Bargains and the backlash

The UK's new laws on bribery and corruption may be among the world's toughest, but a judicial backlash against plea bargaining is already raising enforcement difficulties.

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The United Kingdom has long had a lamentable reputation when it comes to corporate corruption overseas. That's not because its companies are especially more willing than others to pay bribes. A corrupt foreign official on the take is more likely to get a bribe from an Australian, French or Spanish company, according to Transparency International, the anti-corruption group. The UK's problem is its record of prosecuting corrupt companies, which has been dire.

The country has talked tough on corruption for over a decade. It signed the OECD's Anti-bribery Convention back in 1997, pledging itself to take overseas corruption seriously. But in the 13 years that followed it convicted not a single company of corruption overseas.

The lack of action was partly attributable to the UK's archaic corruption laws. The OECD said as long ago as 2003 that legal reform was needed; four years later it expressed 'serious concern' that new legislation was still not in place. But the Serious Fraud Office (SFO), the country's lead enforcement agency, must shoulder its share of the blame. Until recently, it simply didn't treat overseas corruption as a priority issue.

Confessing corruption

Lately, there has been change on both fronts. A new Bribery Act was finally passed in April this year, making it easier to prosecute companies and individuals for corruption. The Act creates a new general offence of bribery, a specific offence of bribing foreign officials, and a corporate offence of failing to prevent bribery. And over the last 18 months, the SFO has shown greater willingness to enforce laws that were already in place. It has adopted a new strategy, based on a carrot and stick approach. Companies that self-report their corruption concerns are offered the prospect of a quick investigation and a plea bargain. Those that don't play ball must face the full force of the law.

With the Bribery Act finally in force, the UK has made the leap from laggard to leader, at least on paper. It has one of the toughest foreign corruption regimes in the world. A zero-tolerance approach to 'facilitation payments', for example, puts it ahead of the fearsome US Foreign Corrupt Practices Act. But its carrot and stick approach has already provoked a backlash from the judiciary. And

anti-corruption campaigners question whether the new laws will make any difference if they are wielded by an SFO that is too willing to settle, rather than prosecute.

Plea bargaining, common in many jurisdictions, is anathema to the UK legal system. The country's judges have always reserved the right to impose whatever sentence they feel appropriate. Defence and prosecution in a case can informally discuss a potential plea, but there was never any legal protocol covering how those discussions should take place. And judges were clear they would not tolerate any cosy deals.

This changed in May 2009. The Attorney General, the Government's top legal official, published new guidelines that allow prosecution and defence to hold formal plea talks and put an agreed case to a judge. The rules only apply to matters of serious fraud and corruption. The aim was to control the spiralling cost of taking such cases to court.

When the new plea deal powers took effect, the SFO published separate guidance aimed at encouraging companies that have uncovered suspicions of corruption to blow the whistle on themselves. Those that come forward early in this way are offered the chance of having their failings dealt with as a civil rather than criminal matter, where possible.

One significant feature of the new approach is that it is based only on guidance – the established rules of legal process were not changed, meaning that presiding judges were left firmly in charge. Prosecutors are explicitly not allowed to offer a deal on sentence, or to make sentence a condition of plea. That raised a question: when the SFO started bringing plea-bargain cases to court, how would the judiciary respond? The SFO might do a deal with a defendant, but would a judge accept it?

The early signs were positive for the SFO. It scored its first victory with its new approach last year when construction business Mabey & Johnson became the first UK company to be convicted of overseas corruption charges. Under a deal with the SFO, the company pleaded guilty to a set of charges and agreed to pay a financial penalty, compensation, legal costs, and the cost of an independent compliance monitor. The company admitted it paid £1 million in bribes in Jamaica, Ghana and Iraq to win export orders worth over £60 million. It also broke United Nations sanctions by paying money to Saddam Hussein's regime in Iraq. The courts accepted the deal, fined the company £3.5 million and ordered it to pay a confiscation order and costs.

But, while the Mabey & Johnson case went smoothly, trouble was already brewing with another, more controversial, plea deal.

Plea or prosecute

The SFO had long been investigating arms company BAE Systems over allegations that it systematically paid bribes to win contracts worth billions of pounds. In September 2009, it gave the company a deadline to reach a plea deal or face prosecution. Media reports suggested the prosecutor was looking for a fine of between £500 million and £1 billion. The deadline came and went, so the SFO said it would ask for leave to prosecute. In the end, it didn't, and agreed a deal that would see BAE pay a £30 million fine and admit UK accounting infractions. The US authorities, meanwhile, hit the company for $400 million, making the UK end of the deal appear soft in comparison.

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Anti-corruption campaigners were outraged by the settlement. Campaign Against Arms Trade and The Corner House, two pressure groups, said they were 'shocked and angered' by the deal. 'As a result of the settlement there will be no opportunity to discover the truth behind alleged bribery and corruption in the many BAE deals that were under investigation,' they said in a joint statement. 'The UK penalty is a tiny price for BAE to pay to see the end of the investigations that had been gathering evidence for years and were coming to a head.'

The UK end of the BAE deal has not – at time of writing – come before a court for approval. But judges have ruled on two other cases involving SFO plea deals, and taken the opportunity to lambast the prosecutor's approach to bribery and corruption offences.

In one of those cases, a judge ignored an SFO request that Robert Dougall, a Company Director involved in corruption, be given a suspended sentence. Instead, it sentenced him to 12 months in jail, making Dougall the first UK executive to receive a custodial sentence for overseas corruption offences (the sentence was suspended after an appeal the following month).

Dougall, former Marketing Director at medical supplies company DePuy

International, had admitted his involvement in making corrupt payments of £4.5 million to people working for the Greek state health system. The SFO said he was its first ever 'co-operating defendant' in a major corruption case and had given the agency 'substantial assistance' with its ongoing investigations. The judge who wanted to send him to jail accepted the public policy interest in encouraging cooperation from defendants, but said: 'It does not justify a suspended sentence in a case where corruption was systemic and long-term and involved several million pounds in corrupt payments.'

In the other case, judicial criticism of the SFO was even more stinging. Lord Justice Thomas criticised a plea deal that the agency reached with chemicals company Innospec, saying the SFO 'had no power to enter into the arrangements made and no such arrangements should be made again'. Thomas said he wanted to fine the company 'tens of millions' for its corrupt practices in Indonesia. But a joint plea deal that the SFO agreed with US prosecutors involved in the case restricted the sentence the judge could impose to a

An Anti-Corruption Strategy for the Legal Profession

In April this year, the IBA launched its 'Anti-Corruption Strategy for the Legal Profession' project with support from the Organisation for Economic Co-operation and Development (OECD) and the United Nations Office on Drugs and Crime (UNODC). The global initiative aims to raise awareness among legal professionals about existing international anti-corruption instruments and equip lawyers with the necessary tools and knowledge to identify, address and resolve potential threats to the integrity of the legal profession caused by corruption.

Addressing delegates at the Biannual IBA Latin American Regional Forum Conference in Santiago, Chile, IBA President, Fernando Peláez-Pier, said: 'Private legal practitioners are a missing piece in the structure of the global fight against corruption. I am therefore delighted that the IBA is joining forces with the most prominent international organisations in the field, the OECD and UNODC, who have expressed their support for this IBA initiative. This project will empower lawyers to assume their role as champions in this key battle against one of the major threats to global development.'

The project consists of three main activities:

The IBA will produce a global report on the risks and threats of corruption in the legal profession, based on the results of a major international survey conducted by the IBA and on research in the area conducted by the IBA's legal projects team. The report will be presented at the IBA Annual Conference in Vancouver, Canada, being held on 3–8 October 2010.

The IBA will conduct a series of in-country training sessions for senior-level private practitioners. The initial training sessions will take place in the second half of this year in five Latin American jurisdictions – Argentina, Chile, Colombia, Mexico and Peru – and will pave the way for similar future training in other regions of the world, such as Asia and the CIS.

The IBA will organise sessions at various IBA conferences around the world to analyse developments and further advance the project.

Nicola Bonucci, Director of Legal Affairs of the OECD and IBA Anti-Corruption Committee Vice-Chair, said: 'The OECD applauds this sector-based initiative in the fight against bribery and all forms of corruption. This Strategy for the Legal Profession will hopefully set the standard for many other businesses and professions to start taking concrete steps towards this common end. We look forward to supporting the Strategy for the Legal Profession and to IBA's ongoing support for the OECD's own Initiative to Raise Global Awareness of Foreign Bribery.'

Dimitri Vlassis, Head of the Corruption and Economic Crime Branch at UNODC, added, 'The role of intermediaries and specialised professionals is crucial to the success of efforts to prevent and control corruption. In a world where international business transactions have become more diverse and complex than ever before, lawyers need to possess detailed knowledge of a host of issues that may arise, especially as a result of the implementation of the United Nations Convention against Corruption, the only global and most comprehensive legal framework against corruption, so they can properly advise their clients and safeguard the integrity of their profession.'

The different activities and achievements of this project will be published periodically on the IBA website at: http://tinyurl.com/anticorruption-iba

'wholly inadequate' £8 million fine.

It's notable that Thomas, the UK's Deputy Head of Criminal Justice, presided in this case. The Innospec sentencing was due to be handled by a more junior judge, but Thomas took over because the plea deal agreed by the SFO raised constitutional issues.

Judicial backlash

Such weighty criticism will make it more difficult for the SFO to implement its anti-bribery and corruption strategy. Chris Colbridge, Partner at law firm Kirkland & Ellis, believes the SFO will find it harder to offer a defendant, or a fellow prosecuting agency, any certainty about the outcome of a plea discussion. 'The SFO should be nervous about giving any assurances. They can only go so far, and defendants should now be very aware of that,' he says.

The SFO declined a request for an interview about the implications of the Innospec and DePuy cases. It seems inevitable that it will need to rethink its approach, and the guidelines that it works by will have to change.

If the SFO needs the authority to offer certainty to defendants and foreign prosecutors, then UK judges may have to accept that their powers will be curtailed, at least in some circumstances. The judiciary might not agree to that, says Louise Delahunty, a business crime specialist at lawyers Simmons & Simmons and a member of the IBA's Anti-Corruption Committee. 'You can say that we need to change the rules, but judicial discretion on sentencing is a fundamental and historic part of our criminal justice system,' she says. 'Any fettering of that discretion may be seen as an attack on judges' independence.'

Even if the SFO can win the judges over to its way of thinking, limiting the power of the judiciary could require new legislation, which would be time-consuming. 'The question that people are asking is, what happens in the meantime?' says Delahunty. 'There is a worry that in this confusion companies will not come forward to self-report because there isn't any clarity about what will happen. It is very concerning and needs to be dealt with quite urgently.'

While the Innospec and DePuy ruling will make life more difficult for the SFO – at least in the short term – anti-corruption campaigners have welcomed them. 'The judicial backlash against the SFO's approach is extremely welcome from the viewpoint of a fair justice system,' says Susan Hawley of campaign group Corruption Watch. 'Both judgments show that white collar crime should not be treated with different criteria than any other form of crime,' she said. The Innospec judgment 'was absolutely ground-breaking in putting overseas corruption on the legal map by calling it one of the most serious offences a company can commit'.

Hawley wants an SFO that is more willing to prosecute offenders. The Head of the SFO, Richard Alderman, has talked about wanting to be helpful to companies and to offer them advice, she says. The agency employs fewer prosecutors than it used to and is rushing too fast to copy a plea and settlement strategy that the US authorities have spent decades finessing. 'I think the SFO's approach on corruption under Alderman has been too soft,' she says. 'It's a lot of carrot and not much stick. Companies that don't need to self-report are unlikely to do so if they don't think there is any meaningful likelihood of being caught and prosecuted.' The self-reporting system devised by the SFO offers little hard deterrent, she argues.

Chandu Krishnan, Executive Director of Transparency International UK, says he wants to see how the Bribery Act beds down before deciding whether the SFO is being too soft on companies. Prosecution 'should be the norm', he says, because bribery and corruption are serious offences. But he adds, 'one can also see where there may be situations where prosecutors will determine that it is in the public interest that there be a negotiated settlement'.

'The crucial thing,' Krishnan says, 'is that when a decision is taken to go for a negotiated settlement, then it should be done in a totally transparent way. The criteria on the basis of which that decision is taken should be made clear and there should be consistency. It is possible that we are still some way from attaining that.'

The SFO needs its self-reporting and plea dealing approach to work, not least because its already stretched resources are being cut. Its £51 million resource budget for 2008/9 was reduced to £45 million in the current year and is due to shrink further to £37 million next year. 'But it is wrong to get into the mentality of saying resources are going to be limited so it may be better to go for more negotiated settlements,' says Krishnan. 'The resource issue should not be driving enforcement strategy. It is a question of justice, that should be the main principle.'

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