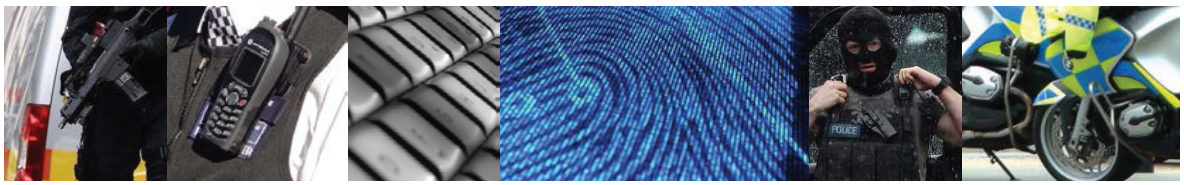
London First

‘Fighting Corruption - How Effective Are We?’

Breakfast briefing – 23 April 2014

Kindly hosted by Linklaters



FIGHTING CORRUPTION – HOW EFFECTIVE ARE WE?

On 23 April 2014 a breakfast debate was held by London First on the topic of 'Fighting Corruption – How Effective Are We?' The event was kindly hosted by Linklaters.

The debate was hosted and chaired by Satindar Dogra, Partner, Linklaters and the event was programmed around a series of short presentations from:

- **David Green CB QC**, Director, Serious Fraud Office.
- **Robert Barrington**, Executive Director, Transparency International (UK).

THE DEBATE

The impact of the UK Bribery Act (2010) has had significant consequences spanning far beyond the borders of the UK. Requiring companies to publish their anti-bribery policies, the landmark legal framework stipulated by UK Bribery Act (2010) is widely considered throughout the global community as the 'gold standard' of anti-bribery and anti-corruption legislation. However, while the Serious Fraud Office (SFO) has displayed an impressive determination to investigate and prosecute perpetrators of serious and complex fraud, the UK Bribery Act (2010) has been the subject of considerable interest, discussion and, in some instances, criticism as to its overall efficiency and effectiveness as an anti-money-laundering mechanism.

While historically under the old regime there have been very few successful prosecutions, the introduction of the UK Bribery Act (2010) has seen little change in this statistical trend. As English criminal law proposes considerable burdens upon prosecutors seeking to establish corporate criminal liability, the difficulties associated with corporate attribution and establishing a company's directing mind and will have not been alleviated by the introduction of the UK Bribery Act (2010). The addition of Deferred Prosecution Agreements (DPAs) in February 2014 has led to further scepticism over the active participation of corporates and whether DPAs will encourage companies to self-report.

MAKING THE CASE FOR THE BRIBERY ACT (2010)

While the legacy of the UK Bribery Act (2010) may still be in its infancy, the legislative framework laid out by the statute has been intentionally tough in its approach to corporate corruption. Having spawned a thriving industry of legal counsel and representation, the UK Bribery Act (2010) has brought to bear an industry-wide realisation and endemic awareness of the corrosive effects of bribery, particularly in the developed world where these perversions disrupt economic markets, consolidate and reinforce the power of corrupt elites and stunt upward economic and social mobility.

Charged with a mission to investigate and prosecute the top tier of serious and complex fraud and bribery, the SFO has utilised the statutory framework of the UK Bribery Act (2010) as a powerful tool to clearly separate the relationship between the SFO and corporates, precluding the possibility that lines between the two might once again become blurred. While the development of a 'tick-box' mentality on compliance among corporates remains a clear and present danger, the SFO continues to be dogged in its pursuit to expand existing criminal investigations as well as initiate new cases.

Amongst those existing investigations, the SFO has two cases which are currently awaiting trial: one alleging bribery of Nigerian tax officials, and the other asserting claims of bribes around Africa in return for lucrative contracts. In addition to having newly opened criminal investigations against Rolls Royce who are alleged to have perpetrated bribes throughout various sectors of business, the SFO has expanded inherited proceedings against ENRC for its activities in Kazakhstan and the Congo, and GPD and its relationship with the Saudi National Guard.

Producing results, however, is a lengthy process which requires patience and a consistent dedicated effort. With two cases currently on trial featuring three defendants and a further 11 cases featuring 32 defendants awaiting trial, the SFO is powerless to speed up the court process once the cases enter the judicial system.

The positive aspect of this lengthy engagement, however, is that with time also comes knowledge and the opportunity for extensive intelligence capacity-building. The SFO is developing an increasingly sophisticated picture of the threat landscape, identifying where the vulnerabilities lie beyond the classic sectors of construction, the extraction industries and infrastructure projects. Expanding on their analytical capability of open and closed sources of intelligence, the SFO has worked vigorously to strengthen existing links with the UK's national intelligence agencies in addition to its relationships with international entities so that a sensible and equitable division of labour can be negotiated and that organisational objectives and demands may be more efficiently achieved.

The SFO's increasing use of whistle-blowers and informants allied with an extensive array of other modern and lawful policing methods including – where appropriate – intrusive surveillance, the SFO has been able to look at crime in action, moving beyond the traditional method of looking at historical cases of fraud. As the collective body of knowledge gathered by the SFO increases, so too does the risk of criminality being discovered.

It is therefore with detection and deterrence in mind, that Deferred Prosecution Agreements were introduced earlier this year, under which a DPA prosecutor may charge a company with a criminal offence but automatically suspends any further criminal proceedings relating to that charge. DPAs are subject to corporate compliance and a company must agree to a number of conditions which may include paying a financial penalty, paying compensation and co-operating with future prosecutions for individuals. If the company does not honour the conditions stipulated by the agreement, the prosecution may resume.

While critics of DPA's maintain their scepticism – labelling them as a soft approach to corporate corruption and accusing the legislation of setting a dangerous precedent for corporates to commit offenses and evade prosecution – they remain an important tool for the SFO to gather evidence and information which may have otherwise never come to their attention. DPAs remain firmly under the jurisdiction and supervision of the courts and can only be permitted by a judge should they deem it to be in the public interest.

In return for their full compliance, a DPA allows the company in question to avoid prosecution, keep the matter quiet until the final hearing, and speed up the entire process saving both time and money. More importantly, however, it affords the company some degree of control over proceedings, as opposed to none whatsoever, and provides a degree of closure and certainty. It is this process, therefore, that the SFO expects will lead to an improved culture of prevention and compliance and, ultimately, an emergence of consistency and predictability through the observation of practice over time.

IS THE UK WINNING THE FIGHT AGAINST CORRUPTION?

Two hundred years ago the UK was undeniably fraught with corruption. Penetrating all levels of society, the UK was a country in which it was possible to buy a seat in parliament, to sway a trial in your favour by bribing the judiciary or jury, and in which an individual joined the armed forces not to fight for King and country but rather for the promise of financial reward. The UK of today, however, is a world far removed from that of two centuries ago. Ranking at a respectable fourteenth place on Transparency International's Corruption Perceptions Index (2013), efforts made by the UK Government, industry and the financial market have all had a dramatic and positive impact on the trajectory of the once corruptive practices of this country.

Despite these positive advances, however, the much improved position of the UK brings with it a danger of complacency: the physical signs of which are already becoming evident. In its recent opinion survey which looks at bribery worldwide, Transparency International found that respondents from the UK had paid bribes in 5% of cases in the past year, a figure which had previously been below 5%.

While the Prime Minister's announcement in October 2013 outlining plans to establish a National Anti-Corruption Action Plan was a welcome move on the part of the Government, the UK's overall approach to corruption remains potentially problematic. With many different departments under the jurisdiction of a wide range of security officials, the UK's chaotic approach to tackling corruption remains in stark contrast to the many countries overseas where it is common practice to assign responsibility for this function to one singular department or figure. As such, the National Anti-Corruption Action Plan has the potential to act as a game-changer in the UK's fight against corruption provided it can restructure existing ineffective and inefficient command structures.

Continued momentum to provide the SFO with the legislative framework, the resources, and political backing to facilitate its operations is also necessary if the UK is to consolidate and strengthen its resolve in the fight against corruption. While the UK Bribery Act (2010) has provided the much needed legislative foundation to the work of the SFO, the statute was largely in response to the 1997 OECD Anti-Bribery Convention making it 13 years out of date. In that time, those corrupt individuals willing to obfuscate their illegal activities have become highly successful in evading detection through pre-existing legislative processes. The UK Bribery Act (2010), therefore, needs to develop its legal position in line with modern requirements and employ legal mechanisms which make it fit for purpose in the 21st Century.

GLOBAL OUTLOOK

In the last two decades the global effort in the fight against corruption has seen a number of key positive advances:

1) **Increasing legislative framework**. One of the most effective tools that can be employed in the global effort to crack-down on corruption is to make such practices illegal and to support them with the necessary legislative framework and prosecutorial powers. While putting this framework into place has been challenging and hugely demanding, significant advances in the form of the OECD Anti-Bribery Convention, the UK Bribery Act (2010) and the UN Convention Against Corruption have all acted to facilitate progress in this area.

2) **Awareness of the problem, the task, and the progress**. Two decades ago there was no accepted measurement for corruption. In the last 20 years, however, our ability to quantify corruption has developed considerably following significant research efforts made by the global academic community. There now

exists a vast body of academic literature and methodology which underpins our understanding of corruption and how it operates, ultimately facilitating a more effective and targeted approach to fighting corruptive practices.

3) **Increased political will**. In recent years, the issue of corruption has crept its way up the agenda of political elites all over the world. Featuring prominently at both the G8 and G20 Summits, corruption has become a pressing issue which is now being taken seriously by governments across the globe, spurring on international co-operation.

4) **Citizen engagement**. As the presence of corruption in governments, industry and financial markets has become more pronounced, the vox populi has become increasingly dissatisfied. Recent revolutionary movements in Tunisia, Egypt, Libya, Syria, Ukraine, and throughout South America have all taken a hostile stance which is distinctly anti-corruption in tone. Allied with a rise in transparency – largely the effect of the advent of social-media platforms in the last decade – the role of the citizen has become increasingly participatory and is proving to be a powerful catalyst for change and a formidable force in the face of injustice.

FUTURE CHALLENGES

While there have been a number of global advances in recent years in the fight against corruption, as we look ahead to the future there are still several challenges and threats that we will need to face:

1) **Complicity**. There remains a culture in the UK of doing business with the independently wealthy without questioning the origin of their money, a common practice in which London has distinguished itself. As such, the global attitude towards the UK is one of ambivalence. While there is a sense of admiration for the UK with its rule of law and independent judiciary, there is significant apprehension by many who see London as a ‘clearing house’ for corruption.

2) **Lack of enforcement**. Having a legal framework which is not enforced to the full extent of the law will prove to be insufficient in the fight against corruption. It is critical that the SFO and other enforcement agencies are given the tools and resources to commit to a dedicated and thorough effort which is fit for the 21st Century.

3) **Consistency**. There is a common perception, particularly among British business, that international efforts to tackle corruption are not taking place on a ‘level playing field’. While the UK has instituted its own bribery legislation there needs to the equivalent legislation throughout the globe in order to co-ordinate international efforts. Therefore, anti-corruption needs to be kept at the top of the agenda at the G8 and other international forums so as to exert pressure on foreign governments to institute change.