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Ten Years of the Bribery Act Part 2 Shifting the Focus?

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In our first article we looked at the road to the Bribery Act ("the Act") and provided some context on how its provisions came to be, in particular the inclusion of the strict liability corporate offence of failing to prevent bribery. In this, our second article marking 10 years of the Act, we will look at whether the Act has, so far, lived up to its expectations. We will also discuss what the Act has meant for enforcement activity and the impact of deferred prosecution agreements ("DPAs").

An excellent piece of legislation

In March 2019, the House of Lords Select Committee on the Bribery Act 2010 ("the Committee"), published its post-legislative scrutiny report. The Bribery Act was described as "*an excellent piece of legislation which creates offences which are clear and all-embracing.*" The corporate offence of failing to prevent bribery was regarded as particularly effective. Additionally, in 2017, the OECD, the principal source of pressure on the UK to modernise its laws, found that the UK had taken important steps to become a major enforcer of the foreign bribery offence among OECD countries and had demonstrated a strong anti-corruption drive.

The corporate offence of failing to prevent bribery

It is indisputable that the bribery offences under the Act are a vast improvement on their predecessors. However, the UK was also under pressure from the OECD to introduce a corporate criminal offence. This meant a departure from the conventional approach to corporate criminal liability by the inclusion of an offence under section 7 of failure of a commercial organisation to prevent bribery ("the corporate offence"). This offence, according to the Law Commission would "banish any doubt" over the adequacy of UK anti-bribery laws and compliance with obligations under international Conventions. It is a defence for a commercial organisation to prove that it had in place adequate procedures to prevent bribery by associated persons.

The Committee observed that because companies and their shareholders can benefit hugely from corrupt conduct, the question arose as to how they should be punished for what could be the conduct of a tiny minority of those involved, without harming those who have played no part. The Committee described the section 7 offence as "remarkably successful," so much so that the failure to prevent model was followed in the Criminal Finances Act 2017, in the creation of an offence of failure to prevent the facilitation of tax evasion.

Deferred Prosecution Agreements and the Corporate Offence

The corporate offence is proving to be the provision of the Act, which has had the most significant impact. It undoubtedly put anti-bribery compliance on the agenda in an unprecedented way, but with the introduction of DPAs in 2014, it has also made investigating a corporate defendant far more attractive to law enforcement, which would otherwise have to rely on the "identification principle" to

attach criminal liability to a corporate. The combined effect of the corporate offence and the DPA has provided a powerful weapon to the Serious Fraud Offence ("SFO"), currently the only UK agency to have used DPAs. For this reason, a discussion about the impact of the Act is almost inextricably linked to a discussion about DPAs and the corporate offence.

It is important to remember that DPAs apply to a number of criminal offences, but it is principally in relation to the corporate offence that they have been used. To date, six of the nine DPAs reached have involved the corporate offence. On 1 July 2021, ten years to the day of the coming into force of the Act, a tenth DPA is expected to be announced. It will be the seventh involving the corporate offence. In each case, the company has paid a large financial penalty, including in one case, a penalty of €997 million. With such huge paydays, it is no wonder that entering into a DPA with a corporate entity is an attractive prospect for the SFO and one on which it intends to focus.

Shifted Focus?

In its Annual Business Plan for 2021/22, the Serious Fraud Office (SFO) identified its key priorities. These include *"Encouraging good corporate compliance, and continuing to deploy [DPAs] where these can help to deliver justice for victims quickly and effectively, whilst mandating improvements to avoid future fraud, bribery or corruption."* It is also worthy of note that the SFO also identified five outcome delivery measures against which to monitor progress. These tellingly include *'the total value of financial contributions to the government through the continued use of DPAs.'*

The Committee when it looked at the use of DPAs also considered the prosecution of individuals. It emphasised in its report that the *"DPA process far from being an alternative to the prosecution of individuals, makes it all the more important that culpable individuals should be prosecuted."* In theory, the material provided to the SFO by a company as part of the cooperation expected in exchange for a DPA, should provide the evidence to assist in the prosecution of individuals. However, in every case where a company has entered into a DPA, the SFO has either unsuccessfully prosecuted individuals or not brought any charges at all. This raises another question about whether there is something amiss with the DPA process, the way it is being used or some other reason why this lack of success exists. It also raises the concern that the corporate offence has not had the enforcement impact intended. Has the realisation that DPAs provide a huge financial windfall distracted the SFO from its ultimate objective namely the investigation and prosecution of wrongdoing committed by individuals, or is there insufficient scrutiny of the underlying basis of a DPA? A DPA requires judicial approval before it can be finalised, however, a judge has limited insight into the granular detail of the basis of the proposed agreement between the SFO and the company, neither of whom, by the stage it reaches the court, has any incentive to derail the process.

The Director of the SFO has repeatedly stated in public that one of the difficulties faced by the agency in its pursuit of corporate defendants is the existence of the identification principle. The Law Commission is currently conducting a review of corporate criminal liability and is expected to report at the end of the year. However, this may not entirely explain the lack of success in convicting individuals. It may be that with a DPA in its pocket, insufficient thought and scrutiny is given to the scope of the case brought by the SFO before it finds its way before the courts. It may also be that the DPA process is impacting the attention to detail applied in the disclosure process.

The perhaps unattractive conclusion may be that there has been a shift in focus, and as long as the SFO is able to produce bountiful DPAs, the absence of convictions of individuals will be overlooked. The fact that a measure of the SFO's progress towards achieving its priorities is the financial contribution DPAs make to the government may be a tacit acknowledgement that things have changed. It must be remembered that the SFO was, until relatively recently, an organisation facing disbandment. These continuing questions over the SFO's existence and its role in foreign bribery cases was a source of concern for the OECD which, it said could weaken the UK's progress in

enforcement. However, the SFO's fortunes have changed and, as it has previously boasted, as a result of DPAs, the SFO contributes more to the Treasury than it costs to run. It is interesting that the SFO is now working with a number of jurisdictions to share its experience in "*successfully implementing the DPA regime.*"

A Success?

There may come a time when despite the income from DPAs, the public will be concerned about the absence of successful action against individuals and a consistent success rate will be expected. The corporate offence is a significant step in criminal liability of corporates but enforcement agencies such as the SFO must not lose sight of their purpose. DPAs are a good thing and are endorsed by the OECD. They provide a way for a company to resolve an allegation without a criminal conviction and for the SFO to obtain evidence and information it may otherwise not have been able to obtain. A DPA also encourages good corporate governance, is less costly than a trial against a large company and where appropriate can require continued monitoring of a company's compliance programme. According to the OECD, a DPA is an effective feature for incentivising self-reporting by companies and resolving foreign bribery cases against corporates. Despite this, most recently in 2019, the OECD observed that although there was an increased level of enforcement of foreign bribery, the total number of finalised and ongoing cases relative to the UK's economy remains low.

It is worth remembering that despite the attractiveness of the money brought in by DPAs, the SFO was created to address the problem of "*the public no longer [believing] that the legal system of England and Wales is capable of bringing perpetrators of serious frauds expeditiously and effectively to book.*" In 1986, the Fraud Trials Committee in "the Roskill Report," which led to the creation of the SFO, found that the public's belief was right. The continued work of the SFO should be focused on this original concern.

Although the Act has been in force for 10 years, DPAs have been available for a shorter period and it may be that both require a longer period to marinate, as a pair, before any real impact can be seen.

In our third and final article, we will look at the wider impact of the Act and where it may be in the next 10 years.

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