

# SubOptic Masterclass 2013

## Legal Masterclass

Presenters: Mike Conradi and Simon Airey

DLA Piper LLP

## Presenter Profile – Mike Conradi

- DLA Piper is one of the largest global law firms – with more than 4,200 lawyers working across around 80 offices in more than 30 countries.
- Mike is one of the firm's lead telecoms partners. He has worked on matters concerning roughly 20 different submarine cable systems, including on due diligence (both for debt finance and for corporate acquisitions).
- Helped draft the SubOptic template supply contract.
- Mike is ranked as a leading telecoms lawyer by all the various independent legal guides and is the editor of the *Communications Law Handbook*.



**Mike Conradi**

**Partner, DLA Piper**

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## Presenter Profile – Simon Airey

- Simon was a barrister in private practice for 12 years before joining DLA Piper and has extensive experience of a broad range of litigation at all levels of the court system.
- He specialises in tax and fraud investigations, bribery and corruption, and corporate compliance issues. He acts in associated litigation and advises clients under investigation by various enforcement authorities, including the Serious Fraud Office, HM Revenue & Customs and their overseas equivalents.



**Simon Airey**

**Head of Investigations**

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## **What we'll discuss today**

1. Due diligence – what do lawyers look for?
2. Bribery and sanctions compliance

# Due diligence – key considerations

- Legal issues
  - Choice of law; jurisdiction
  - Permits
  - Security
- Commercial issues
  - Pre-sales contracts
  - Other key contracts and their terms
- Practical issues
  - Verifying the management's story

## Due diligence – legal issues

- Choice of Law
  - English law (or other common law) very common
- Jurisdiction
  - There's a good reason to look for arbitration
- Permits
  - Are they all in place? Whose responsibility are they?
- Security
  - Need specifically identifiable assets, plus legal ability to use them  
Therefore, no security over an IRU
- Compliance
  - Policies to show compliance with rules on bribery, corruption

## Due diligence – legal issues

- Does the target rely on "dark fibre" from a third party?
  - issue – what happens if the DF seller breaches / becomes insolvent?
  - usually "dark fibre" on submarine systems is just a contract – the "buyer" does not own any assets in a meaningful way – and they're useless on the seller's insolvency
  - easier to create if designed into the legal structure from the start (eg Unity?)

# Due diligence – commercial issues

- Construction contract
  - Milestones – rigorous timetable
  - Liquidated damages – incentivising on-time performance
  - Billing and liability for other consortium members (if applicable)
  - Design life; systematic failure risk
  - Route survey and risks of changes
  - Warranty terms
- Landing party agreement
  - Backhaul – fair, reasonable and non-discriminatory
  - "Open access" to other backhaul providers
  - Co-location/hosting (or in separate agreement?)



# Due diligence – commercial issues

- Pre-sales contracts
  - Customer credit worthiness
  - Are customer's legally **bound**?
  - What are the proposed services levels? Are they achievable?
  - Length of commitment (eg service term)
  - Termination rights
  - Price protection mechanism – refund? additional capacity?
  - Upgrade rights?
- Contracts with the vendor (capacity sales)
  - Could be critical, often vendor will become biggest customer
  - Pricing may be set for long periods ahead – reduces buyer's risk

## Due diligence – commercial issues

- The C&MA
  - liability for other consortia members?
  - how does allocation of construction costs and of capacity work?
    - running costs – of landing stations not used?
    - how are maintenance costs allocated?
  - can rights / interests under the C&MA be assigned? all or in part?
  - How does governance work? How are decisions taken?
  - ability to enforce against consortia members in breach?

## Due diligence – commercial issues

- Maintenance Arrangements
  - what is the maintenance plan?
  - Zone based maintenance arrangement (like ACMA)?
    - NB – once you join you can't leave without decommissioning the cable
    - KPIs on the maintenance authorities – but usually their liability to all owners collectively is capped
  - Maintenance service from a (single) supplier?
    - term, liability, termination provisions, SLAs etc

## Due diligence – financial issues

- Financial status of the supplier
- Additional protection provided:
  - Performance bonds
  - Parent company guarantees
  - Payment profile

Foreign Corrupt Practices Act  
**and**  
UK Bribery Act

# Agenda

- 1. Global Anti-Corruption Environment**
- 2. Foreign Corrupt Practices Act**
- 3. UK Bribery Act**

# Global Anti-Corruption Environment

# U.K. Bribery Act 2010



## A few statistics

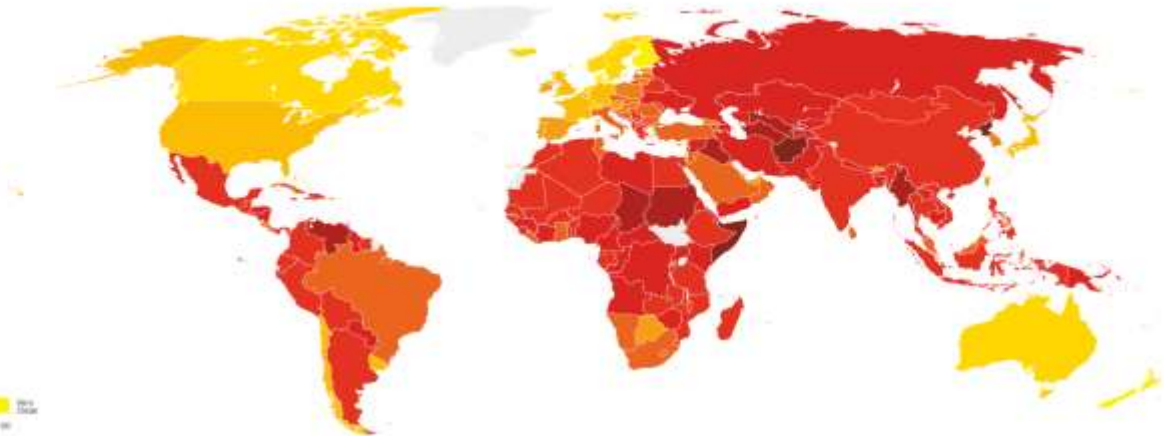
- **€120 billion** - estimated cost of corruption in the European Union per annum (almost as much as the EU's annual budget)
- **\$148 billion** - estimated cost of corruption in Africa per annum (thought to represent 25% of Africa's GDP + to increase cost of goods by up to 20%)
- **\$1 trillion** - conservative estimate of annual bribes paid worldwide in developed and developing countries
- **15%** of all companies in industrialised countries believe they have to pay bribes to win or retain business (40% in Asia / 60% in former Soviet Union)

# Global corruption risks



## CORRUPTION PERCEPTIONS INDEX 2012

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



RANK	COUNTRY/TERRITORY	SCORE
1	Denmark	90
2	Finland	89
3	New Zealand	89
4	Sweden	88
5	Singapore	87
6	Switzerland	86
7	Australia	85
8	Norway	85
9	Canada	84
10	Netherlands	84
11	Iceland	82
12	Luxembourg	80
13	Germany	79
14	Hong Kong	77
15	Belgium	76
16	Belgium	76
17	Japan	74
18	United Kingdom	74
19	United States	73
20	Cuba	72
21	Lithuania	72
22	Bahamas	71
23	France	71

24	Saint Lucia	71
25	Austria	69
26	Ireland	69
27	Dartar	69
28	United Arab Emirates	68
29	Cyprus	66
30	Romania	63
31	Spain	63
32	Estonia	64
33	Malawi	63
34	Portugal	63
35	Puerto Rico	63
36	Gang Vincent and the Grenadines	62
37	Slovenia	61
38	Taiwan	61
39	Cape Verde	60
40	Israel	60
41	Slovakia	58
42	Dominica	58
43	Poland	58
44	Mexico	57
45	Mauritius	57
46	Korea (South)	56
47	Brunei	55

RANK	COUNTRY/TERRITORY	SCORE
48	FYR Macedonia	43
49	South Africa	43
50	Russia and Territories	42
51	Lithuania	54
52	Rwanda	53
53	Georgia	52
54	Seychelles	52
55	Bahrain	51
56	Czech Republic	49
57	Latvia	49
58	Malaysia	49
59	Turkey	48
60	Cuba	48
61	Jordan	48
62	Morocco	48
63	Mauritania	45
64	Oman	47
65	Croatia	46
66	Slovakia	46
67	Ghana	45
68	Laos	45
69	Kuwait	44
70	Romania	44
71	Saudi Arabia	44
72	Brazil	43

73	Myanmar	43
74	Thailand	37
75	Zambia	37
76	Bahrain	36
77	Italy	40
78	San Tomé and Príncipe	42
79	Bulgaria	41
80	Lebanon	41
81	Montenegro	41
82	Tajikistan	41
83	Sri Lanka	40
84	China	39
85	Serbia	39
86	Trinidad and Tobago	38
87	Burkina Faso	38
88	El Salvador	38
89	Jamaica	38
90	Paraguay	38
91	Malawi	38
92	Malawi	37
93	Morocco	37
94	Suriname	37
95	Switzerland	37

96	Guatemala	33
97	Niger	33
98	Togo	33
99	Dominican Republic	32
100	Colombia	36
101	Djibouti	36
102	Greece	38
103	India	36
104	Madagascar	36
105	Mongolia	36
106	Senegal	36
107	Argentina	35
108	Gabon	35
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184	Poland	34
185	Ghana	34
186	Kuwait	34
187	Mal	34
188	Norway	34
189	Philippines	34
190	Albania	33
191	Ethiopia	33

# Corruption Perceptions Index 2012

## Transparency International CPI –

Ranks 176 countries by their perceived levels of corruption, as determined by expert assessments and opinion surveys.

Scale from **0** (highly corrupt) to **100** (highly clean)

### The bottom ranked countries are:

- Iraq 18
- Uzbekistan / Turkmenistan 17
- Myanmar 15
- Sudan 13
- North Korea / Somalia / Afghanistan 8

### The top ranked countries are:

- Denmark / Finland / New Zealand 90
- Sweden 88
- Singapore 87
- Switzerland 86
- Australia 85

Countries	Rating / 100	Rank / 176
<b>Russia</b>	<b>28</b>	<b>133</b>
<b>India</b>	<b>36</b>	<b>94</b>
<b>China</b>	<b>39</b>	<b>80</b>
<b>Brazil</b>	<b>43</b>	<b>69</b>
<b>Slovakia</b>	<b>46</b>	<b>62</b>
<b>Turkey</b>	<b>49</b>	<b>54</b>
<b>Czech Republic</b>	<b>49</b>	<b>54</b>
<b>South Korea</b>	<b>56</b>	<b>45</b>
<b>Poland</b>	<b>58</b>	<b>41</b>
<b>Spain</b>	<b>65</b>	<b>30</b>
<b>United Arab Emirates</b>	<b>68</b>	<b>27</b>
<b>France</b>	<b>71</b>	<b>22</b>
<b>United States</b>	<b>73</b>	<b>19</b>
<b>United Kingdom</b>	<b>74</b>	<b>17</b>
<b>Germany</b>	<b>79</b>	<b>13</b>
<b>Canada</b>	<b>84</b>	<b>9</b>

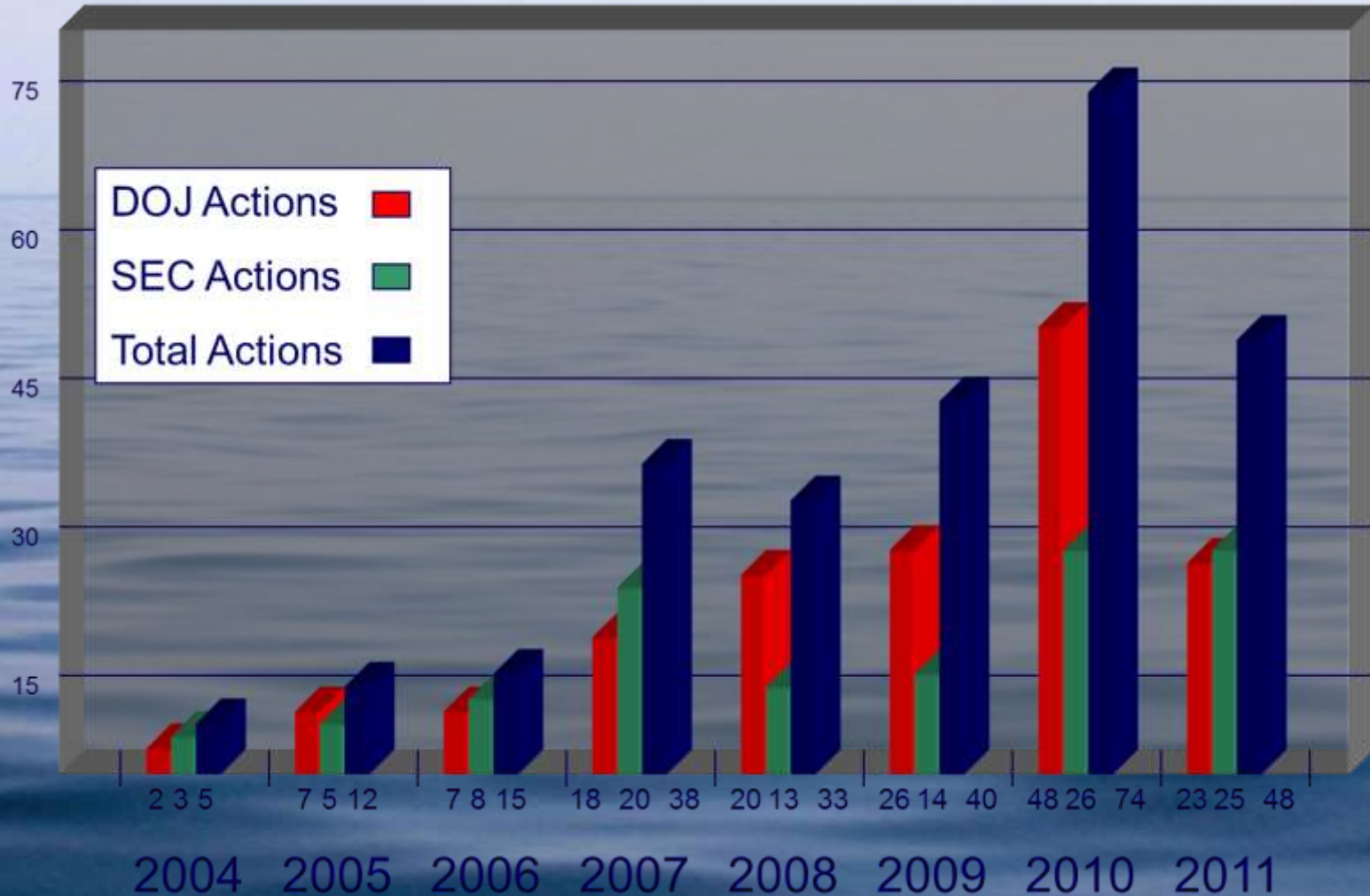
## Examples of recent regulatory trends

- Desire to create 'level playing field' internationally
- 15 September 2011- European Commission passed a formal resolution:
  - calling for EU-wide sanctions against corruption
  - urging Member States to make a clear political commitment to enforce rules against corruption
- Increased 'whistleblower' activity (consider impact of US *Dodd-Frank Act*)
- Very significant increase in enforcement activity globally
  - especially in Germany, China, Australia and Switzerland
  - and in the UK, under the old law...

## Recent Surge in UK Enforcement (old law)

- **Balfour Beatty** - October 2008
- **AMEC plc** - October 2009
- **Mabey & Johnson** - September 2009
- **Innospec Limited** - March 2010
- **Robert Dougall** (De Puy International executive, pleaded guilty) - April 2010
- **Julian Messent** (PWS International insurance broker, pleaded guilty) - Nov. 2010
- **BAE Systems** - December 2010
- **MW Kellogg Ltd** - February 2011
- **Mabey & Johnson** (two directors and a sales manager convicted) - Feb. 2011
- **DePuy International Ltd** - April 2011
- **Macmillan Publishers Limited** - July 2011
- **Operation Navigator** (four people convicted/oil and gas contracts) - Jan. 2012
- **David Turner** (Innospec sales/ marketing director, pleaded guilty) - Jan. 2012
- **Miltiades Papachristos** (Innospec regional sales director charged) - Feb. 2012

# FCPA Prosecution Trends



## Ernst & Young Global Fraud Survey 2011 / 2012

- According to a survey of 400 executives, there is a greater tolerance of bribery compared with the previous year
- 15% of Chief Financial Officers around the world are willing to make cash payments to win or retain business (9% previous year)
- 4% of Chief Financial Officers said they would falsely record financial performance (3% previous year)
- 34% consider it acceptable to use entertainment to win business

# UK – old Laws and Legislation

- Previous legislation in the UK - outdated collection of laws:
  - *Public Bodies Corrupt Practices Act 1889*
  - *Prevention of Corruption Act 1906*
  - *Prevention of Corruption Act 1916*
  - *Anti-Terrorism Crime and Security Act 2001*
  - common law offence of bribery
- all now replaced by the *Bribery Act 2010* - "a model of its kind"
- designed to address modern business risks and to make offences easier to prosecute
- The Bribery Act is generally accepted to represent the new "gold standard" in ABC legislation - many companies are adopting UK and FCPA standards even if not subject to UK or US jurisdiction



## How does the Bribery Act differ from the FCPA?

**The UK Bribery Act differs from the FCPA in a number of ways.**

**A few of the principal differences are as follows. Under the Act:**

- it is an offence to receive (as well as to give) a bribe
- bribery of private individuals and companies (as well as public officials) is illegal
- acts of bribery in the UK and overseas are illegal
- there is a 'strict liability' corporate offence of "failing to prevent bribery"
- there is no exemption for promotional expenditure or 'facilitation payments'
- the penalties are different (10 years prison -v- 5 years under FCPA)
- the extra-territorial reach is potentially much broader

# Bribery Act 2010 – main provisions

- The Act came into force on 1 July 2011. It applies to commercial and private bribery, and bribery of public officials, in the UK and overseas
  - s. 1 paying a bribe (offer, promise or give - directly or indirectly)
  - s. 2 receiving a bribe (request, agree to accept or receive - directly or indirectly)
  - s. 6 bribing a foreign public official (offering, promising or giving)
  - **s. 7 failure by a commercial organisation to prevent bribery**
  - **s. 14 consent or connivance by a senior officer**
- Penalties:
  - individuals: up to 10 years' imprisonment and/or unlimited fine
- (+ disqualification of directors > 15 years); companies: unlimited fine

## Section 1

**Offering, promising or giving (directly or indirectly) a financial or other advantage to a person...**

- (i) with the intention to induce or reward the improper performance of a relevant function or activity; or
- (ii) knowing or believing that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity

## “Financial or Other Advantage”

**Examples:** directly or indirectly (e.g. through a third party)

- Inflated contractual prices
- ‘Consultancy’ agreements
- Gifts, entertainment and hospitality
- Commissions and introduction fees
- Ancillary services for local community
- Donations to local or charitable causes
- ‘Losing’ bidders hired as sub-contractors
- Travel and expenses for overseas site visits
- Loyalty and volume rewards; discounts, rebates, kickbacks
- Goods or services provided privately (e.g. building work, iPads)
- Offers of future work or employment; jobs for family members, *etc*

## Section 2

### Requesting, agreeing to receive or accepting (directly or indirectly) a financial or other advantage...

- (i) with the intention that a relevant function or activity should be performed improperly; or
- (ii) where the request, agreement or acceptance *of itself* constitutes improper performance of a relevant function or activity; or
- (iii) as a reward for the improper performance of a relevant function or activity by that person or another; or
- (iv) where (in anticipation of or in consequence of a person requesting, agreeing to receive or accepting a financial or other advantage) a relevant function or activity is performed improperly by that person, or by another at that person's request or with their assent or acquiescence

## Section 6

**Offering, promising or giving a foreign public official (directly or indirectly) a financial or other advantage...**

... with the intention of *influencing*<sup>1</sup> that official in their official capacity in order to obtain or retain business, or an advantage in the conduct of business

Note: the definition of "foreign public official" is very broad (see section 6(5) and the commentary in the Ministry of Justice Guidance)

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<sup>1</sup> compare to section 1 which refers to an intention to "induce or reward...improper performance"

## Corporate Hospitality

- The Act contains no specific guidance, monetary limits, exemptions or defences in relation to gifts, entertainment or hospitality
- however - gifts, entertainment and hospitality are not made illegal by the Act
- *"Hospitality or promotional expenditure which is reasonable, proportionate and made in good faith is an established part of doing business. The Act does not seek to penalise such activity" <sup>1</sup>*
- Some risk lies in the fact that what is considered appropriate is left to the discretion of the prosecutor

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<sup>1</sup> **Joint Prosecutors' Guidance** (Serious Fraud Office and the Director of Public Prosecutions)

## Corporate Hospitality

- In essence, an offence is committed only where there is an intention to induce or reward improper behaviour
- But - extravagant or frequent gifts and entertainment are likely to attract more attention and cause a negative inference to be drawn
- Serious Fraud Office revised policy statement - October 2012: "If on the evidence there is a realistic prospect of conviction, the SFO will prosecute if it is in the public interest to do so" [my emphasis]
- To reduce risk, companies should have clear policies and procedures and should respect those applied by the people or companies that they deal with (consider the application of section 1(ii) of the Act)
- Transparency / record keeping are important (but be aware of certain problems associated with keeping a Gifts Register, for example)



## Facilitation Payments

- FPs have always been illegal under UK law - and are illegal in most countries globally (they are currently only legal, in certain circumstances, in US, Canada, Australia, New Zealand & South Korea)
- SFO revised policy statement October 2012: "If on the evidence there is a realistic prospect of conviction, the SFO will prosecute if it is in the public interest to do so" [my emphasis]
- Even small bribes may give rise to other offences in the UK e.g.
  - books and records / Companies Act offences
  - misleading auditors / false accounting / tax offences
  - money laundering / Proceeds of Crime Act offences
- Once suspicion is raised, the SFO can obtain further evidence using compulsory disclosure notices under the *Criminal Justice Act 1987* (note: no 'right to silence' or privilege against self-incrimination)

## Section 12: Jurisdiction

- The Bribery Act has very broad scope and extra-territorial reach:
  - under **sections 1, 2 or 6**, an offence is committed if any act or omission which forms part of the offence takes place in the UK
  - if no such act or omission takes place in the UK, it is necessary for the perpetrator to have a "close connection" with the UK e.g.
    - (a) any person who is a British citizen or is ordinarily resident in the UK
    - (b) any company incorporated in the UK
    - person or company can be prosecuted for offences committed anywhere in the world
  - under **section 7**, a commercial organisation can be prosecuted if it carries on a business, or part of a business, in the UK (e.g. through a subsidiary, representative office, etc). The company can be prosecuted under section 7 for bribery committed anywhere in the world

## Section 12 - summary

OFFENCE	ACT / OMISSION IN THE UK	NO ACT / OMISSION IN THE UK
<p><b>sections 1 &amp; 2</b> - bribing or being bribed</p> <p>or</p> <p><b>section 6</b> - bribing foreign public officials</p>	<ul style="list-style-type: none"> <li>▪ any <b>individual</b> (regardless of citizenship or residency status)</li> <li>▪ any <b>corporate</b> (regardless of place of incorporation / formation)</li> </ul>	<ul style="list-style-type: none"> <li>▪ any <b>individual</b> who has a "<i>close connection</i>" with the UK - e.g. a British national or "<i>ordinarily resident</i>" in the UK</li> <li>▪ any <b>corporate</b> that has a "<i>close connection</i>" with the UK - i.e. incorporated or formed in the UK</li> </ul>
<p><b>section 7</b> - commercial organisations failing to prevent bribery</p>	<ul style="list-style-type: none"> <li>▪ any <b>corporate</b> incorporated or formed in the UK</li> <li>▪ any <b>corporate</b> incorporated / formed outside the UK that "<i>carries on a business or part of a business</i>" in the UK</li> </ul>	
<p><b>section 14</b> senior officers who consent or connive in bribery (sections 1, 2 or 6)</p>	<p>any <b>senior officer</b> that has a "<i>close connection</i>" with the UK - e.g. a British national or "<i>ordinarily resident</i>" in the UK</p>	

## Section 7: Failure of Commercial Organisation to prevent bribery

- A company ("C") commits an offence if an "associated person" bribes another person to obtain or retain business for C, or an advantage in the conduct of business for C
  - "associated person" is a person who "performs services for or on behalf of C" (e.g. an employee, agent, subsidiary, contractor, JV partner)
  - the associated person can live or operate anywhere in the world – they do not need to have a "close connection" to the UK
  - irrelevant that C had no knowledge of, or involvement in, the bribe
- But it is a defence for C to prove that it had in place "adequate procedures" that were designed to prevent persons associated with C from undertaking such conduct

## UK Ministry of Justice Guidance regarding “Adequate Procedures”

- The UK Ministry of Justice has issued formal Guidance in relation to "adequate procedures" setting out six key compliance principles:
  - **risk assessment**
  - **procedures proportionate to risk**
  - **top level (board) commitment**
  - **due diligence**
  - **communication (including training)**
  - **monitoring and review**
- This Guidance needs to be read together with other guidance from other key bodies (SFO, Director of Public Prosecutions, Attorney General). The guidance confirms that there is a general public interest in prosecuting bribery offences.

## Section 14: Senior Officers

If a corporate entity\* commits an offence under sections 1, 2 or 6, a "senior officer" may be guilty of the same offence if it was committed with their consent or "connivance" (e.g. if they 'turned a blind eye')

- however, where no part of the offence occurs in the UK, the senior officer must have a "close connection" with the UK (for example, if they are a British citizen or are ordinarily resident in the UK)
- Note: **senior officer** is broadly defined = "director, manager, secretary or other similar officer" - or someone who "purports to act in such capacity"
- \* using the "identification principle" relating to the "guiding mind and will" of the company *i.e.* the Board, the Managing Director or other superior officer(s)

# A new enforcement approach in the UK?

The SFO has previously invited companies to self-report bribery:

- this may result in civil recovery rather than prosecution - guidelines have been published - but note the SFO's recent change in policy (October 2012): generally, there will be a prosecution where (i) there is sufficient evidence of an offence and (ii) a prosecution would be in the public interest
- note also that the UK courts have not been very supportive of the civil process. Associated plea agreements and global settlements have been criticised by judges: see the *Innospec* case
- A prosecution can have very serious collateral consequences...

# Collateral consequences of prosecution

- confiscation of the proceeds of crime (not just profits)
- debarment from public works, supply and service contracts in the European Union under the EU Procurement Directive
- debarment by world development banks
- compensation / reparations to affected countries
- civil actions by competitors who have suffered damage
- reputational damage / damage to shareholder value
- loss of business and investment

Prosecution may be avoided in certain cases if legislation introducing "Deferred Prosecution Agreements" is passed by UK Parliament



## Director of the Serious Fraud Office

The former Director of the SFO, Richard Alderman, has made the following statements about his views on enforcement:

***"Foreign corporates within my jurisdiction under the Bribery Act that continue to use bribery to undercut good ethical UK businesses should be under no illusion here. Finding them and taking vigorous action will be a high priority for us"***

- In order to instigate prosecutions, Mr Alderman has invited companies to
- act as whistleblowers on their rivals. He said:

***"I am prepared to take courageous action dealing with foreign corporations, but please help me with evidence. Tip me off and tell me there was corruption"***

## ***Daily Telegraph newspaper – 1 July 2011***

- The Guidance issued by the Ministry of Justice stated that being listed on the London Stock Exchange would not automatically bring companies under the jurisdiction of the Act
- However, when asked whether such companies are at risk of prosecution under the Act, Alderman said:
  - " *You bet we will go after foreign companies. This has been misunderstood. If there is an economic engagement with the UK then in my view they are carrying on a business in the UK* "
- In a similar approach to foreign companies, he said he would also prosecute large companies if they failed to police their contractors (something the MoJ guidance had suggested may not always be possible under the Act)

# KPMG Anti-Bribery & Corruption Survey 2011

- **Statistics relating to US and UK respondents to the survey**
- Despite guidance from various international sources:
  - 20% did not have communication and training programs
  - 33% did not perform ABC risk assessments
  - 50% did not have a committee responsible for supervising compliance with ABC regulations
  - 75% of US / 60% of UK did not have a full-time ABC compliance officer
- Despite known compliance risks associated with third parties, agents, etc:
  - 40% did not distribute their anti-bribery and corruption policies to 3<sup>rd</sup> parties
  - 60% with ABC training programmes did not require any 3<sup>rd</sup> party participation
  - More than 50% of US and 40% of UK did not obtain periodic compliance certifications from 3<sup>rd</sup> parties

## Global ABC compliance – key actions

- Undertake a risk assessment: assess where the greatest risks are. Understand differences between individual countries, business sectors and business partners, etc
- Review ABC policies and procedures to ensure that they comply with the Act - conduct a "gap analysis"
- Adopt a single minimum 'global' standard – supplemented by local policies and procedures designed to deal with local laws and risks
- Ensure that appropriate resources are devoted to compliance (with periodic audits, preferably by an independent law firm)
- Take account of prosecutor trends, business sector issues and geographical 'hot spots' in order to use compliance resources effectively

## Global ABC Compliance

- Bribery Act and FCPA guidance is clear: "one size does not fit all"
  - procedures need to be tailored according to where, how and with who you do business
  - Procedures also need to be monitored and revised periodically
- Future challenges for compliance:
  - effective due diligence on foreign agents, third parties, etc
  - auditing third parties for compliance
  - variations in local laws (e.g. facilitation payments / data privacy)

## Benefits of ABC compliance

- Keep your company off the regulatory radar
- Minimise or avoid the risk of enforcement action
- Protect company officers and employees from the threat of fines, imprisonment, disqualification, *etc*
- Maintain an open and competitive market
- Maintain company integrity and reputation
- Attract new business and encourage investment

## A final thought....

" Those at the leading edge will gain competitive advantage, in part from their high reputation "

- Lord Woolf

For further information, please contact:

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on Undersea Telecommunications





SubOptic 2013

***An overview of the UK Bribery Act 2010***  
***+ recent trends in global anti-bribery and corruption***  
***compliance and enforcement***

**Simon Airey**  
DLA Piper UK LLP  
London

# Global Anti-Corruption Environment

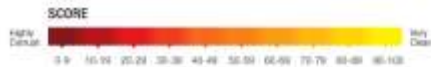
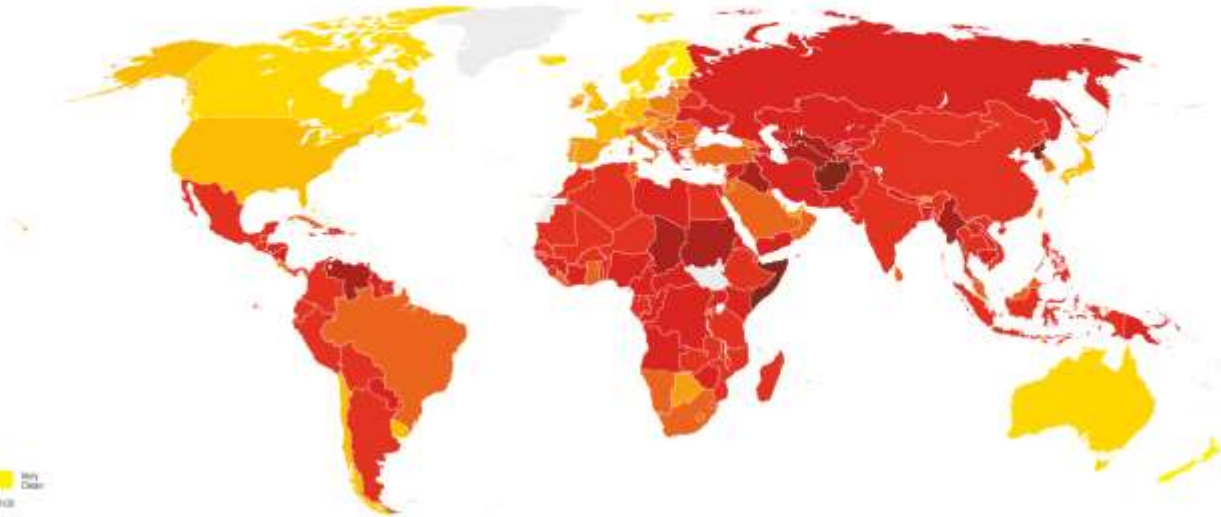
- **€120 billion** - estimated cost of corruption in the European Union per annum (almost as much as the EU's annual budget)
- **\$148 billion** - estimated cost of corruption in Africa per annum (thought to represent 25% of Africa's GDP + to increase cost of goods by up to 20%)
- **\$1 trillion** - conservative estimate of annual bribes paid worldwide in developed and developing countries
- **15%** of all companies in industrialised countries believe they have to pay bribes to win or retain business (40% in Asia / 60% in former Soviet Union)

# Global Corruption Risks

**TRANSPARENCY INTERNATIONAL**  
the global coalition against corruption

## CORRUPTION PERCEPTIONS INDEX 2012

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



RANK	COUNTRY/TERRITORY	SCORE	RANK	COUNTRY/TERRITORY	SCORE	RANK	COUNTRY/TERRITORY	SCORE	RANK	COUNTRY/TERRITORY	SCORE	RANK	COUNTRY/TERRITORY	SCORE
1	Denmark	90	23	Saint Lucia	71	68	FYR Macedonia	43	112	Guatemala	33	157	Tajikistan	22
2	Austria	89	24	Austria	69	69	South Africa	43	113	Niger	33	158	Democratic Republic of Congo	21
3	Finland	89	25	Ireland	69	70	Bosnia and Herzegovina	43	114	Timor-Leste	33	159	Azerbaijan	37
4	New Zealand	89	26	Catar	68	71	Lithuania	54	115	Dominican Republic	32	160	Kenya	37
5	Sweden	88	27	United Arab Emirates	68	72	Rwanda	53	116	Ecuador	32	161	Nepal	37
6	Singapore	87	28	Cyprus	66	73	Georgia	52	117	Egypt	32	162	Nigeria	37
7	Australia	86	29	Botswana	65	74	Seychelles	52	118	Indonesia	32	163	Pakistan	27
8	Switzerland	86	30	Spain	65	75	Bahrain	51	119	Madagascar	32	164	Bangladesh	26
9	Norway	85	31	Estonia	64	76	Czech Republic	49	120	Belarus	31	165	Cameroon	26
10	Canada	84	32	Rhutan	63	77	Latvia	49	121	Mauritania	31	166	Central African Republic	26
11	Netherlands	84	33	Portugal	63	78	Malaysia	49	122	Mozambique	31	167	Congo Republic	26
12	Luxembourg	83	34	Puerto Rico	63	79	Turkey	49	123	Senegal	31	168	Syria	26
13	Iceland	82	35	Saint Vincent and the Grenadines	62	80	Cuba	45	124	Vietnam	31	169	Ukraine	26
14	Germany	79	36	Slovenia	61	81	Jordan	45	125	Lebanon	30	170	Eritrea	25
15	Hong Kong	77	37	Taiwan	61	82	Namibia	45	126	Togo	30	171	Guinea-Bissau	25
16	Barbados	76	38	Cape Verde	60	83	Oman	47	127	Cote d'Ivoire	29	172	Rapua New Guinea	25
17	Belgium	75	39	Israel	60	84	Croatia	46	128	Nicaragua	29	173	Paraguay	25
18	Japan	74	40	Dominica	59	85	Slovakia	46	129	Uganda	29	174	Ghana	24
19	United Kingdom	74	41	Poland	58	86	Ghana	45	130	Malawi	28	175	Kyrgyzstan	24
20	Chile	72	42	Malta	57	87	Lesotho	45	131	Peru	28	176	Yemen	23
21	Uruguay	72	43	Mauritius	57	88	Kuwait	44	132	Mexico	28	177	Philippines	23
22	Bahamas	71	44	Korea (South)	56	89	Romania	44	133	Honduras	28	178	Yemen	23
23	France	71	45	Brunei	55	90	Saudi Arabia	44	134	Iran	28	179	Angola	22
			46			91	Qatar	43	135	Kazakhstan	28	180	Cambodia	22
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# Corruption Perceptions Index 2012

## Transparency International CPI –

Ranks 176 countries by their perceived levels of corruption, as determined by expert assessments and opinion surveys.

Scale from **0** (highly corrupt) to **100** (highly clean)

### The bottom ranked countries are:

Iraq	18
Uzbekistan / Turkmenistan	17
Myanmar	15
Sudan	13
North Korea / Somalia / Afghanistan	8

### The top ranked countries are:

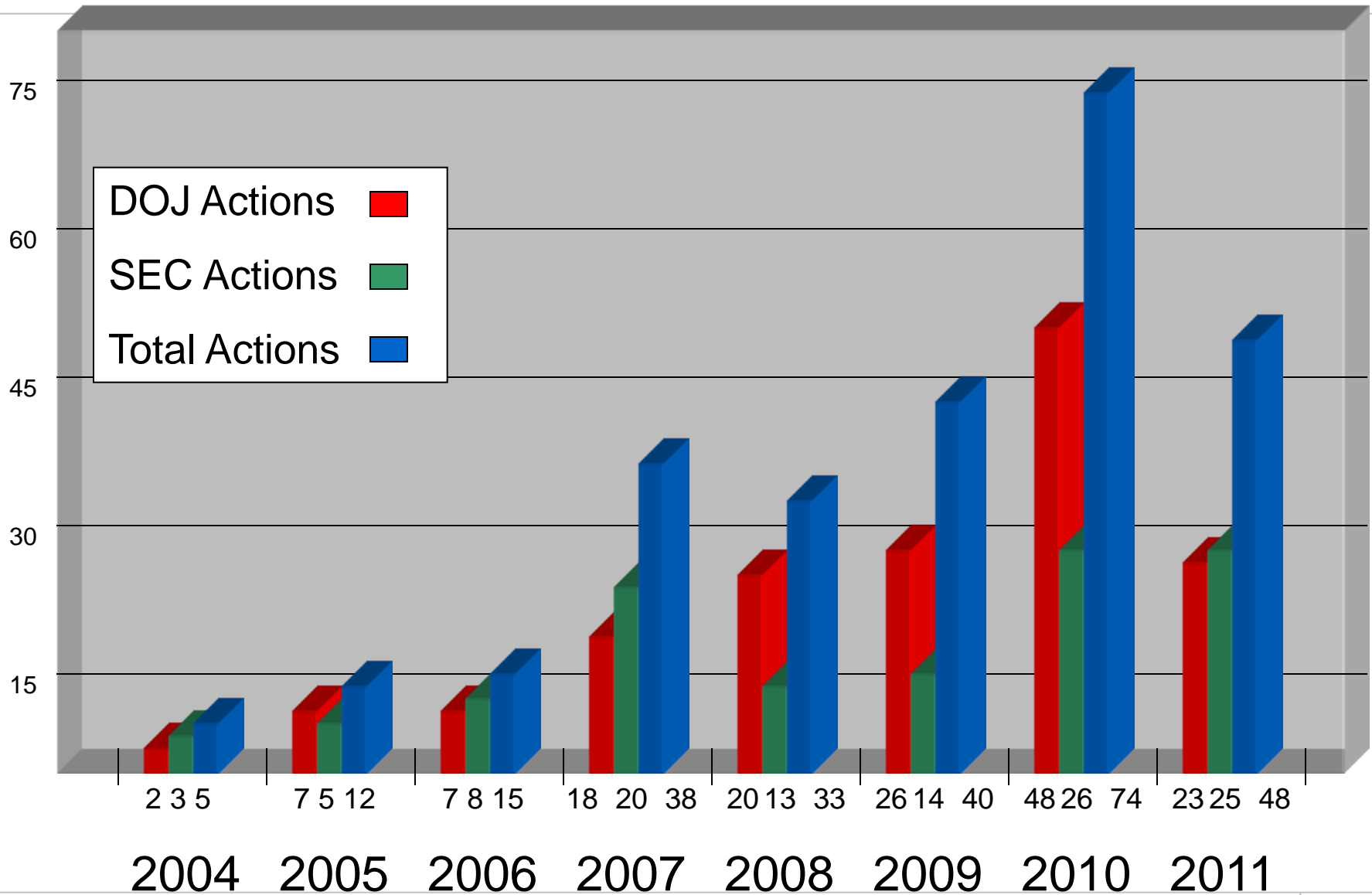
Denmark / Finland / New Zealand	90
Sweden	88
Singapore	87
Switzerland	86
Australia	85

Countries	Rating / 100	Rank / 176
<b>Russia</b>	<b>28</b>	<b>133</b>
<b>India</b>	<b>36</b>	<b>94</b>
<b>China</b>	<b>39</b>	<b>80</b>
<b>Brazil</b>	<b>43</b>	<b>69</b>
<b>Slovakia</b>	<b>46</b>	<b>62</b>
<b>Turkey</b>	<b>49</b>	<b>54</b>
<b>Czech Republic</b>	<b>49</b>	<b>54</b>
<b>South Korea</b>	<b>56</b>	<b>45</b>
<b>Poland</b>	<b>58</b>	<b>41</b>
<b>Spain</b>	<b>65</b>	<b>30</b>
<b>United Arab Emirates</b>	<b>68</b>	<b>27</b>
<b>France</b>	<b>71</b>	<b>22</b>
<b>United States</b>	<b>73</b>	<b>19</b>
<b>United Kingdom</b>	<b>74</b>	<b>17</b>
<b>Germany</b>	<b>79</b>	<b>13</b>
<b>Canada</b>	<b>84</b>	<b>9</b>

- Desire to create 'level playing field' internationally
- 15 September 2011- European Commission passed a formal resolution:
  - calling for EU-wide sanctions against corruption and urging Member States to make a clear political commitment to enforce rules against corruption
- Increased 'whistle-blower' activity (> US *Dodd-Frank Act*)
- Very significant increase in enforcement activity globally
  - e.g. US, Germany, Australia, Switzerland, China, Korea
  - and in the UK, under the old law...

- **Balfour Beatty** - October 2008
- **AMEC plc** - October 2009
- **Mabey & Johnson** - September 2009
- **Innospec Limited** - March 2010
- **Robert Dougall** (De Puy International executive, pleaded guilty) - April 2010
- **Julian Messent** (PWS International insurance broker, pleaded guilty) - Nov. 2010
- **BAE Systems** - December 2010
- **MW Kellogg Ltd** - February 2011
- **Mabey & Johnson** (two directors and a sales manager convicted) - Feb. 2011
- **DePuy International Ltd** - April 2011
- **Macmillan Publishers Limited** - July 2011
- **Operation Navigator** (four people convicted/oil and gas contracts) - Jan. 2012
- **David Turner** (Innospec sales/ marketing director, pleaded guilty) - Jan. 2012
- **Miltiades Papachristos** (Innospec regional sales director charged) - Feb. 2012

# FCPA Prosecution Trends





- According to a survey of 400 executives, there is a greater tolerance of bribery compared with the previous year
- 15% of Chief Financial Officers around the world are willing to make cash payments to win or retain business (9% previous year)
- 4% of Chief Financial Officers said they would falsely record financial performance (3% previous year)
- 34% consider it acceptable to use entertainment to win business

# U.K. Bribery Act 2010

**The UK Bribery Act differs from the FCPA in a number of ways. A few of the principal differences are as follows. Under the Act:**

- it is an offence to receive (as well as to give) a bribe
- bribery of private individuals and companies (as well as public officials) is illegal
- acts of bribery in the UK and overseas are illegal
- there is a 'strict liability' corporate offence of "failing to prevent bribery"
- there is no exemption for promotional expenditure or 'facilitation payments'
- the penalties are different (10 years prison -v- 5 years under FCPA)
- the extra-territorial reach is potentially much broader

- Previous legislation in the UK - outdated collection of laws:
  - *Public Bodies Corrupt Practices Act 1889*
  - *Prevention of Corruption Act 1906*
  - *Prevention of Corruption Act 1916*
  - *Anti-Terrorism Crime and Security Act 2001*
  - common law offence of bribery
  
- all now replaced by the *Bribery Act 2010* - "a model of its kind"
  
- designed to address modern business risks and to make offences easier to prosecute
  
- The Bribery Act is generally accepted to represent the new "gold standard" in ABC legislation - many companies are adopting UK standards (or a combination of UK and FCPA standards) even if not subject to UK or US jurisdiction

The Act came into force on 1 July 2011. It applies to commercial and private bribery, and bribery of public officials, in the UK and overseas

- s. 1 paying a bribe (offer, promise or give - directly or indirectly)
- s. 2 receiving a bribe (request, agree to accept or receive - directly or indirectly)
- s. 6 bribing a foreign public official (offering, promising or giving)
- **s. 7 failure by a commercial organisation to prevent bribery**
- **s. 14 consent or connivance by a senior officer**

Penalties:

- individuals: up to 10 years' imprisonment and/or unlimited fine (+ disqualification of directors > 15 years); companies: unlimited fine

## **Offering, promising or giving (directly or indirectly) a financial or other advantage to a person...**

- (i) with the intention to induce or reward the improper performance of a relevant function or activity; or
- (ii) knowing or believing that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity

## **Examples:** directly or indirectly (e.g. through a third party)

- Inflated contractual prices
- ‘Consultancy’ agreements
- Gifts, entertainment and hospitality
- Commissions and introduction fees
- Ancillary services for local community
- Donations to local or charitable causes
- ‘Losing’ bidders hired as sub-contractors
- Travel and expenses for overseas site visits
- Loyalty and volume rewards; discounts, rebates, kickbacks
- Goods or services provided privately (e.g. building work, iPads)
- Offers of future work or employment; jobs for family members, *etc*

### Requesting, agreeing to receive or accepting (directly or indirectly) a financial or other advantage...

- (i) with the intention that a relevant function or activity should be performed improperly; or
- (ii) where the request, agreement or acceptance *of itself* constitutes improper performance of a relevant function or activity; or
- (iii) as a reward for the improper performance of a relevant function or activity by that person or another; or
- (iv) where (in anticipation of or in consequence of a person requesting, agreeing to receive or accepting a financial or other advantage) a relevant function or activity is performed improperly by that person, or by another at that person's request or with their assent or acquiescence



### **Offering, promising or giving a foreign public official (directly or indirectly) a financial or other advantage...**

... with the intention of *influencing*<sup>1</sup> that official in their official capacity in order to obtain or retain business, or an advantage in the conduct of business

Note: the definition of "foreign public official" is very broad (see section 6(5) and the commentary in the Ministry of Justice Guidance)

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<sup>1</sup> compare to section 1 which refers to an intention to "induce or reward...improper performance"

- The Act contains no specific guidance, monetary limits, exemptions or defences in relation to gifts, entertainment or hospitality
- however - gifts, entertainment and hospitality are not made illegal by the Act
- *"Hospitality or promotional expenditure which is reasonable, proportionate and made in good faith is an established part of doing business. The Act does not seek to penalise such activity" <sup>1</sup>*
- Some risk lies in the fact that what is considered appropriate is left to the discretion of the prosecutor

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<sup>1</sup> **Joint Prosecutors' Guidance** (Serious Fraud Office and the Director of Public Prosecutions)

- In essence, an offence is committed only where there is an intention to induce or reward improper behaviour
- But - extravagant or frequent gifts and entertainment are likely to attract more attention and cause a negative inference to be drawn
- Serious Fraud Office revised policy statement - October 2012: "If on the evidence there is a realistic prospect of conviction, the SFO will prosecute if it is in the public interest to do so" [my emphasis]
- To reduce risk, companies should have clear policies and procedures and should respect those applied by the people or companies that they deal with (consider the application of section 1(ii) of the Act)
- Transparency / record keeping are important (but be aware of certain problems associated with keeping a Gifts Register, for example)

- FPs have always been illegal under UK law - and are illegal in most countries globally (they are currently only legal, in certain circumstances, in US, Canada, Australia, New Zealand & South Korea)
- SFO revised policy statement October 2012: "If on the evidence there is a realistic prospect of conviction, the SFO will prosecute if it is in the public interest to do so" [my emphasis]
- Even small bribes may give rise to other offences in the UK e.g.
  - books and records / Companies Act offences
  - misleading auditors / false accounting / tax offences
  - money laundering / Proceeds of Crime Act offences
- Once suspicion is raised, the SFO can obtain further evidence using compulsory disclosure notices under the *Criminal Justice Act 1987* (note: no 'right to silence' or privilege against self-incrimination)

The Bribery Act has very broad scope and extra-territorial reach:

- under **sections 1, 2 or 6**, an offence is committed if any act or omission which forms part of the offence takes place in the UK
- if no such act or omission takes place in the UK, it is necessary for the perpetrator to have a "close connection" with the UK e.g.
  - (a) any person who is a British citizen or is ordinarily resident in the UK
  - (b) any company incorporated in the UK

person or company can be prosecuted for offences committed anywhere in the world
- under **section 7**, a commercial organisation can be prosecuted if it carries on a business, or part of a business, in the UK (e.g. through a subsidiary, representative office, etc). The company can be prosecuted under section 7 for bribery committed anywhere in the world

# Section 12 - summary

OFFENCE	ACT / OMISSION IN THE UK	NO ACT / OMISSION IN THE UK
<p><b>sections 1 &amp; 2</b> - bribing or being bribed</p> <p>or</p> <p><b>section 6</b> - bribing foreign public officials</p>	<ul style="list-style-type: none"> <li>▪ any <b>individual</b> (regardless of citizenship or residency status)</li> <li>▪ any <b>corporate</b> (regardless of place of incorporation / formation)</li> </ul>	<ul style="list-style-type: none"> <li>▪ any <b>individual</b> who has a "close connection" with the UK - e.g. a British national or "ordinarily resident" in the UK</li> <li>▪ any <b>corporate</b> that has a "close connection" with the UK - i.e. incorporated or formed in the UK</li> </ul>
<p><b>section 7</b> - commercial organisations failing to prevent bribery</p>	<ul style="list-style-type: none"> <li>▪ any <b>corporate</b> incorporated or formed in the UK</li> <li>▪ any <b>corporate</b> incorporated / formed outside the UK that "carries on a business or part of a business" in the UK</li> </ul>	
<p><b>section 14</b> senior officers who consent or connive in bribery (sections 1, 2 or 6)</p>	<p>any <b>senior officer</b> that has a "close connection" with the UK - e.g. a British national or "ordinarily resident" in the UK</p>	

# Section 7: Failure of Commercial Organisation to prevent bribery

- A company ("C") commits an offence if an "associated person" bribes another person to obtain or retain business for C, or an advantage in the conduct of business for C
  - "associated person" is a person who "performs services for or on behalf of C" (e.g. an employee, agent, subsidiary, contractor, JV partner)
  - the associated person can live or operate anywhere in the world – they do not need to have a "close connection" to the UK
  - irrelevant that C had no knowledge of, or involvement in, the bribe
- But it is a defence for C to prove that it had in place "adequate procedures" that were designed to prevent persons associated with C from undertaking such conduct

- The UK Ministry of Justice has issued formal Guidance in relation to "adequate procedures" setting out six key compliance principles:
  - **risk assessment**
  - **procedures proportionate to risk**
  - **top level (board) commitment**
  - **due diligence**
  - **communication (including training)**
  - **monitoring and review**
  
- This Guidance needs to be read together with other guidance from other key bodies (SFO, Director of Public Prosecutions, Attorney General). The guidance confirms that there is a general public interest in prosecuting bribery offences.



- Specifically targeted due diligence should be undertaken to detect and assess the complex legal, financial and reputational risks before completion
- Due diligence is crucial - identify red flags and potential corruption issues
- Consider available guidance on good practice
- A failure to conduct due diligence can be an aggravating factor and may lead to higher penalties and prosecutions against an acquiring company

After the initial DD has been undertaken:

- Follow up action - how much DD is enough?
- Reputational DD – how far does it need to go?
- Further investigations – lawyers, accountants or DD specialists? Consider advantages of legal privilege
- 'Toxic' information – how do you deal with it?
- Money laundering – are there reporting implications?

## **Proceeds of Crime Act 2002**, relevant offences:

- section 327 - concealing, disguising, converting, transferring or removing criminal property from the UK
- section 328 - entering into or becoming concerned in an arrangement that facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.
- section 329 - acquiring criminal property at an undervalue or using such property for little or no consideration.
- section 330 - failing to disclose (regulated sector)

Where bribery risks are identified during the due diligence process, the client can consider some or all of the following:

- Insist on remedial action
- Exclude tainted assets
- Contractual protection – warranties and / or indemnities
- Seek guidance from relevant enforcement authorities
- Seek a price adjustment
- Walk away from the deal if risks / risk profile too high

If a corporate entity\* commits an offence under sections 1, 2 or 6, a "senior officer" may be guilty of the same offence if it was committed with their consent or "connivance" (e.g. if they 'turned a blind eye')

- however, where no part of the offence occurs in the UK, the senior officer must have a "close connection" with the UK (for example, if they are a British citizen or are ordinarily resident in the UK)

Note: **senior officer** is broadly defined = "director, manager, secretary or other similar officer" - or someone who "purports to act in such capacity"

\* using the "identification principle" relating to the "guiding mind and will" of the company *i.e.* the Board, the Managing Director or other superior officer(s)

## The SFO has previously invited companies to self-report bribery:

- this may result in civil recovery rather than prosecution - guidelines have been published - but note the SFO's recent change in policy (October 2012): generally, there will be a prosecution where (i) there is sufficient evidence of an offence and (ii) a prosecution would be in the public interest
- note also that the UK courts have not been very supportive of the civil process. Associated plea agreements and global settlements have been criticised by judges: see the *Innospec* case
- A prosecution can have very serious collateral consequences...

- confiscation of the proceeds of crime (not just profits)
- debarment from public works, supply and service contracts in the European Union under the EU Procurement Directive
- debarment by world development banks
- compensation / reparations to affected countries
- civil actions by competitors who have suffered damage
- reputational damage / damage to shareholder value
- loss of business and investment

It may be possible to avoid prosecution in certain circumstances if legislation introducing "Deferred Prosecution Agreements" is passed by UK Parliament later this year (2013)

The former Director of the SFO, Richard Alderman, has made the following statements about his views on enforcement:

***"Foreign corporates within my jurisdiction under the Bribery Act that continue to use bribery to undercut good ethical UK businesses should be under no illusion here. Finding them and taking vigorous action will be a high priority for us"***

In order to instigate prosecutions, Mr Alderman has invited companies to act as whistle-blowers on their rivals. He said:

***"I am prepared to take courageous action dealing with foreign corporations, but please help me with evidence. Tip me off and tell me there was corruption"***



- The Guidance issued by the Ministry of Justice stated that being listed on the London Stock Exchange would not automatically bring companies under the jurisdiction of the Act
- However, when asked whether such companies are at risk of prosecution under the Act, Alderman said:  
  
***" You bet we will go after foreign companies. This has been misunderstood. If there is an economic engagement with the UK then in my view they are carrying on a business in the UK "***
- In a similar approach to foreign companies, he said he would also prosecute large companies if they failed to police their contractors (something the MoJ guidance had suggested may not always be possible under the Act)

On 14 March 2012, *The Times* newspaper in the UK reported that the Department for International Development will support efforts to combat overseas corruption by passing on tip-offs about suspected bribes to enforcement agencies. According to the Department, information was not shared previously because of data protection concerns and bureaucracy

## Statistics relating to US and UK respondents to the survey

Despite guidance from various international sources:

- 20% did not have communication and training programs
- 33% did not perform ABC risk assessments
- 50% did not have a committee responsible for supervising compliance with ABC regulations
- 75% of US / 60% of UK did not have a full-time ABC compliance officer

Despite known compliance risks associated with third parties, agents, etc:

- 40% did not distribute their anti-bribery and corruption policies to 3<sup>rd</sup> parties
- 60% with ABC training programmes did not require any 3<sup>rd</sup> party participation
- More than 50% of US and 40% of UK did not obtain periodic compliance certifications from 3<sup>rd</sup> parties

- Undertake a risk assessment: assess where the greatest risks are. Understand differences between individual countries, business sectors and business partners, etc
- Review ABC policies and procedures to ensure that they comply with the Act - conduct a "gap analysis"
- Adopt a single minimum 'global' standard – supplemented by local policies and procedures designed to deal with local laws and risks
- Ensure that appropriate resources are devoted to compliance (with periodic audits, preferably by an independent law firm)
- Take account of prosecutor trends, business sector issues and geographical 'hot spots' in order to use compliance resources effectively

- Bribery Act and FCPA guidance is clear: "one size does not fit all"
  - procedures need to be tailored according to where, how and with who you do business
  - Procedures also need to be monitored and revised periodically
- Future challenges for compliance:
  - effective due diligence on foreign agents, third parties, *etc*
  - auditing third parties for compliance
  - variations in local laws (e.g. facilitation payments / data privacy)

- Keep your company off the regulatory radar
- Minimise or avoid the risk of enforcement action
- Protect company officers and employees from the threat of fines, imprisonment, disqualification, *etc*
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