business'



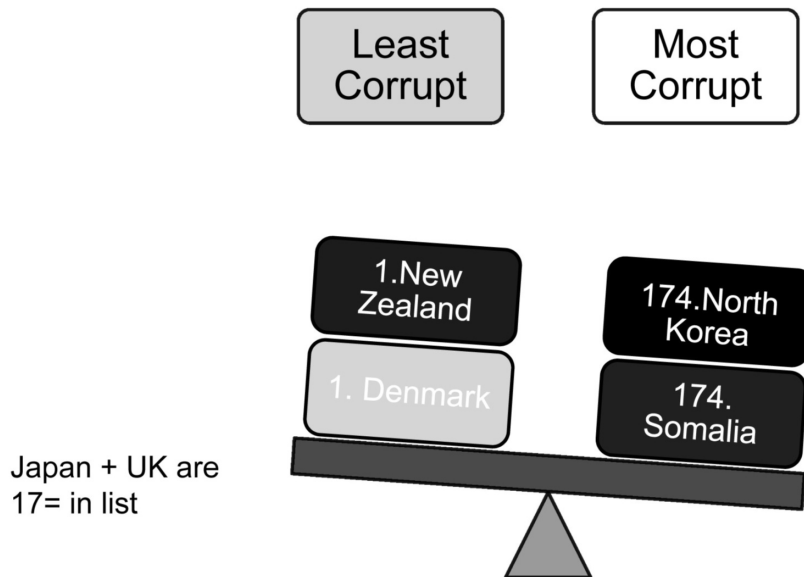
## 176 COUNTRIES. 176 SCORES. HOW DOES YOUR COUNTRY MEASURE UP?

The perceived levels of public sector corruption in 176 countries/territories around the world.

**SCORE**  
Highly Corrupt 0.0 10.19 20.39 30.59 40.79 50.99 61.19 71.39 81.59 91.79 100.00 Very Clean

RANK	COUNTRY/TERRITORY	SCORE	RANK	COUNTRY/TERRITORY	SCORE	RANK	COUNTRY/TERRITORY	SCORE	RANK	COUNTRY/TERRITORY	SCORE
1	Denmark	90	25	Austria	69	49	Hungary	55	89	Thailand	37
2	Finland	90	26	Ireland	69	50	Costa Rica	54	90	Zambia	37
3	New Zealand	90	27	Qatar	68	51	Lithuania	54	91	Benin	36
4	Sweden	88	28	United Arab Emirates	68	52	Rwanda	53	92	Columbia	36
5	Singapore	87	29	Cyprus	66	53	Georgia	52	93	Djibouti	36
6	Switzerland	86	30	Botswana	65	54	Seychelles	52	94	Greece	36
7	Australia	85	31	Spain	65	55	Bahrain	51	95	India	36
8	Norway	85	32	Estonia	64	56	Czech Republic	49	96	Maldives	36
9	Canada	84	33	Ethiopia	63	57	Latvia	49	97	Qibouti	36
10	Netherlands	84	34	Portugal	63	58	Malaysia	49	98	Green	36
11	Iceland	82	35	Saint Vincent and the Grenadines	62	59	Turkey	49	99	Senegal	36
12	Luxembourg	80	36	Puerto Rico	63	60	China	39	100	Argentina	35
13	Germany	79	37	Slovenia	61	61	Jordan	48	101	Gabon	35
14	Hong Kong	77	38	Taiwan	61	62	Namibia	48	102	Tanzania	35
15	Barbados	76	39	Cape Verde	60	63	Oman	47	103	Algeria	34
16	Belgium	75	40	Israel	60	64	Croatia	46	104	Armenia	34
17	Japan	74	41	Poland	58	65	Slovakia	46	105	Bolivia	34
18	United Kingdom	74	42	Malta	57	66	Ghana	45	106	Gambia	34
19	United States	73	43	Mauritius	57	67	Kenya	34	107	Kazakhstan	34
20	Chile	72	44	Kuwait	56	68	Peru	38	108	Mali	34
21	Uganda	72	45	Romania	54	69	Morocco	37	109	Madagascar	32
22	Bahamas	71	46	Brazil	53	70	Saudi Arabia	44	110	Indonesia	32
						71	Switzerland	43	111	Guatemala	33
						72	South Africa	43	112	Niger	33
						73	Bosnia and Herzegovina	42	113	Timor-Leste	33
						74	Italy	42	114	Dominican Republic	32
						75	Japan	42	115	Ecuador	32
						76	Senegal	41	116	Nepal	32
						77	Liberia	41	117	Nigeria	32
						78	Montenegro	41	118	Pakistan	32
						79	Tunisia	41	119	Bangladesh	30
						80	Sri Lanka	40	120	Madagascar	30
						81	China	39	121	Cameroon	26
						82	Serbia	39	122	Central African Republic	26
						83	Togo	39	123	Mauritania	31
						84	Trinidad and Tobago	38	124	Mozambique	31
						85	Burkina Faso	38	125	Sierra Leone	31
						86	El Salvador	38	126	Congo Republic	26
						87	Jamaica	38	127	Syria	26
						88	Panama	38	128	Ukraine	26
						89	Peru	38	129	Lebanon	26
						90	Mali	38	130	Togo	30
						91	Mali	37	131	Cote d'Ivoire	29
						92	Mali	37	132	Nicaragua	29
						93	Mali	37	133	Uganda	29
						94	Mali	37	134	Guinea	28
						95	Mali	37	135	Yemen	23
						96	Mali	37	136	Iran	22
						97	Mali	37	137	Angola	22
						98	Mali	37	138	Cameroon	22
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## TI Corruption Index 2012



## TI Bribe Payers Index 2011

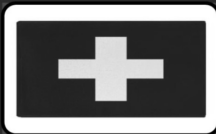
- A ranking of 28 of the world's most economically influential countries according to the likelihood of their firms to bribe abroad. 10 indicates they never bribe, 0 indicates that they always do.

## Top Three Countries



1. Netherlands

• Score 8.8



1. Switzerland

• Score 8.8



3. Belgium

• Score 8.7

## Bottom Three



26. Mexico

• Score 7.0



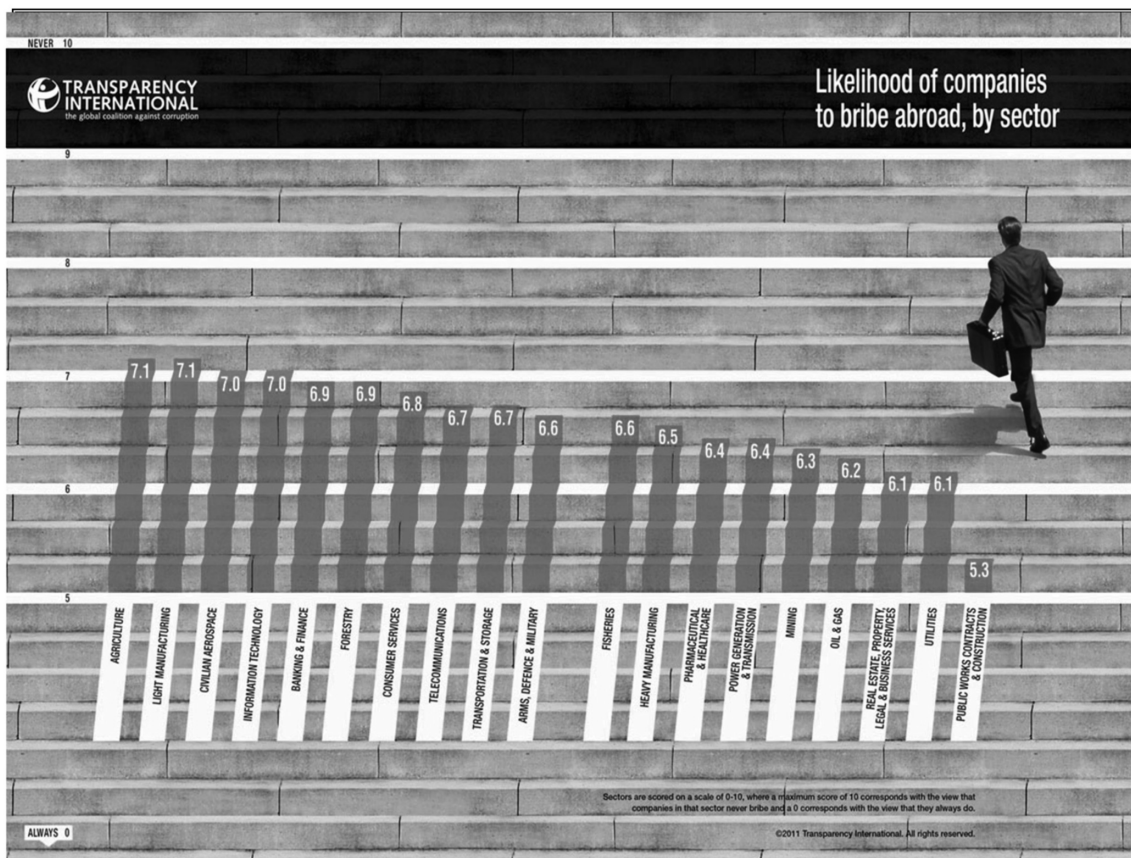
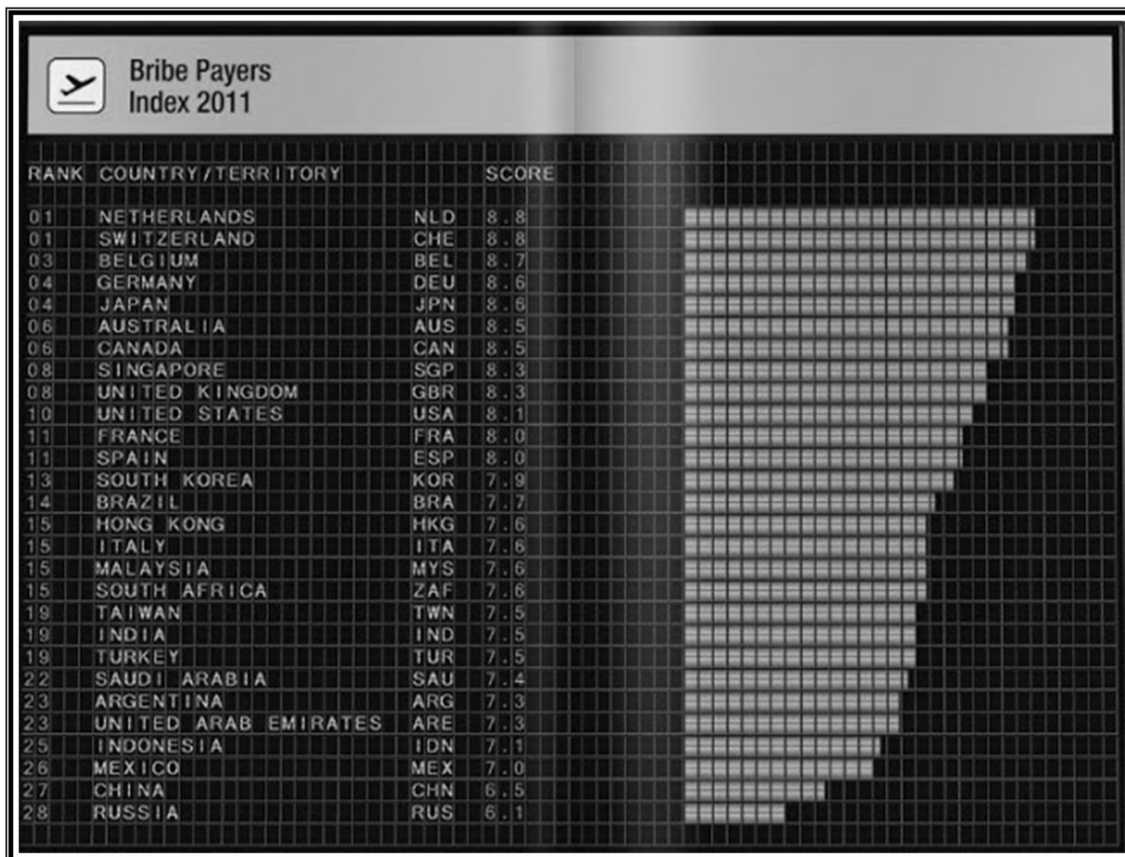
27. China

• Score 6.5



28. Russia

• Score 6.1



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Top ten largest penalties for FCPA violations				
Rank	Company	Home Country	Amount (\$million)	Year
1	Siemens	Germany	800	2008
2	KBR/Halliburton	US	579	2009
3	BAE	UK	400	2010
4	Snamprogett i/Eni	Netherlands/Italy	365	2010
5	Technip	France	338	2010
6	JGC	Japan	219	2011
7	Daimler	Germany	185	2010
8	Alcatel-Lucent	France	137	2010
9	Magyar Telekom/Deutsche Telekom	Hungary/Germany	95	2011
10	Panalpina	Switzerland	82	2010

## Bribery Act 2010

C

- OECD pressure on the UK to update its anti-corruption legislation

### Changes

- No AG consent required for prosecution (Consent of DPP/DSFO sufficient)
- Maximum penalty ten years
- Increases extra-territorial jurisdiction to prosecute bribery committed abroad

## Sections 1 & 2 Offences

- S1 Active Bribery  
(offer, promise, give; financial or other advantage)
- S2 Passive Bribery  
(requests, agrees to receive or accepts)

Mental element:

Intending to induce improper performance

Improper Performance = breach an expectation of "good faith", "impartiality" "trust" re the function or activity



## Bribery of Foreign Public Official

### S6 Bribery of FPO

No need for improper performance

Dual intention to influence FPO in performance of functions + retain business

- Any legislative, administrative, judicial position, public function, public agency/enterprise, public international organisation

Defence: If permissible by written law

## Corporate Failure to Prevent

- S7 “Relevant commercial organisation” liable for “person associated” (performs services for the org) who pays bribe [under S1/6]

- Defence: If have adequate procedures

(On the balance of probabilities)

- MoJ Guidance:

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

Leadership; Policies; Monitoring; Risk assessment; Recording; Training.

- Extends jurisdiction to any organisation that conducts “part of their business” in the UK

## Section 12 - Territorial Application

- If any part of the conduct involved in sections 1, 2 or 6 are committed in the UK then have jurisdiction
- If all the actions in question take place abroad, still have jurisdiction as long as the person performing them is British national, resident in the UK, incorporated in the UK or has a “close connection” with the UK
- As long as the commercial organisation in S7 “carries on its business or part of its business” in the UK, then have jurisdiction

## Types of Corrupt Payments

- Kickbacks  
(a portion of the value of the contract demanded as a bribe by an official for securing the contract)
- Facilitation/Grease payments  
(to perform or speed up performance of the official)
- Commission Payments  
(via 3rd party agents for public officials to gain unfair advantage)
- Payments directly to public officials  
(to gain unfair commercial advantage)

## Corruption Indicators 1

- Abnormal cash payments
- Abnormally high commission payments
- Payments routed through offshore accounts with no apparent business links
- Payments made via 3<sup>rd</sup> party countries
- Agents with little or no subject knowledge
- Little evidence of due diligence or independent oversight

## Corruption Indicators 2

- Lack of evidence re agent's work done
- Inflated invoice prices
- Urgent or advance payments for bringing forward orders
- Bypassing normal tendering or contract procedures
- Lavish gifts or overseas trips provided
- Payment of education fees

## Corruption Investigation Issues

- Date of offending, Pre 1 July 2011?
- Secret nature of the agreement
- Need to obtain email corres/PCs
- Need to establish personal associations
- Can involve many layers of moving funds across international borders - MLA slow
- Time limitations to the availability of evidence (Banking, telephone, webmail a/c's)

## Corruption Investigation Tips

- Encourage commencement of enquiries overseas via national authorities commencing own investigations
- Engage with MLA processes early
- Engage with SLO's early
- Memorandums of understanding
- Focus and prioritise key lines of enquiry
- Use of I2 and other association charts
- Use of intel / CHIS / Intercepts
- SOCPA agreements

## Initial Plan

- Offence(s) under investigation
- Resources
- Intelligence strategy
- Parameters
- Suspects
- Witnesses
- Location of Evidence
- Forensic opportunities
- Financial Investigation

- Proactive opportunities
- Risk Assessment
- Community impact
- Business impact
- Disclosure
- Media
- Target dates for actions
- Victim Liaison

## **SFO POWERS**

### **I. S.2 CJA 1987 POWERS**

- The Criminal Justice Act 1987 provides powers to enable me and my staff to carry out investigations more effectively. They are contained in s.2 of the Act.
- These are wide-ranging powers exercisable only in respect of cases where I have decided to commence an investigation into serious or complex fraud, bribery or corruption. The powers can be exercised personally by me or by staff whom I have designated to exercise these powers on my behalf.
- I can also exercise these powers on behalf of an overseas authority where requested to do so by the Secretary of State but, again, only where it appears to me on reasonable grounds that the offence in respect of which I have been requested to obtain evidence involves serious or complex fraud.
- S.2 of the Act enables me to require, by way of a written notice, any person being investigated or any other person whom I have reason to believe has relevant information to either answer questions or provide me with information with respect to any matter relevant to the investigation.
- Importantly, I can require the production of specified documents that relate to the offence under investigation — this is the single greatest use of the power. It includes a power requiring the person producing the documents to also provide an explanation in relation to any of them.
- What powers of enforcement are there? Where a magistrate is satisfied that there are reasonable grounds for believing that:
  - any person has failed to comply with an obligation to produce documents, or
  - it is not practicable to serve a notice; or
  - the service of a notice might seriously prejudice the investigationhe can issue a warrant authoring a police constable to enter and search premises and seize relevant documents.
- There are limits as to the use to which the SFO may put any statement that a person is required to give in response to a notice. We cannot rely on such statements in evidence unless it is for a specific offence of providing a false or misleading statement or, in the course of a prosecution for some other offence, the accused makes a statement which is inconsistent with what he said in response to the notice.
- We can, however, rely in evidence on documents which were already in existence at the time we served the s.2 notice — and, indeed, such material often forms the core of many of our cases.
- This distinction — between being able to rely upon documents which already exist as opposed to not being able to rely on the answers to questions which someone is required to provide — is intended to give effect to the law against self-incrimination which, in its most basic form, provides that a person accused of a criminal offence cannot be compelled to produce material that may subsequently be used as evidence against him save and unless that material already has its own independent existence.
- There are also express provisions protecting legally privileged material. In addition, special protection is given to confidential banking material — such material can only be obtained if I personally authorise the making of a requirement (or, if I am unavailable, for example

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because I am overseas, an individual nominated by me does so).

- Failure, without reasonable excuse, to comply with any requirement under a s.2 notice is itself a criminal offence, punishable by way of up to six months imprisonment and / or a fine.
- As noted already, making a false or misleading statement in response to a notice is also an offence. The maximum punishment here is two years imprisonment and / or a fine.
- Finally, there is also an offence of knowingly falsifying, concealing, destroying or otherwise disposing of documents relevant to an investigation. This is considered a serious offence — the maximum penalty is seven years imprisonment and / or a fine.
- These powers are an important tool in our armoury. In 2012-13 the SFO issued 402 s.2 notices in relation to both our own domestic investigations and in support of overseas investigations. As at the end of August this year, we have issued 200 such notices.
- The great value of these powers is that they enable us to obtain important documentary evidence that might not otherwise be easily available to us, right at the outset of an investigation. For example, early access to banking material is often a crucial aspect of our cases. Banks, as you will appreciate, hold their clients information subject to a duty of confidentiality and will ordinarily only release information if they are made subject to a court order. A s.2 notice, however, overcomes any legal duty of confidentiality that a bank has and so is a highly efficient means of securing relevant evidence quickly.
- As with any aspect of an investigation, focusing the request being made is critical. Asking, for example, for the entire server of a particular institution is likely to result in the production of millions of documents, all of which then have to be reviewed and many of which are likely to be wholly irrelevant. Our experience is that time spent considering *exactly* what is required (often, where it is appropriate, with input from those upon whom the notice is to be served) is time well spent.
- Finally, in July 2008, the Act was amended to enable me to use my s.2 powers at the 'pre-investigative' stage of a case in relation to overseas bribery and corruption cases. This is because experience has taught us that it is often difficult to make an accurate assessment as to whether it is worth accepting such cases for investigation without at least some assessment of the underlying documentary material and this amendment is therefore intended to enable me to obtain such material even before I decide whether to accept a case for investigation or not.

## II. OTHER POWERS

- In addition to s.2 notices, the SFO has access to a wide range of others powers which are not unique to the SFO but which can be used by the police and other law enforcement agencies generally. These include the following:
  - Powers under the Serious Crime Act 2007 to *seek Serious Crime Prevention Orders* — where a person has been convicted of having committed a serious offence, the Crown Court may make an order designed to protect the public by preventing, restricting or disrupting his further involvement in serious crime (we can also apply to the High Court in respect of cases where a person has not been convicted but the Court is nonetheless satisfied that a person has been involved in serious crime).
  - Powers under *the Serious and Organised Crime and Police Act 2005 (SOCPA)* — these provide a legislative framework for those who wish to co-operate with the authorities. Main provisions are:
    - s.71 (full immunity from prosecution),
    - s.72 (an agreement not to use specified evidence against a person — a so-called 'restricted use undertaking'),

- s.73 (written agreement in which a defendant agrees to assist an investigation or prosecution with a view to thereby obtaining a reduced sentence; ordinarily, this will require the accused to plead to certain offences and may also require him to agree to giving evidence on behalf of the prosecution); and
  - s.74 (enables a prosecutor to refer a defendant's case back to the court for a review of sentence after conviction; this is used in cases where a defendant offers assistance after he has already been sentenced for his own offending).
- SOCPA also enables a court to make a *Financial Reporting Order* (s.76) wherever a person is convicted of a relevant financial offence and the court is satisfied that the risk of the offender committing another such offence is "sufficiently high" to justify the making of the order. The order requires the individual concerned to make regular reporting of their financial affairs to the authorities for a specified period.
- Covert powers under *the Regulation of investigation Powers Act 2000* (RIPA) — this provides a legislative framework for a wide range of covert law enforcement techniques including intercepts (note that the product of domestic intercepts is inadmissible within UK criminal proceedings), the use of covert intelligence sources (i.e. informants) and surveillance (two main types of surveillance are covered; general or 'directed' surveillance and 'intrusive' surveillance (e.g. surveillance within a person's home) that requires a higher level of authorisation and greater safeguards).
- Powers under *the Proceeds of Crime Act 2002* — these cover a wide range of issues, most of which are related to the preservation (pre-conviction) and the confiscation and subsequent enforcement (post-conviction) of a person's criminal benefit. Key powers include:
  - Account monitoring orders (an order of a court which instructs a financial institution to provide an investigator with information on the current activity of an account).
  - Restraint orders (an order of the Crown Court that prevents named individuals from dealing with any aspect of their assets without the authority of the court; the aim being to preserve assets in the event of a conviction)
  - Confiscation orders (an order of the Crown Court in which a convicted defendant is ordered to pay over their 'benefit' from specified criminal conduct)
  - Production orders (an order of the Crown Court for a person or company to produce specified material for the purpose of assisting certain types of investigation, including any investigation into an offence of money laundering and any confiscation investigation)
  - Civil Recovery orders (an order of the High Court that specified property is deemed to be 'criminal property' and that the value of that property is thus to be paid to the State; usually used only as an alternative to criminal prosecution where either there is insufficient evidence to bring or maintain proceedings or it is not in the public interest to do so)



## THE BRIBERY ACT 2010

### 1. Background leading up to the Bribery Act 2010

- Recognition that, pre-Bribery Act, the UK's anti-bribery legislation was antiquated and in need of modernisation
- The legislation in force was, in some cases, more than a century old:
  - The *Public Bodies Corrupt Practices Act 1889* (only applied to those working on local public bodies (i.e. local government) and did not extend to Crown employees)
  - The *Prevention of Corruption Act 1906* (this was, and is, the main pre Bribery Act offence; applies to all agents and any person who gives consideration to an agent)
  - The *Prevention of Corruption Act 1916* (extended the PCA 1906 to Crown employees or employees of a public body)
- The only previous change to our law had been contained within *The Anti Terrorism, Crime & Security Act 2001*:
  - This extended the previous legislation to all UK nationals who conduct business overseas
  - It was thus an extension of the existing law — but not a full overhaul.
- Became increasingly apparent that the UK needed a modern 'fit for purpose' anti-bribery legislation
- Pressure arose from the OECD for the UK to update its anti-corruption legislation:
  - E.g. in their 2008 'Phase 2' report<sup>1</sup> into the UK, the OECD's Working Group on Bribery noted that:

*"...the UK's continued failure to address deficiencies in its laws on bribery of foreign public officials and on corporate liability for foreign bribery has hindered investigations. The Working Group reiterates its previous 2003, 2005 and 2007 recommendations that the UK enact new foreign bribery legislation at the earliest possible date."* (page 4)

and on page 71 of the same report the Working Group concluded as follows:

*"The Working Group is disappointed and seriously concerned with the unsatisfactory implementation of the Convention by the UK ... and urges the UK to adopt appropriate legislation as a matter of high priority."*

### 2. Famous cases of combating bribery of foreign public officials before the Bribery Act 2010 was enacted

- *Robert John Dougall* — Dougall was a former DePuy executive who pleaded guilty in April 2010 to his involvement in £4.5 million worth of corrupt payments to medical professionals within the Greek healthcare system. He was sentenced to 12 months imprisonment.
  - Dougall was appointed Director of Marketing at DePuy International Limited in 1999. He was responsible for developing business in Greece. DPI sold orthopaedic products; in order to penetrate the Greek market, inducements and rewards were provided to surgeons in return for the purchase of DPI products.

<sup>1</sup> See <<http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/41515077.pdf>>.

- DPI used a local distributor, Medec S.A. which was owned and run by Nikolaos Karagiannis. He was paid, in advance, a “commission” by DPI on all sales; a proportion of which was used to make the corrupt payments to surgeons in Greece.
- These payments were made with the knowledge and oversight of Dougall.
- Also worthy of note — Dougall was the first “co-operating defendant” in a major SFO investigation. He entered into a s.73 written agreement with the SFO in June 2009 and provided substantial assistance to the investigation.
- In April 2011, the SFO obtained a civil recovery order against DPI to the value of £4.829 million plus costs, representing the proceeds of crime for the period 1998 to 2006.
- *Mabey & Johnson* — Mabey & Johnson, an engineering firm, was the first corporate in the UK to be prosecuted for overseas corruption offences.
  - The prosecution for corruption arose out of a self-report in which the company disclosed evidence that it had sought to influence decision-makers in public contracts in Jamaica and Ghana between 1993 and 2001.
  - In addition to the corruption offences, the company was also prosecuted for sanctions offences relating to a breach of UN sanctions in 2001/02 as they applied to contracts in the Iraq “Oil-for-food” programme.
  - The company pleaded guilty to these offences in July 2009. They were sentenced in September 2009, paying a total fine of £3.5 million plus a £1.1 million confiscation order, £1.4 million by way of reparations, prosecution costs of £350k and a further £250k towards the cost of an independent SFO approved monitor who would review their internal compliance programme.
  - Richard Alderman, the then Director, hailed the sentence as “a landmark outcome” and noted this was “the first conviction in this country of a company for overseas corruption”.
  - Following the conviction, new management took over the company and introduced new anti-bribery measures. The company continued to co-operate with the SFO and, in January 2012, agreed to the making of a civil recovery order in the High Court to the value of £130k in recognition of sums it had received through share dividends derived from contracts won through unlawful conduct.
- *Innospec* — Two senior Innospec executives have pleaded guilty to offences of conspiring to make corrupt payments to individuals in Indonesia and Iraq to secure contracts for Innospec Ltd for the supply of its products.
  - Paul Jennings, former CEO, pleaded guilty in June 2012 to two offences of conspiring to corrupt in that he gave, or agreed to give, corrupt payments to public officials and other agents of the governments of Iraq and Indonesia between 2003 and 2008 as inducements to secure, or rewards for having secured, contracts from those government for the supply of products by Innospec.
  - Another Innospec executive, Dr David Turner, former Global Sales and Marketing Director, had pleaded guilty to similar offences in January 2012.
  - Sentencing has been adjourned pending the outcome of proceedings against two further defendants, due to be tried in March 2014.
  - The company itself had pleaded guilty to offences of bribing employees of Pertamina (an Indonesian state owned refinery) and other government officials in Indonesia in March 2010. The company was fined the sterling equivalent of \$12.7 million as part of a global settlement involving the UK and the US authorities.
- *Oxford Publishing* — In July 2012, Oxford Publishing Ltd. agreed to pay a £1.895 million civil recovery order in recognition of sums it had received which were generated through unlawful conduct related to UK subsidiaries incorporated in Tanzania and Kenya.
  - OPL is a wholly owned subsidiary of Oxford University Press. It operates throughout

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Africa where it is principally involved in the publication of school textbooks.

- In 2011, OUP became aware of possible irregular tendering practices involving its education business in East Africa. As a result of an internal investigation, they voluntarily disclosed to the SFO concerns in relation to contracts arising from tenders which it's Kenyan and Tanzanian subsidiaries had entered into between 2007 and 2010.
  - Following further work, supervised by the SFO, it was accepted by OUP that payments had been offered and made, directly and through agents, which were intended to induce the recipients to award competitive tenders and / or publishing contracts for schoolbooks to both the Kenyan and Tanzanian subsidiaries.
  - In the light of the co-operation offered, it was decided that the public interest in this case was best met not by prosecuting but through the making of a civil recovery order.
  - At the time of the order, I said "This settlement demonstrates that there are, in appropriate cases, clear and sensible solutions available to those who self-report issues of this kind to the authorities".
- *BAE Systems plc* — In December 2006, the then Director, Robert Wardle, decided to discontinue an investigation into the affairs of BAE Systems plc as far as they related to the Al Yamamah defence contract with the government of Saudi Arabia. His decision was taken following representations that had been made to both the Attorney General and the Director concerning the need to safeguard national and international security. In reaching that decision, no weight was given to commercial interests or the national economic interest.

3. Outline of provisions and distinctive features in the Bribery Act 2010

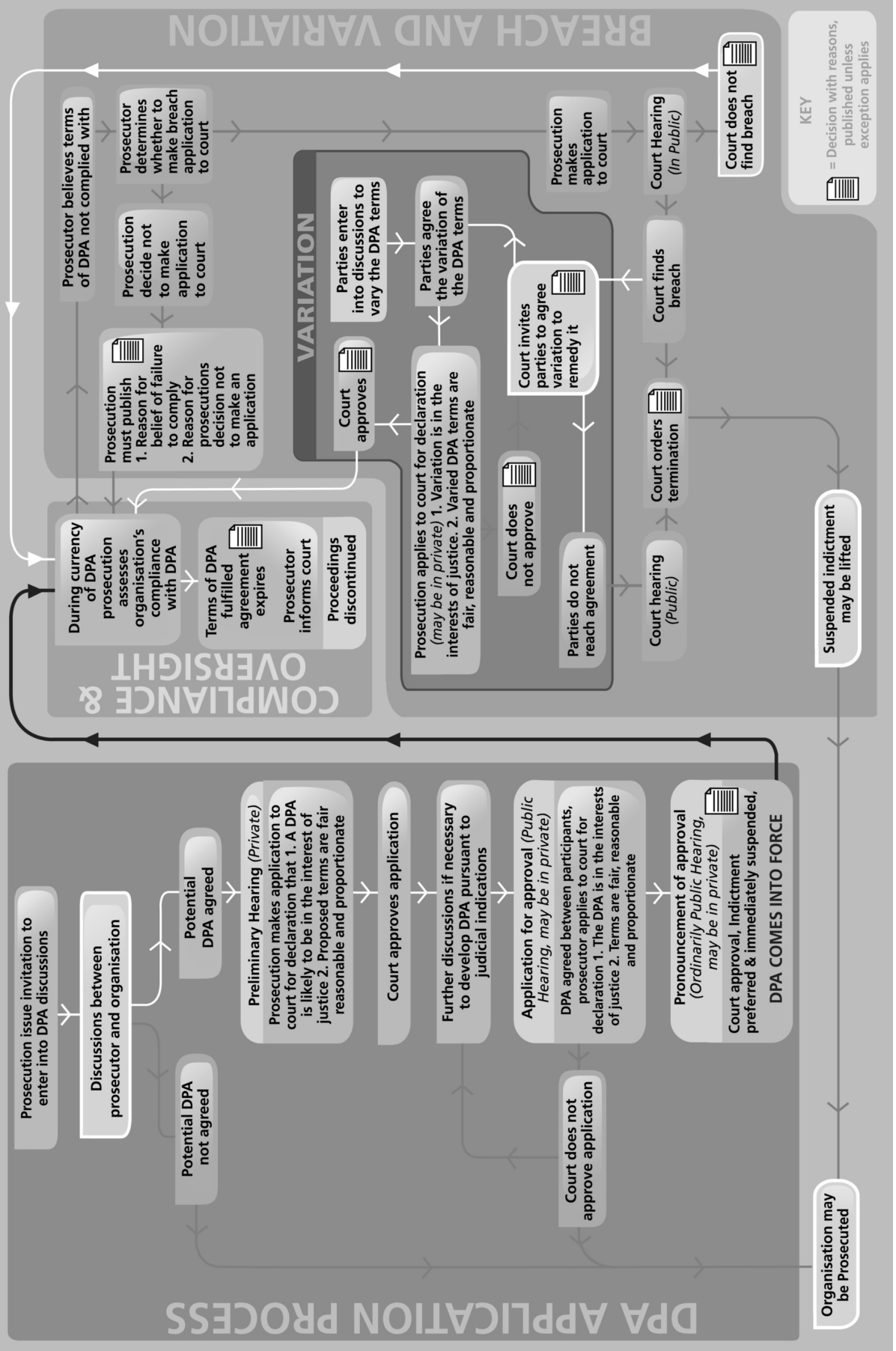
- The Act came into force on 1 July 2011. It is not retrospective.
- It repeals the offences outlined above in relation to conduct that post-dates the Act.
- Creates a number of offences:
  - *s1 Bribery of another person* ('active bribery'): committed where a person offers, promises or gives a financial or other advantage to another person, intending to induce them to perform improperly a relevant function or activity, or to reward a person for such improper performance.
  - *s2 Receiving a bribe* ('passive bribery'): committed where a person requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly by themselves or another.
  - *s6 Bribery of foreign public officials*: committed where a person in the act of intending to obtain or retain a business advantage bribes a foreign public official with the intent of influencing them.
  - *s7 Corporate liability for failure to prevent bribery*: this is the most radical innovation within the Act. Under this provision, a 'relevant commercial organisation' is guilty of an offence if any person associated with it bribes another person intending to obtain or retain a business advantage.
    - It is a defence for the organisation to show that it had 'adequate procedures' in place to prevent such activity from taking place.
    - This offence applies to any organisation that conducts "part of their business" in the UK.
- Territorial application — if any part of the conduct involved in ss.1, 2 or 6 are committed in the UK, then the UK courts have jurisdiction. Even if all the actions in question take place abroad, the UK still has jurisdiction as long as the person performing them is a British national *or* resident in the UK *or* incorporated in the UK *or* has a "close connection" with the UK.
- Two other changes made by the Act:

- The maximum sentence on conviction was increased from seven to ten years (plus an unlimited fine).
- Removal of requirement for consent to be given by our Attorney General — proceedings are now commenced personally by me as Director.

4. Current situation of enforcement of the Bribery Act 2010

- The Act has now been in force for a little over two years
- Much has been made in the British media of the fact that there have been relatively few prosecutions under the Act, including thus far only one case brought by the SFO
- This is not surprising — firstly, as noted, the Act only applies to conduct which occurs after July 2011; secondly, these are cases which, by their very nature, tend to involve conduct done in secret which may not come to light until months or even years later and; thirdly, even once corrupt activity is discovered, gathering and reviewing material sufficient to mount a successful prosecution can be a lengthy and time-consuming exercise.
- At present, the SFO has around a dozen or so active investigations or prosecutions into cases involving foreign public officials — with several more in the pipeline. Of these, at least four involve conduct that, if capable of proof, would fall under the Bribery Act.
- Even with new legislation, these are complex cases that are often difficult to investigate and prosecute successfully. Key issues include:
  - Evidence of corrupt activity is ordinarily hidden, making it difficult to identify and recover for the purposes of criminal proceedings;
  - Potential witnesses are often reluctant to co-operate with the authorities, meaning that the documentary evidence becomes even more important in proving the case;
  - Where there is corrupt activity, this is rarely confined to just one or two instances — often, our investigations unearth a whole system of corruption, often spanning multiple countries;
  - This can mean that we need to make some tough choices about where to best focus our resources in order to ensure that we pursue a focused and manageable case;
  - It also means that we are very much dependent upon assistance from other jurisdictions to secure admissible evidence — not all of whom have a fully developed system of mutual legal assistance.

## Overview: DPAs in Practice



**Bribery Act 2010**

Ministry of Justice guidance on the Bribery Act 2010

⟨<https://www.justice.gov.uk/legislation/bribery>⟩

Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions

⟨[http://www.sfo.gov.uk/media/167348/bribery\\_act\\_2010\\_joint\\_prosecution\\_guidance\\_of\\_the\\_director\\_of\\_the\\_serious\\_fraud\\_office\\_and\\_the\\_director\\_of\\_public\\_prosecutions.pdf](http://www.sfo.gov.uk/media/167348/bribery_act_2010_joint_prosecution_guidance_of_the_director_of_the_serious_fraud_office_and_the_director_of_public_prosecutions.pdf)⟩

Guidance on Corporate Prosecutions: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions

⟨[http://www.sfo.gov.uk/media/65217/joint\\_guidance\\_on\\_corporate\\_prosecutions.pdf](http://www.sfo.gov.uk/media/65217/joint_guidance_on_corporate_prosecutions.pdf)⟩

**Deferred Prosecution Agreements**

Draft Deferred Prosecution Agreement Code of Practice (“DPA Code”) issued by the Director of Public Prosecutions and Director of the Serious Fraud Office

⟨<http://www.sfo.gov.uk/media/256647/dpa%20code%20consultation%20final%20approved.docx>⟩