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# **Anti-Bribery & Corruption 2022: Current Trends In The U.K. Market And Hot Topics**

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## ANTI-BRIBERY & CORRUPTION 2022

### CURRENT TRENDS IN THE U.K. MARKET AND HOT TOPICS

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Lisa Osofsky, the current Director of the U.K.'s Serious Fraud Office (the **SFO**), described 2022 as “*the year of the trial*” due to (an unprecedented) eight SFO trials listed in 2022 and early 2023. While the volume of trials reflects an increasing change of pace within the corporate criminal enforcement landscape in the UK, the ramifications of the Covid pandemic had a well reported impact on the progress of investigations and prosecutions across all the U.K.'s law enforcement authorities. This, rather than anything else, may be the reason why there are eight SFO trials listed in such quick succession. And now, with the relaxation of restrictions connected to the pandemic, and the commencement of the war in Ukraine, “hearts and minds” in the UK have been focused on tackling corruption and the flow of ‘dirty money’ through UK financial institutions and into assets such as residential property. The UK is currently in the latter stages of the implementation of its 2017 – 2022 Anti-Corruption Strategy and is expected to publish its (delayed) fourth update later this year. That update will provide an assessment of the progress made in 2021, and it is anticipated that the government will set out their ambitions for the next five-year anti-corruption plan.

Steps have been slow in the implementation of plans to address issues such as corporate transparency in the fight against corruption and economic crime. However, we have seen renewed vigour in the government's efforts, exemplified by the fast-tracking of legislation in the form of the Economic Crime (Transparency and Enforcement) Act 2022 (**ECA 2022**) in response to Russia's invasion of Ukraine, which introduces a register of overseas entities, amendments to Unexplained Wealth Orders and enhancements to the UK sanctions regime. Alongside the ECA 2022, there are plans for future legislation regarding Companies House Reforms, as addressed in the recently published Corporate Transparency and Register Reform White Paper.

#### *Disclosure and the outsourcing of investigations and increased use of technology*

As the U.K.'s principal agency for tackling serious and complex fraud, and bribery and corruption, the SFO has been the subject of significant criticism for its failures to manage its obligations under the statutory disclosure regime. The SFO's recently published Business Plan for 2022-2023 and its Strategic Plan for 2022-2025, refers explicitly to proposals for the management of its disclosure obligations. This is not a surprise given the highly publicised major disclosure failings in two recent high-profile SFO prosecutions. Amid the prosecution's case against two former Serco senior executives in 2021, it was identified that a significant volume of potentially relevant material had not been disclosed. This led to the collapse of the trial as the SFO offered no evidence against the defendants and the jury were directed to return verdicts of ‘not guilty’. The disclosure failings were considered so significant that Brian Altman QC was appointed by the SFO to conduct an independent review into those disclosure failings (the “Altman Review”). Numerous issues, including disclosure failings, reared their head again in December 2021, when the conviction of an individual for bribery in the Unaoil case was quashed by the Court of Appeal; those same disclosure failings were relied upon by the Court of Appeal in March 2022

when it quashed yet another individual's bribery conviction in the same case; and it has recently been announced that a third individual convicted in that case has also filed an appeal on the basis that the Court of Appeal's findings render his conviction unsafe. On the same day as the Court of Appeal judgment in December 2021, the Attorney General commissioned another independent review of the SFO's Unaoil failings and appointed former High Court judge and Director of Public Prosecutions, Sir David Calvert-Smith, to lead the review and report on its findings in May 2022 (the Calvert-Smith Review). However, due to "unavoidable delays," including enabling individuals named in the report time to reply, the report is now due to be provided to the Attorney General before 21 July 2022.

#### *Reform of the CPIA 1996*

In response to questions raised by the U.K.'s Parliamentary Justice Committee on 29 March 2022 regarding its disclosure issues, the SFO referred to the current disclosure regime (largely set out under the Criminal Procedure and Investigations Act 1996 (**CPIA**)) as a contributing factor in the issues that it has had and continues to face, describing it as outdated when it comes to gathering and reviewing significant volumes of electronic data in a now digital world. The SFO has since written to the Attorney General's Office proposing a specific CPIA Code of Practice to manage the huge volume of digital and hardcopy material it collects. The proposal is that any Code of Practice would apply only to cases of serious or complex fraud, bribery, and corruption. The contents of the proposal have been acknowledged by the Attorney General, but not made public.

#### *Technology*

It is hardly surprising that as part of the SFO's Strategic Plan over the next 12 months, it has described its priorities as enhancing its technological capabilities (which includes its disclosure processes) and increasing the resources and digital skills of its workforce. It has recently been announced that the SFO has outsourced the disclosure review process to an external eDisclosure consultancy, Anexsys, in the G4S case - a trial of individuals due to take place in January 2023. This engagement is an unexpected step by the SFO, particularly in light of the SFO's evidence to the Public Accounts Committee in February 2022 that outsourcing disclosure would be both risky and more expensive than conducting disclosure processes internally. There is a lack of guidance or explanation, at least publicly, as regards the process implemented to ensure a reliable review is undertaken; however, the SFO have been utilising external resources in the disclosure review process for years, instructing independent document reviewers and disclosure counsel, under the guidance of the case team Disclosure Officer and Case Controller. The G4S outsourcing is not, it is understood, the SFO shifting its legal obligations to record and schedule all material in its possession that may undermine the prosecution case or assist that of the defence. It will therefore still retain practical oversight, however, we are yet to see what impact, if any, the explicit outsourcing to an eDisclosure company will have on the process; the Altman and Calvert-Smith reviews, are likely to provide useful recommendations regarding the disclosure process for future matters. Moreover, as part of the Spending Review, the SFO has allocated a combined total of £12.6 million to enhance its information, communication, and technological capabilities; a valuable, albeit long overdue, investment and recognition of the need for the SFO to have the technological capacity, skill set and authority to use the technological advancements available to successfully and effectively manage the enormous volumes of materials it collates during its investigations. Given this investment, outsourcing in the way that the SFO has in the G4S matter, may be indicative of an approach adopted specifically to address the current gap in the SFO's capabilities rather than anything long term.

### *Anti-bribery and corruption investigation focus*

A mainstay of Lisa Osofsky's tenure at the SFO has been a recognition and embracement of international cooperation; recognising the increasingly multi-jurisdictional and complex nature of the SFO case load has highlighted the role that law enforcement cooperation has played in a number of the SFO's most significant results, from Rolls Royce, to Airbus and, most recently, Glencore Energy (UK) Ltd (noting that Glencore has indicated pleas in the UK to a number of Bribery Act 2010 charges on 24 May 2022). To quote from Kenneth Polite Jr, the incumbent Assistant Attorney General of the U.S. Department of Justice, Criminal Division, "...the trend toward multiple jurisdictional investigations is here to stay." The SFO has confirmed that most of its current cases have an international component and consider current threats and trends to lie within the extractive industry, which is a high-risk industry for bribery and corruption. Lisa Osofsky explained that "as we move to situations where extractives are changing in nature, we are looking to different renewables and a continuing focus on carbon."

### *DPAs*

The SFO also confirmed that its current focus is in bringing prosecutions against individuals. Historically this has been an area in which the SFO has had limited success, particularly in respect of bribery and corruption offending, even where a company has entered into a Deferred Prosecution Agreement (**DPA**). Its flagship successes have instead centred around corporate suspects, under the DPA regime. The SFO has been particularly keen to stress over the past year that the DPA regime has resulted in it being able to deliver £1.6 billion for the Treasury through the financial penalties imposed. Taken at face value, this is an impressive statistic, and we anticipate that DPAs will continue to be a key focus of the SFO. However, recent developments over the last 12 months may also indicate that the SFO are, in fact, moving away from solely relying on non-prosecution remedies such as DPAs and are instead willing to prosecute corporate suspects.

### *Prosecution of Corporate Suspects*

Before May 2022, there had been only four prosecutions of corporates for the section 7 UKBA offence of failing to prevent bribery, namely: i) Sweett Group plc in 2015, a guilty plea; ii) Skansen Interiors Ltd in 2018, a contested trial resulting in a conviction; iii) Petrofac Ltd in 2021, guilty pleas to seven offences of failing to prevent bribery; and iv) Boulting Group Ltd, Tritec Systems Ltd and Electron Systems Ltd in April 2022, with all three companies pleading guilty to an offence of failing to prevent bribery. However, no prosecution had, until recently, been brought against any corporate suspect for a substantive offence of bribery under the UKBA and given that many bribery investigations against corporate suspects were being resolved by way of a DPA, a question was raised as to whether the law enforcement authorities, principally the SFO, had the appetite for prosecuting corporates.

However, in May 2022 Glencore Energy (UK) Ltd was charged with seven offences of bribery, specifically five substantive offences of bribery and two offences of failing to prevent bribery. At a recent hearing, Glencore indicated its intention to plead guilty to all offences. This is significant as it indicates the resolve of the SFO to *prosecute* corporate suspects, even where such prosecutions will require it to demonstrate a "directing mind and will" of the company whose conduct and state of mind can be attributed to the company (the 'identification principle'), under the current corporate criminal liability legislation. This development, together with the prosecution of Petrofac in 2021, is an indication that

corporate suspects cannot view a DPA as a certain outcome and thus a cost of business.

### *Reform of Corporate Criminal Liability*

Establishing a 'directing mind and will' has traditionally proven a stumbling block for prosecutors. It is widely recognised that the complex corporate structures in existence for many large and sophisticated companies present difficulties for the prosecution in attributing the involvement of a "directing mind and will". Unsurprisingly, the SFO has been one of many arguing for a change in the law on corporate criminal liability.

In recognition of the issues in establishing corporate criminal liability, the Law Commission was tasked by the Ministry of Justice to review this area of law and to provide an assessment of different options for reform. It published its options paper on 10 June 2022. The 263-page report has been criticised as underwhelming and, whilst its contents merit a separate chapter, it is noteworthy that an option to retain the identification principle remains but in a form that provides more certainty: defining more precisely the category of senior individuals whose acts or omissions can be attributed to the corporate. This would allow conduct to be attributed to a company where a member of the senior management engaged in, consented to, or connived in the offence. This is designed to address criticisms of the identification principle in circumstances where it is considered more difficult to prosecute large corporates.

The options also include the rejection of a failure to prevent economic crime offence on the basis that this would be too wide-ranging for corporates and those responsible for issuing guidance on reasonable procedures (which will no doubt be a disappointment to the SFO who championed this approach). However, the recommendations do include the creation of a new, albeit limited, offence of failure to prevent fraud by an employee or agent. Whether the U.K. Government will choose to implement any of the options remains to be seen and no timetable has been indicated.

### *Wider Anti-bribery and Corruption reform*

Any successful investigation into Bribery and Corruption is likely to interact with the U.K.'s money laundering regime, which is governed by the Proceeds of Crime Act 2002 (**POCA**). The Law Commission has been busy, and in addition to its review into corporate criminal liability, has also been commissioned to review the confiscation regime, governed by Part 2 of POCA, and launched a consultation paper in September 2017. The consultation suggests reforms to encourage the use of powers to prevent assets from being dissipated before a confiscation order is made, to ensure that when confiscation orders are made they realistically reflect what was gained from the crime, as well as improving the enforcement of confiscation orders. The results of this consultation and recommendations are expected to be published this summer.

### *The ECA 2022*

On 12 May 2022, the National Crime Agency (**NCA**) published its annual plan for 2022 / 2023. A focus of which is the clamping down of 'corrupt elites and their professional enablers'. It has established a new 'Combating Kleptocracy Cell' which was announced in February this year, through which it intends to: target corrupt elites through their assets in the UK; target the key enablers of these corrupt elites; and support, alongside other agencies and departments, criminal cross-Government sanctions delivery and enforcement.

The NCA intends to utilise the powers established under the ECA 2022 to “*improve transparency over the foreign ownership of companies and property in the UK and to strengthen the enforcement of financial sanctions*”. The Act has introduced a register of overseas entities which will include information about overseas entities that own UK Property and their beneficial owners, which is intended to set a new standard for global transparency. Entities that do not declare their beneficial owner will face restrictions in dealing with their property, and a failure to comply with the legislation could result in financial penalties and/or up to five years imprisonment. The Act also introduces provisions intended to strengthen Unexplained Wealth Orders (**UWOs**) making them easier to use and less of a financial burden for law enforcement agencies, as well as powers to strengthen the U.K.’s sanctions regime.

Whilst the NCA’s focus is on seeking criminal justice outcomes, the agency intends to utilise civil recovery powers to freeze and forfeit assets that are reasonable grounds to suspect are the proceeds of crime. It is likely therefore that we will see increased use of these powers including UWOs, Account Freezing Orders, Account Forfeiture Orders, and wider civil recovery powers in the future.

#### *Economic Crime and Corporate Transparency Bill*

In keeping with the momentum and engagement that we are currently seeing from the U.K. Government; during the Queen’s Speech on 10 May 2022 a second Economic Crime Bill (**ECB**) was included in the Government’s legislative agenda and is widely seen as a positive step in the fight against corruption. The proposed changes are described as fundamentally changing Companies House as an organisation; moving it away from a purely administrative function and introducing measures that will protect the integrity of the register.

The current system can be exploited to disguise ownership and conceal corrupt payments through the creation of ‘shell’, or ‘fronting’, companies and partnerships. This has long been recognised as an issue, as exemplified in the U.K. Government’s Anti-Corruption Plan 2014: “*the company registration framework has become vulnerable to exploitation by malign actors, corrupt officials and criminals from overseas*”.

The anticipated discretionary powers under the ECB are intended to address the ease with which it is currently possible to register a U.K. company, including the ability to query suspicious information and filings pre and post registration. At present, even if a Registrar considers that false information has been provided by an applicant, it has limited power to do anything about this, including an inability to share concerns with third party agencies, such as HMRC. The proposed legislation will overhaul the process, allowing Companies House to reject filings (subject to a right to respond by the applicant) and share data about suspicious activity with law enforcement agencies.

The reform will also mandate that identification is verified for all directors or Persons with Significant Control. At present discussions are taking place as to how verification will be undertaken, including the use of a Government identification service.

#### *Conclusion*

The implementation of the ECA 2022 and inclusion of the ECB on the legislative agenda are clear indicators of the significant developments and enforcement options for the U.K.’s law enforcement agencies to tackle corruption and the flow of ‘dirty money’ through the U.K. The challenge for law

enforcement will be to secure the resources to investigate and prosecute cases. The SFO has traditionally had to rely upon its core funding, supplemented by funds from the Treasury Reserve, so it can flex to meet the requirements of large cases. While this has worked for specific investigations in the past, it is necessary to obtain sufficient funding to be invested in the wider activities of the SFO. Now that investigators and prosecutors are shielded from adverse costs decisions if they are unsuccessful in UWO cases, the reverse burden of proof requiring a defendant to justify their wealth and only a civil standard of proof on the prosecution, these should proliferate over the coming 12 months.

Lastly, 2022 has already been the year of the economic sanction. We can expect to see more sanctions developments and implementation including legislation enabling Governments to more easily forfeit the assets they have seized.

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