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Anti-Corruption 2022

UK: Trends & Developments
Ian Hargreaves and Matthew Beech
Covington & Burling LLP

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Trends and Developments

Contributed by:

*Ian Hargreaves and Matthew Beech
Covington & Burling LLP see p.9*

Ten Anti-Bribery and Anti-Corruption (ABAC) Trends and Developments in the UK

International law-enforcement agencies uniting in anti-corruption efforts

Bribery schemes can be complex and frequently transcend international borders. In recent years, anti-corruption enforcement agencies have become increasingly focused on the need to cooperate and co-ordinate with their international counterparts. The Airbus enforcement action that was concluded in January 2020, which followed a co-ordinated multi-jurisdictional investigation involving French, US, and UK anti-corruption authorities, and resulted in a EUR3.6 billion global resolution, illustrated to all anti-corruption enforcement agencies the substantial benefits that can be reaped through effective international co-operation.

Since then, the UK's Serious Fraud Office (SFO) has signalled that it will continue to prioritise co-operation with its international counterparts in future investigations and enforcement actions. In its 2021/2022 business plan, the SFO acknowledged that many of its operational successes have been predicated on the authority's ability to collaborate with international partners. Indeed, the SFO's successful prosecutions of four Unaoil executives—the last of which was announced in March this year—were supported by several international authorities, including in France, Australia, the US, and the Netherlands.

Notwithstanding some alleged tensions with overseas enforcement agencies, including those reported in the Unaoil matter previously referred to, we anticipate an even greater reliance on co-operation between countries, going forward in 2022.

Are safe-haven jurisdictions also cracking down?

There are also signs that some jurisdictions that were once considered as safe havens for white-collar criminals—and their illicit proceeds—are starting to take steps to crack down on corruption and become more transparent. For example, the SFO's Unaoil prosecutions were also supported by enforcement authorities in Monaco, a jurisdiction with few recognised anti-corruption measures, and one that is renowned as a tax haven and for the substantial secrecy it affords its residents: characteristics that are highly attractive to criminals.

Similarly, in January 2021, the mining tycoon Beny Steinmetz was convicted by a court in Switzerland of paying bribes to the wife of the former Guinean president, Lansana Conté, in exchange for mining exploration rights at the Simandou site in Guinea. The Swiss court gave Steinmetz a five-year prison sentence and a USD56-million fine (though he is currently appealing the conviction). This is the first major international bribery trial that has been held in Switzerland, and a sign that, going forward, the country may take a tougher stance on corruption and related criminal conduct.

If these trends continue, we can expect the SFO (and other leading anti-corruption authorities) to seek to cultivate relationships with enforcement agencies in offshore and other historically secretive jurisdictions, where corrupt actors have, for many years, based their operations and sought to launder and conceal their illicit gains. Depending on the extent to which the SFO and its international counterparts are successful in forging such bonds, we may see a significant increase

in anti-corruption enforcement action, as the activities of corrupt actors in the so-called “black box” jurisdictions are exposed.

Increased collaboration with other domestic enforcement authorities

As well as forging deeper ties to international enforcement agencies, the SFO will continue to consolidate its relationships with domestic authorities. This year, the SFO has continued to expand its loans and secondments’ programme with other enforcement agencies and government departments. In 2020/2021, the SFO welcomed staff from the Cabinet Office, the Home Office, the Ministry of Justice, and the National Crime Agency (NCA). The SFO also seconded 17 of its own staff members to the National Economic Crime Centre, the Crown Prosecution Service, the Government Legal Department, and other government departments. Not only does this secondment programme enable the SFO to share, and benefit from, the resources and expertise of other UK-based enforcement authorities and government departments, but it also increases the extent to which these organisations will collaborate and share intelligence with one another during live investigations and prosecutions.

In the last year, the SFO has also exchanged secondees with private-sector law firms and chartered accountancy firms—a practice which, over time, will enable the SFO to gain deeper insights into investigation best practices in the private sector and the strategies and tactics used by law firms when defending white-collar clients.

With the SFO collaborating more closely with other agencies and government departments, and benefiting from private sector know-how, the authority can be expected to become more adept and versatile at investigating suspects,

prosecuting wrongdoers, and recovering the proceeds of crime over the coming years.

A closer relationship with Whitehall

The SFO is also cultivating stronger links with the UK government. The SFO’s 2021/2022 business plan highlighted that the SFO has recently contributed to a range of legislative and policy initiatives, including the legislative frameworks governing the SFO’s investigative and prosecutorial powers, disclosure in criminal cases, and the use of covert human intelligence sources. The SFO clearly sees a closer relationship with Whitehall, and active involvement in legislative and policy initiatives, as fundamental to its existence going forward, and to securing new powers that will enable the authority to conduct more effective investigations and, ultimately, increase the number of successful enforcement actions against corrupt actors.

The extent to which the SFO is able to influence policy and legislative decisions on its own investigative and enforcement powers remains to be seen. However, with financial crime surging during the COVID-19 pandemic, and the resources of UK enforcement agencies becoming increasingly stretched, the government will be cognisant of the need to ensure that these agencies have the tools they need to pursue and punish offenders. This may also lead to pressures on the SFO and other UK criminal agencies to combine forces and reduce costs. However, considering the recent financial successes of the SFO, its closure—which was discussed during Theresa May’s tenure—is not anticipated and it is likely that the independence of the SFO and its specialist workload will continue well beyond 2022.

Indeed, the government can be expected to consider seriously any policy and legislative contributions made by agencies such as the SFO that will enable them to punch above their

weight when combating serious crime on multiple fronts.

The push for individual convictions

The SFO has once again signalled its commitment to obtaining convictions against individual offenders, particularly those in senior positions within an organisation. Obtaining such convictions can be difficult—a fact that is not lost on the SFO. However, in many respects, including its public duty to do so, the SFO has no alternative but to bring prosecutions against the individuals involved.

In a speech by Lisa Osofsky, the Director of the SFO, in June this year, she acknowledged that the governance of modern global companies is often so complicated that it is difficult to ascertain where power and control truly resides, which, in turn, can make it very challenging for the SFO to identify the individuals who are actually culpable of misconduct. Osofsky stated that there is a culture of organised irresponsibility in many major organisations operating in the UK, which she believes flows from the fact that UK law currently enables leaders to distance themselves from the actions of their company. According to Osofsky, organised irresponsibility is reflected in inappropriately heavy delegation, poor record-keeping, responsibility spread across different entities, and a culture at the top of “don’t raise that with me”. Even where it is possible for the SFO to identify individual offenders and take them to trial, rigorous defence counsel and the high burden of proof makes securing convictions difficult.

Notwithstanding these challenges, the SFO has had some recent successes during 2021. In January, a Petrofac executive pleaded guilty to several counts of bribery and recently received a two-year suspended sentence after providing a significant amount of assistance to the SFO in relation to the successful prosecution of the

corporate entity. In March, following a conviction for conspiracy to give corrupt payments in connection with the Unaoil case, a former senior sales manager at SBM Offshore was sentenced to three and a half years’ imprisonment; as previously noted, this is the fourth individual conviction secured by the SFO following the Unaoil investigation. Further, in August, a fraudster was jailed for almost nine years after failing to pay a confiscation order, following an earlier prosecution by the SFO.

Investigating and prosecuting individuals who hide behind complex corporate structures and governance mechanisms can be time-consuming and expensive. However, the SFO is clearly not being deterred and its recent successes in prosecuting individuals will likely galvanise the authority to pursue further convictions. Indeed, in August, the SFO brought new charges against five individuals in the construction sector for bribery and money laundering offences.

... and recovering the proceeds of crime

In addition to holding individuals responsible for criminal conduct, the SFO is also focused on recovering the proceeds of crime from offenders and compensating victims—a commitment highlighted by the SFO in its 2021/2022 business plan. The SFO emphasised that it would seek out asset-forfeiture opportunities under the Criminal Finances Act 2017 during SFO-led investigations and prosecutions, and identify opportunities for civil recovery, including through engagement with international partners. Greater emphasis on this will be seen during 2022.

The SFO is following through on its pledges in this area. Under Amec Foster Wheeler Energy Limited’s deferred prosecution agreement (DPA), which related to the company’s use of corrupt agents in the oil and gas sector across several jurisdictions, the company agreed to pay compensation of GBP210,610 to the people of Nige-

ria as part of its GBP103 million settlement with the SFO.

Further, in June 2021, the SFO announced that it had secured an account-forfeiture order against an account linked to the criminal gains of Virendra Rastogi, one of the architects of a USD700 million metal-trading fraud. Notwithstanding that Rastogi and his co-conspirators were found guilty of conspiracy to defraud as far back as 2008, this year, the SFO managed to seize GBP247,911 from a UK account allegedly containing proceeds from the fraud. Finally, on 17 June, the SFO secured a GBP402,465 confiscation order against the former Unaoil executive Basil Al Jarah, who was jailed for bribery offences in October 2020.

Law-enforcement authorities in the UK, including the SFO, have considerable powers to help them recover the proceeds of crime, including robust powers such as account-freezing orders, account-forfeiture orders, and unexplained wealth orders. Crucially, these powers do not require law-enforcement authorities to secure a prior criminal conviction against the respondent or to prove their case beyond reasonable doubt—characteristics that make these orders very effective.

In recent years, some legal commentators have been surprised by how sparingly certain of these powers have been used, given their draconian nature. However, the proceedings associated with the deployment of these powers can be lengthy, complex, and expensive. Further, criminals invariably spread their illicit gains across multiple accounts or assets, which means enforcement authorities can end up spending substantial time and resources pursuing relatively low-value criminal property. The SFO suggests it is being sensibly strategic about its use of these powers, but it is clearly on the hunt for appropriate opportunities to deploy them in

order to recover the proceeds of crime. It needs to do so, as the SFO has been given these powers by its paymaster, the UK Government, so it is expected to utilise them further during 2022.

A setback in evidence-gathering powers

While the last year has highlighted the effectiveness of some of the powers at the SFO's disposal, it has also resulted in new constraints for the SFO in its efforts to tackle corruption and other serious crime. Lisa Osofsky will be looking to remove these obstacles during 2022.

In February, the SFO saw its overseas investigatory powers clipped by the Supreme Court. During an SFO investigation into KBR, Inc, a US-based entity with UK subsidiaries, the authority issued a Section 2 Criminal Justice Act 1987 notice, requiring the company to produce certain materials relevant to the SFO's investigations that were held outside of the UK. KBR challenged the notice on the basis that the SFO had exceeded its powers and could not use such a notice to compel a foreign company to disclose materials held overseas. The SFO argued that its issuance of the notice was lawful, on the basis that KBR had a sufficient connection to the UK through its subsidiaries. The case ran all the way up to the Supreme Court, which ultimately found in KBR's favour.

This decision will have come as a bitter disappointment to the SFO, not only because it may now be harder for the agency to obtain documents held overseas, but also because high-profile adverse decisions such as this will remind companies and individuals alike that full co-operation is not the only available strategy when under investigation by the SFO—and that challenging the SFO can also bear fruit. With the SFO's eagerness to encourage self-reporting and pursue DPAs wherever possible, this is not a precedent the authority will want to set.

The slow grind towards corporate criminal liability reform

This may be the most important development of 2022 (if it happens). Indeed, it will build upon and eclipse the importance of Section 7 of the UK Bribery Act 2010 and the facilitation of tax-evasion offences in the 2017 Criminal Finances Act, should the talking finally end and action be taken to introduce broader failure to prevent offences.

The SFO has been frustrated by the fact that reform of the law on corporate criminal liability has continually been delayed. In the UK, with the exception of certain “failure to prevent” and strict liability offences, a company can only be held criminally liable if prosecutors can prove beyond reasonable doubt that individuals representing the “directing mind and will” of the company were responsible for the relevant offence. The infamous SFO v Barclays case—where the court held that Barclays was not criminally liable for the actions of its CEO and CFO—confirmed that, for larger companies with devolved and complex management structures, it is very difficult to satisfy this test and prosecute such companies.

As was noted in last year’s article, the government’s three-year assessment of the case for corporate criminal liability reform, which ended last year, was inconclusive, and the government subsequently tasked the Law Commission to conduct further analysis.

In June this year, the Law Commission launched a consultation, which did not set out formal options, but rather some of the alternative approaches to corporate criminal liability that might be considered. These included:

- using the doctrine of vicarious liability (which is common under US federal law);
- modifying the identification principle by enabling fault to be attributed to a company

- where a corporate culture encouraged, tolerated, or enabled non-compliance; and
- creating new “failure to prevent” offences, potentially including an overarching “failure to prevent economic crime” offence, which could encompass all types of financial crime, such as money laundering and terrorist financing, fraud, breaches of financial sanctions rules, and fraudulent trading.

The Law Commission will produce its report on the conclusions it has reached following this consultation. This will, hopefully, be available by early 2022, if not before. It will then be up to the Government to act upon that report. It is anticipated that the Government will introduce a new test for corporate criminal liability, and it is expected to be a version of the “failure to prevent” offence, which already has variations in the Acts previously referred to. However, one should tread carefully before making any absolute predictions in this area. The Treasury is already concerned at the significantly increased costs from which UK PLC is suffering in relation to energy prices, other inflationary pressures, dealing with COP26 outcomes and the impact of Brexit (and COVID-19). It will be lobbying against increasing those costs with the added burden of “failure to prevent” compliance. One should also put into the mix that there may well be a General Election in the summer of 2023 and the Conservative Government, which has already been bashed by UK PLC for some of its recent decisions, will not be keen to introduce new legislation that is opposed by UK PLC so soon before a General Election.

The SFO’s continued reliance on deferred prosecution agreements

Thankfully for the SFO, DPAs continue to be an effective tool in bringing companies to justice for corruption; so far this year, the SFO has secured three new DPAs. As previously noted, in July, the SFO announced that it had entered into a

GBP103 million DPA with Amec Foster Wheeler Energy Limited, which formed part of a global USD177-million settlement with the UK, US, and Brazilian authorities. The company accepted responsibility for ten offences relating to the use of corrupt agents between 1996 and 2014 across Nigeria, Saudi Arabia, Malaysia, India, and Brazil.

Also in July, the SFO announced that it had secured two DPAs with two UK-based companies for bribery offences in connection with the award of multi-million pound UK contracts, under which the companies will pay a total of GBP2,510,065.

In her June speech, Osofsky spoke glowingly about the DPA regime. She praised the ability of DPAs to encourage offending companies to uphold the law and become good corporate citizens, while also preventing unnecessary economic damage where a conviction could put a company out of business and destroy jobs. Osofsky stated that the SFO's strategy of pursuing DPAs is paying dividends, with corporates learning the lessons of DPAs and the SFO significantly improving its financial impact; Osofsky noted that the ten DPAs that had been agreed at the date of her speech had delivered penalties and costs, and returned illicit gains, worth more than GBP1.5 billion.

For an under-funded and under-resourced agency such as the SFO, DPAs can deliver results quickly and efficiently in comparison to traditional prosecutions, and they allow the SFO to take on more cases than would be possible if the authority were constantly mired in long-running adversarial investigations and criminal proceedings.

It should also be stressed that, when the SFO has significant co-operation from informed individuals, and the corporate has not been forth-

coming in reporting its misdemeanours, the SFO will not necessarily (or be able to) hand out DPAs like confetti. Petrofac is a good example of this. Emboldened by the result in Petrofac, in 2022 the SFO is not anticipated always to default to the DPA route, which in any event requires judicial scrutiny and approval. However, we are also confident that at least two or three substantial DPAs will be seen during 2022, which will result in significant recoveries for the state—and, potentially, for the victims.

The impact of COVID-19 and Brexit

COVID-19 and Brexit continue to present significant challenges for the SFO and other law enforcement agencies, and their resources are likely to be stretched as the full extent of COVID-19 and Brexit-related crime is uncovered. In its 2021 strategic assessment, the NCA noted that COVID-19 has heightened the threat to businesses posed by corruption, particularly in relation to procurement contracts (both in general and specifically relating to COVID-19). However, the pandemic's most significant impact on crime has not been on bribery and corruption, but rather on fraud.

The pandemic (combined with the UK's departure from the EU) has precipitated a marked increase in fraud and the extent of the damage is only now becoming clear. Action Fraud (which is due, and will receive, a make-over) reported GBP3 billion in losses to individuals and organisations in 2020—though the NCA indicated in its 2021 strategic assessment that the true figure may be substantially higher, given the significant level of under-reporting. Further, HMRC estimates that up to GBP3.5 billion will be lost due to fraud and error in connection with the Coronavirus Job-Retention Scheme, and the National Audit Office estimates that GBP15-26 billion will be lost due to fraud and defaulting payments in connection with the Bounce-Back Loan scheme.

Although it is unlikely that the SFO will be tasked with chasing down the vast majority of criminals who will have used some of the schemes and loopholes created to alleviate the financial pain of COVID-19, there may be some investigations into corrupt actors whose actions, which often take place in distant jurisdictions and do not necessarily cause direct harm to the British taxpayer, may seem far less egregious than those of fraudsters misappropriating large amounts of taxpayers' money on home soil. This could result in such investigations being stalled or not getting off the ground at all.

A significant further concern for both the NCA and the SFO is that, with increased market volatility caused by the impact of COVID-19 and Brexit, including significant price fluctuations resulting from the supply chain crisis, it will be difficult to identify and prove that prices include an element of criminal activity, whether that is for fraud or to pay a bribe. Artificial intelligence, in which the SFO and NCA are rightly placing a significant amount of faith and hope, will not necessarily be able to identify these activities due to the "perfect storm" currently faced by UK business and the UK economy.

With the SFO's resources being significantly stretched as it refocuses on fraud, the authority can be expected to increase pressure on companies to self-report misconduct relating to bribery and corruption, including by imposing significant penalties on companies who fail to do so, and potentially rewarding those who do through more favourable DPAs.

Covington & Burling LLP has one of the largest white-collar practices in the world. Covington's team regularly manages complex matters that involve multiple jurisdictions and regulators, including anti-corruption, cartel, and trade controls matters. Senior members of the firm's white-collar, regulatory, industry, privacy/data security, and e-discovery practices on the ground, in its 13 offices across the Americas, Africa, Europe, and Asia, are well-placed to provide seamless cross-border representation,

conduct internal investigations, and help design and implement effective compliance programmes. The firm also recognises that a host of legal and regulatory issues may arise in the course of an investigation, and that they may garner the attention of other regulators, enforcement authorities, and private litigants. The firm has extensive experience in handling multi-regulator, multi-forum investigations and litigation, as well as the collateral issues that come with them.

AUTHORS



Ian Hargreaves is a partner in Covington's London office. For over 20 years, he has specialised in advising on fraud – both civil and criminal elements, asset-tracing and recovery, bribery and corruption, money laundering, sanctions and investigations/compliance work generally. Ian has acted for clients across a range of sectors, including life sciences, energy, financial and retail. He has successfully concluded several recent investigations in Russia, China, Africa and Europe. For over a decade he has been involved in the largest UK fraud cases - playing a pivotal role to the Berezovsky/Patarkatsishvili litigation, and in the Abyazov/BTA Bank litigation.



Matthew Beech is an associate in the anti-corruption and white-collar defence and investigations practice groups in London. He advises clients across the full spectrum of criminal matters, including bribery and corruption, tax evasion, money laundering, and cybercrime. He also advises clients on both civil and criminal fraud, and has experience in asset-tracing and recovery, and regulatory investigations. Matthew has acted for a range of clients, including financial institutions, pharmaceutical companies, and high net worth individuals.

Covington & Burling LLP

22 Bishopsgate
London
EC2N 4BQ

Tel: 0207 067 2128
Fax: 0207 067 2222
Email: ihargreaves@cov.com
Web: www.cov.com

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