



**DETECTING
AND PUNISHING
CORPORATE BRIBERY**

POLICY PAPER SERIES
NUMBER ONE

AN EVALUATION OF
UK CORPORATE PLEA
AGREEMENTS AND CIVIL
RECOVERY IN OVERSEAS
BRIBERY CASES

Transparency International (TI) is the world's leading non-governmental anti-corruption organisation. With more than 90 Chapters worldwide, TI has extensive global expertise and understanding of corruption.

Transparency International UK (TI-UK) is the UK chapter of TI. We raise awareness about corruption; advocate legal and regulatory reform at national and international levels; design practical tools for institutions, individuals and companies wishing to combat corruption; and act as a leading centre of anti-corruption expertise in the UK.

Acknowledgements

We are grateful to Helen Garlick and Ian Trumper of the Transparency International UK board for researching and drafting this policy paper. It was first issued as a consultation paper in December 2011. We would like to thank the **European Commission – Directorate-General Home Affairs** for funding this Policy Paper series as part of an EU-wide European National Integrity Systems project coordinated by Transparency International.

Publisher: Transparency International UK

Editors: Helen Garlick & Ian Trumper

First published May 2012

© 2012 Transparency International UK. All rights reserved. Reproduction in whole or in parts is permitted, providing that full credit is given to Transparency International and provided that any such reproduction, whether in whole or in parts, is not sold unless incorporated in other works.

For more information on Transparency International UK, please contact us at:
32-36 Loman Street, London SE1 0EH; Tel 0207 922 7906; www.transparency.org.uk

Disclaimer

Every effort has been made to verify the accuracy of the information contained in this report. All information was believed to be correct as of December 2011. Nevertheless, Transparency International UK cannot accept responsibility for the consequences of its use for other purposes or in other contexts. Policy recommendations reflect Transparency International UK's opinion. They should not be taken to represent the views of those quoted or interviewed unless specifically stated. This project has been funded with support from Prevention of and Fight against Crime Programme European Commission - Directorate-General Home Affairs. This publication reflects the views only of the publisher, and the Commission cannot be held responsible for any use which may be made of the information contained therein.



Prevention of and Fight Against Crime.

With financial support from the Prevention of and Fight Against Crime Programme.

European Commission - Directorate-General Home Affairs

Foreword

Since 2008 there have been some major advances in the prosecution of overseas bribery cases in the UK. There are a number of reasons for this improved enforcement of the OECD Anti-Bribery Convention, one of which is the introduction in March 2008 of the use by the Serious Fraud Office of the Proceeds of Crime Act 2002 to settle cases through the civil courts. There have also been a number of criminal prosecutions of both corporates and individuals which have involved plea agreements conducted under the Guidelines issued by the Attorney General in cases of serious or complex fraud, which enable plea discussions to take place at an early stage of an investigation.

Such initiatives have provided a platform for prosecutors to settle complex cases, which are both costly and difficult to prosecute. Equally, the exercise of prosecutorial discretion in deciding how best to settle cases in the public interest has given rise to some uncertainty as to the outcome of cases, which has been compounded by inconsistent charges and sentencing. This paper seeks to identify the problems faced by prosecutors and companies in trying to settle cases of overseas bribery against the background of the current legal system and practice, and to make some recommendations to improve transparency, recognising that bribery is a serious criminal offence and there is a strong public interest in seeing offenders prosecuted.

This subject matter is complex and TI-UK is grateful in particular for the support given by Jordan Howells. TI-UK invited a number of people prominent in this field, including Andrew Mitchell QC as well as the SFO and FSA, to comment on our analysis and findings. Their comments were useful both in ensuring that the factual basis of the paper was sound and in getting some alternative perspectives on what could be described as negotiated justice.

The UK government has recently published a consultation paper on Deferred Prosecution Agreements, and TI-UK hopes that this Policy Paper will provide a useful contribution to the development of law and practice over the prosecution and settlement of overseas bribery cases.

Helen Garlick

Board Member
Transparency International UK

Ian Trumper

Board Member
Transparency International UK

Table of Contents

EXECUTIVE SUMMARY	5
SECTION 1 – INTRODUCTION	9
SECTION 2 – PLEA AGREEMENTS AND CIVIL SETTLEMENTS: THE LEGAL FRAMEWORK	13
2.1 The legal framework that governs plea agreements	13
2.2 Protocols that govern the conduct of prosecutors	15
2.3 Plea negotiations	18
2.4 Principles of civil recovery	22
SECTION 3 – SENTENCING	24
3.1 Fines	24
3.2 Confiscation	26
3.3 Rehabilitation (monitors).....	27
3.4 Restitution (compensation).....	27
3.5 Debarment.....	28
SECTION 4 – ALTERNATIVE LEGAL PROCEDURES.....	29
4.1 Prosecutions in the US for FCPA offences	29
4.2 Other jurisdictions	30
SECTION 5 – CASE STUDIES IN CRIMINAL PROCEEDINGS	31
5.1 Mabey & Johnson – September 2009	31
5.2 Innospec Ltd – March 2010	33
5.3 The BAE Systems case – December 2010	36
SECTION 6 – COMMENTARY AND ISSUES IN CRIMINAL PLEA AGREEMENTS	41
6.1 Prosecution conduct	41
6.2 Sentencing issues	47
SECTION 7 – CASE STUDIES IN CIVIL SETTLEMENTS	54
7.1 Balfour Beatty – October 2008	54
7.2 AMEC – October 2009	55
7.3 Aon settlement with the FSA – January 2009	56
7.4 M W Kellogg Ltd – February 2011.....	58
7.5 DePuy – April 2011.....	59
7.6 Macmillan Publishers – July 2011	61
7.7 Willis settlement with the FSA – July 2011	62

SECTION 8 – COMMENTARY AND ISSUES ON CIVIL SETTLEMENTS.....	63
8.1 Use of civil powers under POCA	63
8.2 Prosecution practice	63
8.3 Sentencing issues	66
8.4 The role of the FSA	69
SECTION 9 – EMERGING ISSUES AND RECOMMENDATIONS	71
9.1 Primacy of criminal settlements.....	71
9.2 Transparency.....	71
9.3 The respective roles of the judiciary and prosecutor in criminal plea agreements	72
9.4 Seriousness of overseas bribery	73
9.5 Rehabilitation – appointment of monitors	75
9.6 Bribery offences and debarment	75
9.7 Limitations of civil settlements	76
9.8 Deferred prosecutions	77
9.9 International cooperation on investigations and prosecutions	77

Executive Summary

The UK has been criticised for a decade for failing to prioritise the investigation and prosecution of overseas bribery. The criticism has receded over the past two years in the light of an improved enforcement record by the Serious Fraud Office (SFO) and the enactment of the Bribery Act 2010. The UK's record has in part improved due to the use of plea agreements in criminal proceedings and Civil Recovery Orders. However, civil powers of recovery were designed for other purposes, and their use has revealed a number of challenges and deficiencies, leading to concerns over their appropriateness and in consequence the handling of cases by the SFO.

This has created uncertainty in the minds of both the business community and civil society about the circumstances in which a prosecution will take place, the likelihood of some form of plea agreement, the range of sentencing, fines and asset forfeiture, the risk of debarment and the extent to which multi-jurisdictional offences can be definitively settled in the UK.

There is now a sufficient number of UK cases to allow an informed discussion of the trends in enforcement and understand where the current system is working and not working. It is particularly important to examine the subject at this time as prosecutors, companies, legislators and the wider public need to know whether the instruments available to prosecutors are sufficient to ensure that enforcement is effective under the Bribery Act, especially at a time of static or declining resources for prosecutors.

This paper is at times critical of the use of civil powers to settle criminal cases for a number of reasons, including lack of transparency, poor labelling of the criminal conduct, unclear principles for determining the amount to be confiscated, and other issues. However, TI-UK does accept that in some cases it is in the public interest to settle cases using these civil powers, if the alternative is no resolution of the case at all.

This paper therefore seeks to:

- analyse and explain trends in UK enforcement of foreign bribery cases and the change in context brought about by the Bribery Act;
- address whether the use of civil settlements, using powers under the Proceeds of Crime Act 2002 (POCA), are appropriate and effective;
- examine what alternative instruments are available, such as Deferred Prosecution Agreements (DPA) which are used in the US, and how appropriate they might be in the UK context in helping to achieve a system that is more predictable and transparent; and
- make recommendations to the UK government and prosecuting authorities that will help to ensure just, fair and transparent outcomes.

Overall, the intention is to provide a comprehensive analysis of the current landscape and help to stimulate a debate that will lead to better outcomes for both companies and the victims of bribery. If the UK legal system can achieve a reputation for certainty, consistency, fairness and transparency, it will encourage self-reporting and a just determination of overseas bribery cases. Transparency International (TI-UK) is of the view that the right balance, both on the exercising of prosecutorial discretion and in sentencing, has yet to be realised.

Transparency International (TI) has previously published a set of four global guiding principles on settlements. This paper builds on those guiding principles to make 23 recommendations in the UK context:

Recommendation 1: Guiding Principles

A UK settlements regime should follow the following guiding principles:

- i) **Judicial scrutiny:** all settlements should be subject to judicial scrutiny independent from the prosecutor's office;
- ii) **Sentencing:** prosecution of individuals should always remain possible with prison terms for severe wrongdoing. Corporate fines should exceed any profit derived from wrongdoing. Debarment should be considered and linked with acknowledgment of guilt;
- iii) **Restitution:** there should be restitution to the country that suffered from the offence;
- iv) **International cooperation:** there should be cooperation between the UK and other States to facilitate prosecutions in those countries where the offences took place;
- v) **Corporate compliance programmes:** companies that reach a settlement should commit to compliance programmes with the appointment of an independent expert monitor where remedial action is warranted.

Recommendation 2: Criminal prosecutions

Criminal prosecutions of both corporates and individuals should be the norm where the tests under the Code for Crown Prosecutors are met. The use of civil settlements should only be used where there is either insufficient evidence to a criminal standard or there is a strong public interest case not to proceed with a criminal trial, and in those circumstances the prosecutor's reasoning should be made public.

Recommendation 3: Prosecution of senior managers and directors

Where there is sufficient evidence to prosecute the company, the individuals who acted as its guiding mind should also be subject to criminal proceedings. Where a settlement or plea agreement is made with the company, a decision to abandon the prosecution of responsible individuals must be subject to rational and consistent criteria, as set out in the Code for Crown Prosecutors, and should be the exception rather than the rule.

Recommendation 4: Transparency

The SFO should publish far more information on all civil settlements as do, for example, the FSA and DOJ. The nature of the underlying criminal conduct should be accurately and fully described in the documents placed before the courts.

Recommendation 5: Independent review

An independent body should be considered, such as a parliamentary select committee, with a formal role in reviewing sensitive cases with a view to making recommendations on any necessary changes of law and practice.

Recommendation 6: Protocols in international cases

The Attorney General should agree some form of protocol or Memorandum of Understanding with his counterparts, especially with the USA, which deals with the underlying principles of settling concurrent jurisdictional issues. Decisions should be taken on grounds of public interest rather than narrow national self-interest. Defendants should not be encouraged to believe that they can forum shop in the expectation that they can play jurisdictions against each other.

Recommendation 7: Double jeopardy

Double jeopardy should not be used to frustrate criminal proceedings in the UK, in those cases where there is a strong public interest to argue for primacy of the UK courts. In those cases where double jeopardy is pleaded as a reason for not proceeding with criminal charges it should be fully reasoned and publicly justified. The SFO should contribute to the legal debate over double jeopardy by publicly explaining its view on the application of double jeopardy in US and European cases.

Recommendation 8: Sentencing guidelines

The Sentencing Guidelines Council should issue guidance on sentencing in overseas bribery cases, reflecting the seriousness of the offences, the damage that bribery inflicts on society and to provide an effective deterrent to future corporate offending. There should be greater clarity and certainty over the level of fines and the method of calculation, and the aggravating or mitigating factors that should be taken into account in the sentencing.

Recommendation 9: Guidance on recoverable amount

There should be published guidance on what factors to take into account when determining the “recoverable amount” for the purposes of civil settlements under POCA in foreign bribery cases. TI-UK does not consider that it is appropriate to set the recoverable amount at the net profit obtained by the company in all cases. To do so would limit restitution to the disgorgement of profits and fail to provide an effective deterrent to future offending.

Recommendation 10: Compensation of victim countries

Victim countries should receive restitution and prosecutors should work with development agencies, such as DFID, to manage this process.

Recommendation 11: Control over compensation payments

Convicted companies should not be allowed to play any role in devising and implementing compensation arrangements. The convicted company should have no element of control over the disbursement of the payments that were subject to the court order or terms of the settlement agreement.

Recommendation 12: Corporate liability

The work of the Law Commission on corporate criminal liability should be finalised as soon as possible to enable the SFO to seek to clarify its application in respect of offences under the Bribery Act and if necessary test its interpretation before the courts.

Recommendation 13: Review use of civil recovery procedures

Given the present level of uncertainty concerning the rationale for civil settlements there should be a full review of whether the current procedures governing civil settlements are sufficiently robust and transparent in dealing with serious offending in bribery cases.

Recommendation 14: Clarity over when to use civil powers

There must be good and published criteria to depart from a criminal prosecution, with clarity and transparency on the principles adopted by prosecutors in deciding when to use civil recovery in overseas bribery cases.

Recommendation 15: Protocol in using civil powers

There should be a published protocol for conducting civil recovery negotiations, as there is for criminal plea discussions; currently there is no obligation to explain prosecutorial decision-making in the civil court proceedings.

Recommendation 16: Rationale for using civil powers

The SFO should as a matter of standard practice publish its reasoning for using civil powers and be prepared to disclose details of the compromise agreement in much the same way as the DOJ does with DPAs.

Recommendation 17: No blanket immunities

No plea agreement should include a term granting a blanket indemnity from prosecution for undisclosed criminal acts committed in the past. The SFO should consider including this fundamental principle in its self-reporting Guidelines.

Recommendation 18: Proper labelling of bribery offences

Prosecutors should properly label bribery offences and not select alternative charges in order to avoid mandatory debarment, which is a logical and fair outcome in certain cases as it provides a very strong deterrent to corporate offending.

Recommendation 19: Debarment

There should be more clarity on the process for entering and exiting the debarment process, including taking into account any remedial action taken by the company. TI-UK recognises that the current uncertainty over the risk and nature of debarment can play a disproportionate role in plea negotiations, which may result in an inappropriate charge being laid before the court.

Recommendation 20: Appointment of Monitors

The process by which Monitors are appointed, their terms of reference, their powers and reporting need to be subject to clear published guidelines.

Recommendation 21: Sanctions available to Monitors

The Government should consider whether the present law and/or practice needs to be changed in order to support the work of Monitors by the imposition of appropriate sanctions in cases in which a company is not abiding by the terms of a settlement. There is a need to ensure that effective sanctions are available to prosecutors should there be breaches of the agreed terms of compliance programmes that were an integral part of the criminal plea agreement or compromise agreement under a civil settlement.

Recommendation 22: Earlier judicial oversight

Prosecutors should have access to the Court at an earlier stage in plea negotiations to obtain tacit judicial approval of plea agreements and to obtain an indicative range of the fine and confiscation. It is important that whatever extended role is played by the judiciary, the independence and separation of powers between the judiciary and prosecutors is not undermined.

Recommendation 23: Use of Deferred Prosecution Agreements

The Government should consider the introduction of DPAs or some similar sentencing procedure after a thorough assessment of the alternatives. DPAs have proved to be a useful procedure to settle FCPA cases in the USA but the process has also been criticised with little judicial oversight.

Section 1 Introduction

1. In the recent past, the UK has been criticised for failing to prioritise the investigation and prosecution of overseas bribery. Arguably, that criticism has diminished since the UK has improved its enforcement record and the focus of that criticism has been directed at other countries. Despite a deficient law on overseas bribery,¹ since 2008 the Serious Fraud Office (SFO) has brought criminal proceedings using “plea agreements”² in a number of cases, or alternatively used Civil Recovery Orders³ before the High Court, against both corporates and individuals.⁴
2. Civil recovery, as an alternative to prosecution, is the primary incentive for promoting the self-reporting agenda that is being encouraged by the SFO. Whilst it is recognised that it is in the public interest to incentivise self-reporting, and that in certain cases this may lead to civil recovery where a criminal prosecution would be very difficult, Transparency International UK (“TI-UK”) seeks to address whether the use of civil settlements, using powers under the Proceeds of Crime Act 2002 (“POCA”), delivers the basic requirements of just, fair and transparent outcomes.
3. Whilst civil powers under POCA may have aided enforcement options in overseas bribery cases, nevertheless the UK Government recognised the need to reform and to strengthen anti-corruption laws. This aim was brought to fruition through the enactment of the Bribery Act 2010 (“the Bribery Act”), which came into force on 1 July 2011. The Bribery Act has a specific offence of bribing an overseas government official, and introduces a new corporate criminal offence of failing to prevent bribery by associated persons.⁵ TI-UK believes that it is timely, therefore, for a critical examination of the underlying legal principles and practice which have a bearing upon how criminal cases against corporates for overseas bribery cases have been settled in the UK, through both the criminal and civil courts.
4. The cases that have been brought in the UK to date have raised some concerns over the handling of cases by the SFO, including the exercise of prosecutorial discretion coupled with certain procedural, constitutional and other substantive constraints within the justice system that have been exposed in dealing with these significant cases.
5. TI-UK believes that there exists sufficient precedent to enable an assessment of the handling of overseas bribery cases to date, and to predict the challenges that will exist in enforcing the Bribery Act effectively, fairly, consistently and with the transparency that both civil society, business and the wider public requires and expects.
6. Over the past three years there have been a number of guilty pleas (“plea agreements”) in criminal proceedings and Civil Recovery Orders under the Proceeds of Crime Act 2002 (“civil settlements”) resulting from corruption investigations, predominantly brought by the SFO. The handling of many of these cases has drawn criticism from the judiciary and from the NGO community, especially the long-running case of BAE Systems plc (“BAE”) that culminated in a plea agreement for an offence of failing to keep proper books and records and not for corruption offences.
7. The first civil settlement by the SFO was with Balfour Beatty plc (“Balfour Beatty”) in October 2008. The first company to be prosecuted in the UK for an overseas bribery offence was Mabey & Johnson

¹ OECD United Kingdom Phase 2bis report 16 October 2008.

² During the period to July 2011, the SFO has negotiated plea agreements in criminal proceedings with three companies, Mabey & Johnson, Innospec and BAE.

³ During the period to July 2011, the SFO has obtained civil recovery orders under POCA 2002 against four companies: Balfour Beatty, AMEC, M W Kellogg, DePuy International and Macmillan Publishers Ltd.

⁴ During the period to July 2011, eight individuals have been prosecuted in corruption or sanction breaking related cases: Robert Dougall (DePuy International), Julian Messent (PWS International), Richard Forsyth, David Mabey, Richard Gledhill (all Mabey & Johnson), Riad El-Taher, Aftab Noor Al-Hassan and Mark Jessop (all re the Iraq Oil for Food programme).

⁵ Section 7 Bribery Act 2010 – Failure of commercial organisations to prevent bribery.

("M&J") in September 2009. M&J was charged with offences under the old anti-corruption legislation that dated back to 1906.⁶ M&J cooperated with the SFO and the case was resolved by way of a plea agreement. There followed the leading case of Innospec Ltd ("Innospec"), where the sentencing remarks of Lord Justice Thomas laid down some clear markers as to the respective roles of the SFO and the judiciary in plea negotiations and important commentary on sentences.

8. Transparency International (TI) has published guiding principles on settlements which appear on the TI website.⁷ These guiding principles reflect the views expressed by several Chapters from across the TI movement, where different legal systems will give rise to different forms of investigation and prosecution. TI has recommended that settlements should be based on the following underlying general principles:

1. Judicial review of settlement

All settlements should be subject to judicial scrutiny independent from the prosecutor's office. The review should include a public hearing and take into account the views of other affected stakeholders. The detailed conclusions of the review should be made public.

2. Sanctions on individuals and corporations

Prosecution of individuals should always remain possible with prison terms for severe wrongdoing. Corporate fines should exceed any profit derived from wrongdoing. Debarment should be considered and linked with acknowledgment of guilt.

3. Investigation and prosecution where the offence was committed

There should be cooperation between States to facilitate prosecutions in those countries where the offences took place.

4. Anti-corruption fight

Companies should commit to compliance programs with the appointment of an independent expert monitor. There should be restitution to the country that suffered from the offence.

9. These principles are highly relevant to guide the development of UK practice in the investigation and prosecution of overseas bribery. This paper endorses a principled approach to prosecuting overseas bribery; that the exercise of prosecutorial discretion be transparent and accountable and that the sentencing, or if sentencing is not possible, the settlement of cases be on clear, fair and principled basis in the interests of justice and provide effective deterrence.
10. In the UK, Principle 4 above has become increasingly important in relation to Section 7 of the Bribery Act which encourages companies to put in place adequate procedures to prevent bribery taking place. The UK Government has issued guidelines on what it regards to be "adequate procedures"⁸ and guidance on best practice has been published by TI-UK.⁹ An examination of compliance with these procedures is outside the scope of this paper, except the issue of monitorships.
11. The principal concerns that TI-UK has identified are whether pleas in criminal cases and civil settlement negotiations that take place between the defendant company/individuals and the prosecutor are sufficiently subject to judicial scrutiny, and that sentencing adequately reflects the underlying criminal conduct in order to provide an effective deterrent to future offending. TI-UK is also concerned with ensuring that the outcome of overseas bribery cases are sufficiently transparent to public scrutiny, to provide a means to assess whether the case has been approached in a principled way so that, if necessary, the law and practice in this area is developed to provide greater certainty of outcome.

⁶ Both Innospec and M&J were charged with conspiracy to corrupt, Criminal Law Act 1977 in association with the directors, contrary to the Prevention of Corruption Act 1906.

⁷ www.transparency.org/policy-research

⁸ www.justice.gov.uk

⁹ www.transparency.org.uk

12. The legal framework that governs the practices used by the UK enforcement authorities is set out in Section 2. In particular, it examines the policies and associated decision-making processes of the SFO in determining whether to settle a case through the criminal courts based on a plea agreement, or whether to use their powers of civil recovery. There has yet to be a contested trial in the criminal courts of a company accused of bribing overseas officials; all criminal cases to date have been settled by way of plea agreements.
13. Plea agreements and settlements in criminal cases necessarily involve negotiation between the prosecutor and the defence. The SFO exercises prosecutorial discretion in deciding what charges to bring against a defendant, having regard to the Code for Crown Prosecutors and by other guidance issued by the Attorney General on such topics as plea negotiations and the prosecution of corporate bodies. The judiciary has the primary responsibility for sentencing but this role is necessarily limited to the evidence and charges laid before them, in essence to the confines of the plea agreement.
14. The exercise of prosecutorial discretion and variations in sentencing will always leave a degree of uncertainty in the outcome of cases. However, the larger the extent of such uncertainty as to how a case will be handled and the sentencing outcome, the more difficult it becomes to settle cases in a consistent and just fashion.
15. Those uncertainties include the following:
- 1. Prosecution**
 - Whether the prosecutor will agree to a civil outcome for what is essentially serious criminal offending.
 - Whether the prosecutor intends to prosecute individuals associated with the offending.
 - The resources available to the prosecutor to achieve a successful prosecution.
 - Whether there are actions taken by other countries which do not assist in the UK prosecution.
 - 2. Sentencing in criminal cases**
 - The likely range of fines and the relative uncertainty of the principles upon which they are calculated.
 - The basis upon which any confiscation of the proceeds of crime is calculated.
 - The basis upon which any restitution to victim countries is calculated.
 - The role of rehabilitation and the appointment of monitors in sentencing companies.
 - Assessing the appropriate mitigation for either self-referral or for cooperation by defendants.
 - The apparent disparity between fines imposed in the UK, as opposed to those imposed by the courts in the US for FCPA offences.
 - 3. Recovery in civil cases**
 - Adherence to the principles used to calculate “recoverable property” under POCA.
 - The degree of transparency of the civil proceedings.
 - 4. Debarment**
 - The effect and role of debarment on prosecutorial charging practices and on the willingness of defendants to accept corruption charges.
 - 5. Cooperation with other States**
 - Cooperation between countries to agree on primacy of jurisdiction to prosecute the offending and the possibility of obtaining a global settlement.
 - The prosecutor’s obligations to honour international MLA Treaties and Conventions and to continue to assist foreign investigations post a plea agreement or settlement.
16. The US Department of Justice’s (“DOJ”) track record of achieving corporate settlements for overseas bribery is second to none. The US system has developed pre-sentencing practices which facilitate settlement negotiations between the DOJ and companies. One such option is for a company to agree to a deferred prosecution agreement (“DPA”), which has the effect of avoiding a conviction subject to the company admitting to their guilt, paying a monetary amount and complying with a rehabilitation

order, which normally involves the appointment of a monitor. Some concerns have been expressed about the approach of the DOJ in settling offences under the Foreign Corrupt Practices Act (“FCPA”) in a less than transparent and fair manner.¹⁰

17. The Director of the SFO has expressed support for DPAs but recognises that, whereas the US legal system actively incentivises offenders to enter into plea agreements at an early stage of the proceedings, the position is different in the UK. He has stated that the SFO must work on the assumption that all its cases will proceed to trial, which has an impact on the resources available to take on cases.
18. If the UK legal system can achieve a reputation for certainty, consistency, fairness and transparency, it will encourage self-reporting and a just determination of overseas bribery cases. TI-UK is of the view, as is illustrated by the issues emerging from the recent cases brought by the SFO, that the right balance, both on the exercising of prosecutorial discretion and in sentencing, has yet to be realised. Our main findings and recommendations are summarised in Section 9 of this paper.
19. TI-UK hopes that this paper will contribute to constructive debate and action. We welcome comments on its contents.

¹⁰ See “The Façade of FCPA Enforcement” by Professor Mike Koehler, Butler University College of Business, November 2010.

Section 2 Plea Agreements and Civil Settlements: The Legal Framework

2.1 THE LEGAL FRAMEWORK THAT GOVERNS PLEA AGREEMENTS

20. The SFO is the designated lead investigation and prosecution agency for overseas bribery cases in England and Wales. In July 2004, the SFO opened its first significant overseas bribery investigation into the affairs of BAE. During the course of this investigation, which settled in December 2010, there were a number of developments and changes to legal procedures and practice that were relevant to the prosecution of overseas bribery cases.
21. In July 2006, the Attorney General published the “Fraud Review” report, which was an extensive review of the way in which fraud cases were prosecuted in England and Wales and made recommendations, including the introduction of plea discussions in serious fraud cases. The Attorney General was concerned to ensure that the way in which fraud trials were conducted was made quicker and more effective.¹¹
22. In addition, the SFO obtained powers under Part 5 POCA 2002¹² from April 2008, under which it could seek to recover the proceeds of crime through the civil courts. Civil Recovery was originally used by the Assets Recovery Agency¹³ as a means of stripping professional criminals of their unlawfully obtained property in circumstances where a trial had either failed or was not possible.
23. The use of Civil Recovery is covered by the Attorney General’s (AG’s) Guidance on Asset Recovery.¹⁴ This guidance makes it clear that, in general, the objective of crime reduction is best secured by means of criminal investigations and proceedings. However, there are circumstances under which the AG’s Guidance on Asset Recovery may be applied in order to seek to negotiate a Civil Recovery Order, namely, where:
-
- i) it is not feasible to secure a conviction; or
 - ii) a conviction is obtained but a confiscation order is not made; or
 - iii) a relevant authority is of the view that the public interest will be better served by using those powers rather than by seeking a criminal disposal.
-
24. On 18 March 2009, after extensive consultation, including with the judiciary, the Attorney General published the “Attorney General’s Guidelines on Plea Discussions in Cases of Serious or Complex Fraud”¹⁵ (“the AG’s Guidelines on Pleas”). On 5 May 2009 they were brought into force. These guidelines provided the prosecutor with an appropriate process to follow when plea discussions were initiated by the defence.

¹¹ Foreword to the Fraud Review by Lord Goldsmith.

¹² Proceeds of Crime Act 2002, Part 5, (<http://www.legislation.gov.uk/ukpga/2002/29/part/5>).

¹³ The Assets Recovery Agency was amalgamated with the Serious Organised Crime Agency in 2008.

¹⁴ Full text available at:

<http://www.attorneygeneral.gov.uk/Publications/Pages/AttorneyGeneralissuedguidancetoprosecutingbodiesontheirassetrecoverypowersunder.aspx>

¹⁵ The Guidance can be found at:

<http://www.attorneygeneral.gov.uk/Publications/Documents/AG's%20Guidelines%20on%20Plea%20Discussions%20in%20Cases%20of%20Serious%20or%20Complex%20Fraud.pdf>

25. On 21 July 2009 the SFO published its “Approach of the Serious Fraud Office to dealing with Overseas Corruption”. This document highlighted how the SFO intended to exercise its discretion on criminal prosecutions, essentially seeking to incentivise self-reporting by offering, where appropriate, a civil outcome.
26. In April 2010 guidance on corporate prosecutions was issued by the Crown Prosecution Service.¹⁶ This guidance is consistent with the AG’s Guidance on Asset Recovery in that it advises that both corporates and individuals should be prosecuted in appropriate cases in order to provide a strong deterrent to future offending.
27. The above policies and guidance must be applied in a manner that is consistent with the practice and procedure of criminal courts in England and Wales which are governed by the Criminal Procedure Rules (“CrimPR”).¹⁷ For example, Part 57 CrimPR sets out the rules applicable to all proceedings under POCA 2002 and there are specific rules relating to Confiscation Proceedings (Part 58), Restraint (Part 59), Appeals (Parts 71, 72 and 73) and other matters. The CrimPR were amended by the Criminal Procedure (Amendment) Rules 2010¹⁸ and the Criminal Procedure (Amendment No. 2) Rules 2010.¹⁹
28. Where the prosecutor decides to proceed under Part 5 of POCA to recover property under a Civil Recovery Order, the practice and procedure is governed by the Civil Procedure Rules (“CvPR”). This is an important distinguishing factor, as there is far less public scrutiny and transparency under CvPR.
29. The above legal developments, policy and guidance provides the prosecutor with a number of options and tools to settle overseas bribery cases but within a framework of guidance and procedures designed to provide consistent, proportionate and just outcomes.
30. In examining whether this aim has been achieved, this paper examines the three SFO criminal plea agreements that were settled before July 2011. The plea discussions in the cases of M&J (September 2008) and Innospec Ltd (March 2010) were commenced prior to the introduction of the AG’s Guidelines on Pleas. However, it is understood that the SFO chose to follow the AG’s Guidelines because by the time the cases reached court the guidelines were in force.
31. The third plea agreement, in relation to BAE, was also formulated under the AG’s Guidelines on Pleas. The SFO investigation into BAE resulted in settlement negotiations taking place, but according to a statement made by the SFO, these earlier negotiations had reached a deadlock by September 2009; this being well after the introduction of the AG’s Guidelines. The eventual settlement with the US DOJ took place in early 2010, which formed the basis of the plea agreement in the UK criminal case.
32. This paper also examines five cases in which the UK prosecutor decided to use civil recovery in preference to criminal proceedings:
 - i) Balfour Beatty, October 2008 – settlement of £2.25 million re “payment irregularities” in respect of the construction of a library in Cairo for a contract price in excess of £100 million.
 - ii) AMEC, October 2009 – settlement of £4.9 million re “irregular receipts” re the construction of the Incheon bridge in Korea.
 - iii) M W Kellogg (“MWKL”), February 2011 – settlement of £7.0 million re the profits the UK company received from contracts obtained by bribery committed by its parent company Kellogg Brown & Root (“KBR”) re the Bonny Island project in Nigeria.
 - iv) DePuy International, April 2011 – settlement of £4.8 million re unlawful conduct relating to the sale of orthopaedic products in Greece between 1998 and 2006.
 - v) Macmillan Publishers, July 2011 – settlement of £11.3 million re contracts obtained by the Education Division in East and West Africa between 2002 and 2009.

¹⁶ This Guidance can be found at http://www.cps.gov.uk/legal/a_to_c/corporate_prosecutions/

¹⁷ The CrimPR can be found at: <http://www.legislation.gov.uk/ukxi/2010/60/made>

¹⁸ Amendment: <http://www.legislation.gov.uk/ukxi/2010/1921/made>

¹⁹ Amendment No. 2: <http://www.legislation.gov.uk/ukxi/2010/3026/contents/made>

33. In addition, the FSA has fined two companies, Aon and Willis for their failure to have in place adequate management procedures to control payments to overseas agents. Whilst these cases were subject to regulatory fines and not investigated by the SFO, they do provide an insight into situations when regulatory enforcement powers may be an effective option in overseas bribery cases.

2.2 PROTOCOLS THAT GOVERN THE CONDUCT OF PROSECUTORS

The Code for Crown Prosecutors

34. The Code for Crown Prosecutors (“the Code”) is issued by the Director of Public Prosecutions (“DPP”) on behalf of the Crown Prosecution Service (“CPS”). The DPP exercises his functions independently, subject to the superintendence of the Attorney General, who is accountable to Parliament for prosecution conduct. The Code provides guidance to all prosecuting authorities in making prosecutorial decisions. In order for a prosecution to proceed, the ‘Full Code Test’ must be satisfied. This has two stages: i) the evidential stage and, if that is passed, ii) the public interest stage.
35. The evidential stage is an objective test and it requires prosecutors to be satisfied that there is sufficient evidence to provide a “*realistic prospect of conviction*” against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of a conviction. A criminal case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be. Consideration should be given both to whether the evidence can be used in court and its reliability. If this stage is satisfied, then the public interest in prosecuting should be considered. This test is set out at 4.12 of the Code. It states that:

“A prosecution will usually take place unless the prosecutor is sure that there are public interest factors tending against prosecution which outweigh those tending in favour, or unless the prosecutor is satisfied that the public interest may be properly served, in the first instance, by offering the offender the opportunity to have the matter dealt with by an out-of-court disposal. The more serious the offence or the offender’s record of criminal behaviour, the more likely it is that a prosecution will be required in the public interest.”

36. The Code sets out some factors tending in favour and against prosecution, although these are general in nature and not specific to bribery, fraud or corruption cases. The Code also deals with out-of-court disposals, such as conditional cautions. Although these are also general in nature, it is interesting to note that the Full Code Test must nevertheless be met; there must also be an admission of guilt.
37. A new Code for Crown Prosecutors was issued in February 2010. This states (at 4.2) that:

“In the vast majority of cases, prosecutors should only decide whether to prosecute after the investigation has been completed and after all available evidence has been reviewed.”

38. It follows that in plea negotiations the prosecutor should be in possession of all the relevant evidence in order to decide on the basis of charge.

Guidance on corporate prosecutions

39. Under English law, a company is recognised as a separate legal entity from its owners or its directors and as such it can be prosecuted. However, in most complex fraud cases, for example, it is normally individuals who are prosecuted and it is rare that companies face prosecution. Indeed, the first corporate prosecution by the SFO was Severn Trent Water in April 2008 for making false returns to its regulator. This was followed by M&J in September 2009. The Attorney General has issued Guidance on corporate prosecutions, which was last updated on 21 April 2010. This Guidance should be read

in conjunction with, but subordinate to, the Code for Crown Prosecutors. It makes clear at the outset that a company is a legal personality and should be treated no differently from an individual.

40. There are inherent difficulties in prosecuting a company, one being the extent to which the actions of individuals, directors, employees, agents etc., can be proved to be those of the company. For example, if an agent pays a bribe to secure a contract, can such an offence attach to the company? The extent to which criminal intent can be attached to a company is defined through the “*identification principle*”. The identification principle is set out at paragraph 19 of the Guidance as follows:

“This identification principle acknowledges the existence of corporate officers who are the embodiment of the company when acting in its business. Their acts and states of mind are deemed to be those of the company and they are deemed to be ‘controlling officers’ of the company. Criminal acts by such officers will not only be offences for which they can be prosecuted as individuals, but also offences for which the company can be prosecuted...”

41. It is important to note that the above identification principle refers to corporate officers, which is capable of a wide interpretation. However, the Guidance also cites the leading case of *Tesco Supermarkets Ltd v Nattrass [1972] AC 153* which limits the reach of this principle to “*the actions of the Board of Directors, the Managing Director and perhaps other superior officers who carry out functions of management and speak and act as the company*”.
42. Clearly, the larger the corporation and the more complex its structure the harder it is apply the identification principle evidentially. Conversely, as the Guidance suggests, “*the smaller the corporation, the more likely it will be that guilty knowledge can be attributed to the controlling officer and therefore to the company itself.*”
43. The Guidance also sets out some examples of the public interest considerations that apply to the prosecution of companies. Some of the factors tending in favour of prosecution include a history of similar conduct, or where the conduct in question forms part of the company’s established business practices, an inadequate corporate compliance programme and failures to report in full or at all.
44. Conversely, the factors against prosecution include the genuinely proactive and compliant approach of the company, a lack of antecedent similar conduct, the availability of civil or regulatory remedies which are likely to be more effective and proportionate and the historic nature of the offending, such that the company in its current form is effectively a different body from that which committed the offences.
45. Of some relevance to corruption offences is the explicit mention made in the Guidance of the impact prosecution might have under European law, particularly with regard to public tendering and potential debarment under Article 45 of Directive 2004/18. However, it is also noted that the Directive was intended to be draconian, and a decision not to prosecute because of the impact of the Directive would only serve to undermine its deterrent effect.
46. The SFO acknowledges the difficulties associated with prosecuting corporate bodies on the basis of the common law identification principle, but believes that the problem may have been lessened by the creation of the new Section 7 corporate offence of a failure to prevent bribery under the Bribery Act 2010. The Law Commission has been reviewing the issue of corporate prosecutions for some time, but has yet to report its findings and recommendations.

SFO self-reporting guidelines

47. As part of its enforcement of overseas bribery, the SFO has encouraged companies to “self-refer”.
48. M&J self-reported to the SFO and pleaded guilty in September 2008 to corruption in a number of countries. The prosecution noted:

“The policy of the SFO with regard to companies which ‘self-refer’ themselves to the SFO for offences which can be described as – at least, relatively – historic, as in this case, is to apply a proportionate approach to investigation and prosecution, both so as to acknowledge endeavours at remediation, and to encourage other companies which have a history of improper conduct to come forward and ‘clear the slate’. Hence, in the light of the agreement of M&J to institute a system of independent monitoring of its overseas business activities and transactions... as well as certain steps it has already taken to remove certain directors it views as ‘involved’ in the corrupt practices... the SFO is respectfully of the view that the public interest is not best served – as against the Company only – by what might well be long-drawn out litigation over remaining unproven allegations of corrupt practices.”

49. The M&J case was resolved by way of a plea agreement, with charges restricted to corruption offences that took place in two countries. In fact, the company had admitted to similar conduct in four other countries, which was drawn to the judge’s attention for the purpose of sentencing. At the time of this case, the SFO publicly encouraged other corporations to self-report evidence of overseas bribery violations.
50. In July 2009, the SFO formulated detailed guidance to companies in this area.²⁰ The guidelines set out the policy of the SFO in handling overseas bribery cases:

“We have encouraged business and professional advisers to self-report cases of overseas bribery to us... the benefit to the corporate will be the prospect (in appropriate cases) of a civil rather than a criminal outcome as well as the opportunity to manage, with us, the issues and any publicity proactively... For the SFO, this system has the effect of crafting effective and proportionate sanctions for this type of case and of helping to produce a new corporate culture.”

51. Those guidelines have been re-published recently, and indicate that where a company self-reports it may be permitted to perform and manage the investigation through its professional advisors, rather than the investigation being conducted directly by the SFO. With regard to settlement terms, the guidance states that the SFO will:
- i. usually require restitution (disgorgement) of unlawful gains;
 - ii. usually require that a company enhance its compliance and training structures; and
 - iii. in some cases, appoint an external, third-party compliance monitor.
52. The SFO seeks to incentivise self-reporting by prioritising a civil resolution (with admissions of unlawful conduct) if possible, rather than a criminal prosecution, if this is consistent with the public interest. Whatever approach is taken, the SFO has pledged “to try to find satisfactory, sensible and just solutions” when a corporate self-reports.

²⁰ Approach of the Serious Fraud Office to Dealing with Overseas bribery, 21 July 2009.

53. The guidance sets out those circumstances that are likely to define “appropriate cases”:

THE SFO GUIDELINES

- a) Is the Board genuinely committed to resolving the issue and moving to a better corporate culture?
- b) Will the corporate agree to work with the SFO on the scope and handling of any necessary additional investigations?
- c) Will the corporate be prepared to discuss resolution of the issue e.g. restitution through civil recovery, a programme of training and culture change, appropriate action where necessary against individuals and in some cases external monitoring?
- d) Does the corporate understand that any resolution must satisfy the public interest and must be transparent? This will almost invariably involve a joint agreed public statement.
- e) Will the corporate want the SFO, where possible, to work with the regulators and criminal enforcement authorities, both in the UK and abroad, in order to reach a global civil settlement?

54. As a counter-point to self-reporting incentives, the SFO’s guidance makes clear that where a corporation fails to self-report instances of corruption that are then discovered by the SFO through other means, a criminal investigation and disposal is prioritised.

“Without knowing the facts, no prosecutor can ever give an unconditional guarantee that there will not be a prosecution of the corporate. Nevertheless, we want to settle self-referral cases that satisfy paragraph 4 [the circumstances summarised above] wherever possible. An exception to this would be if Board members of the corporate had engaged personally in the corrupt activities, particularly if they had derived personal benefit from this. In those cases we would, in fact, be likely to commence our own criminal investigation.”²¹

2.3 PLEA NEGOTIATIONS

Reduction of sentence for guilty pleas

55. Under UK law there has always been a means for defendants to agree to a plea of guilty with a prosecutor which will give rise to a reduced sentence.²² By Section 152 of the Powers of the Criminal Courts Act 2000, the credit given by a judge for a timely guilty plea by a defendant was put on a statutory basis. One of the recognised and uncontroversial public policy reasons for giving significant reductions of sentence for guilty pleas is that it enables cases “to be disposed of more expeditiously” “shortens the gap between charge and sentence” and “saves considerable cost”.²³
56. It has been estimated that serious fraud cases accounted for only about 0.2% of Crown Court cases in 2003/04 but 16% of the legal aid budget in the Crown Court.²⁴ Savings in time and cost are most apparent, therefore, in serious and complex cases typically undertaken by the SFO, which include overseas bribery cases. The capacity of the court system would be tested if all the SFO’s cases proceeded to trial before a jury. Furthermore, serious and complex fraud and corruption cases require active management during the trial to prevent cases becoming too long or complex for a jury to tolerate.²⁵

²¹ Approach of the Serious Fraud Office to dealing with Overseas bribery.

²² Sentencing Guidelines Council – reductions in sentence for a guilty plea.

²³ Sentencing Guidelines Council Reduction in Sentence for a Guilty Plea, Definitive Guideline (July 2007).

²⁴ The Fraud Review, July 2006.

²⁵ Control and management of heavy fraud and other complex criminal cases, a protocol issued by the Lord Chief Justice of England and Wales (22 March 2005) http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/criminal/pd-protocol/pd_protocol.htm

57. It has always been accepted that incentivisation should play a part in the sentencing process and that it is good public policy, if possible, to reward pleas of guilty with reduced sentences. However, in practice, any reduction in sentence can only be achieved after criminal proceedings have begun, namely after the defendant has been charged with criminal conduct. In the majority of serious fraud cases, any cooperation from defendants was only forthcoming, if at all, very late in proceedings²⁶ where the defence are more likely to want to assess the prosecution case statements; obtain full disclosure of the evidence, including any unused material; and consider their options before offering a plea.
58. The issue in overseas bribery cases is how best to incentivise early pleas whilst at the same time ensuring that the outcome of the case and sentencing properly reflects the underlying criminal conduct of the company and associated individuals.

Acceptance of pleas

59. One incentive may be to agree to a lesser charge. Prosecutors have always had the power to accept pleas to lesser charges but they should have regard to guidance contained in the Code for Crown Prosecutors,²⁷ which in essence applies two tests of principle – the evidential and public interest tests. The basis of the plea should be agreed by the parties in writing and be subject to the approval of the judge.
60. From 2000, and in part in response to public requirements for transparency concerning how cases are disposed of by plea to a lesser charge, or on a particular basis of plea, Bar Council Standards directions and various Court of Appeal authorities were brought together in a standard set of “Guidelines on the Acceptance of Pleas and the Prosecutor’s Role in the Sentencing Process”. These Guidelines were revised and reissued in 2005.
61. The Guidelines recognise that an illogical or insupportable basis for plea will inevitably lead to the imposition of an inappropriate sentence, and is capable of damaging public confidence in the criminal justice system (C1.). Two principles that should be observed are therefore: that pleas should be accurate and reasonable (A2); and the discussions should be transparent (A3).
62. Concurrently, there have also been developments to formalise prosecutorial practices when negotiating pleas and seeking cooperation from defendants. This has culminated in certain provisions under the Serious Organised Crime and Police Act 2005 (“SOCPA”), which created a statutory framework to grant a person conditional immunity from prosecution and to have written agreements with suspects and defendants for giving evidence or other forms of cooperation.²⁸
63. With associated guidelines published by The Association of Chief Police Officers (“ACPO”), The Crown Prosecution Service (“CPS”) and the SFO concerning how these powers are to be used, there is now a structured framework for the negotiation of pleas and the process of cooperation, with a view to giving evidence or obtaining immunity from prosecution.
64. The value at sentencing of plea and of discount for what was called turning Queen’s evidence has been explored in *R v Blackburn*. In the overseas bribery case of *R v John Dougall* these issues were explored by the Court of Appeal, along with the extent to which the prosecution should be involved in recommending the range of sentencing under a plea agreement.

Judicial involvement in the acceptance of pleas

65. The Criminal Procedure Rules give the judiciary a management function. Rule 3.2 sets out some of the difficulties that active case management should ameliorate, with a view to making criminal litigation more efficient and effective, particularly in relation to the progression of complex cases.

²⁶ The Fraud Review, July 2006.

²⁷ The Attorney General’s Guidelines on Acceptance of Pleas (Sept 2009).

²⁸ Sections 71 and 73 SOCPA 2005.

66. Whilst there is guidance issued by the prosecuting authorities, the Criminal Procedure Rules deal with pleas not through formal rules, but under Part IV.45 of the Consolidated Criminal Practice Direction.²⁹
67. Although the prosecutor determines which charges to bring, the Court retains a role in commenting on charges, where there is concern that the proposed course “*may lead to serious injustice*”, subject to the rules relating to the acceptance of pleas.
68. This role is formalised in the Criminal Procedure Rules, Consolidated Criminal Practice Direction, IV.45.8. In cases which have been ordinarily committed, transferred or sent to the Crown Court, the Judge is well placed to comment on the difference between a plea accepted and what might have been the height of the prosecution case. In the majority of criminal cases in the Crown Court, the decision to accept pleas will be taken at a certain level of management within the prosecutor’s office. Should there be criticism of the accepted plea there is recourse to the Branch Crown Prosecutor or ultimately to the DPP.
69. In 2005, in the case of *R v Goodyear* [2005] 2 Cr App R, the courts formalised the system of seeking indications on sentence. This replaced the practice of a visit to the Judge’s room (latterly with a stenographer), which to a limited extent drew the court into the process of plea negotiation. Goodyear was an appeal on sentence and the court issued guidelines that amounted to a formalised procedure to obtain an advance indication of sentence in the Crown Court. However, these guidelines made it clear that the judiciary was not being drawn into some form of plea bargaining:

The independence of the judiciary

“a judge should not be asked or become involved in discussions linking the acceptability to the prosecution of a plea or basis of plea, and the sentence which may be imposed. He is not conducting or involving himself in any plea bargaining.”

70. The approach in Goodyear is endorsed in the Consolidated Criminal Practice Direction at IV.45.29. A court should not give an indication as to sentence unless one has been sought by the accused. Whether to give (or postpone) such a direction is a matter for the discretion of the judge. The court is entitled to indicate that the sentence or type of sentence would be the same whether the case proceeds as a plea of guilty or goes to trial; where the sentence will vary according to plea, the court should only give an indication as to the sentence following a guilty plea. Once an indication has been given, it is binding on that and any other judge who becomes responsible for that case, unless the accused declines to plead guilty after having had a reasonable opportunity to consider his position. The case also makes it clear that the prosecution “*should not say anything which may create the impression that the sentence indication has the approval of the Crown.*”³⁰

Attorney General’s Guidelines on Plea Discussions in Serious and Complex Cases

71. As discussed above, the negotiation and acceptance of pleas in most cases is predicated on there being proceedings in public in the Crown Court, with full transparency of the prosecution case and the defence arguments in mitigation. However, on 5 May 2009 the Attorney General introduced Guidelines on Plea Discussions in Cases of Serious and Complex Fraud cases,³¹ which enable pleas to be agreed prior to charge.
72. As the title suggests, the AG’s Guidelines are restricted to cases of serious or complex fraud. Such cases are defined by the application of certain criteria, such as the size of the fraud, international dimensions, public interest etc. and hence would include all major overseas bribery cases.

²⁹ As per Amendment No. 22, 20 May 2009: <http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/criminal/practice-direction/part4.htm#d6178240>

³⁰ *R v Goodyear* [2005] 2 Cr App R, para 70(d).

³¹ AG’s Guidelines on plea discussions in cases of serious or complex fraud (May 2009), <http://www.attorneygeneral.gov.uk/Publications/Documents/>

73. To date, all of the overseas bribery cases that have been settled by the SFO have involved pleas that were agreed prior to any formal charge, whether the case in question was a result of a self-referral or following extensive investigations by the SFO, as was the case with BAE. Importantly, this pattern is likely to be the norm going forward.
74. Conducting plea negotiations prior to charge provides obvious benefits to the defendant company. It is also of potential benefit to the public purse, as these cases tend to be amongst the more serious, costly and, if contested, lengthy cases to litigate. The SFO has sought to encourage companies to come forward and self-report corruption and enter into plea discussions; however, companies and their defence teams naturally want to know what the process will be and be in a position to assess, with some confidence, the likely outcome.
75. The Board of a public company will regard it as their fiduciary duty to the stakeholders of the enterprise to seek the most advantageous outcome in the plea negotiations and to minimise any uncertainties inherent in the process. Failures by the prosecution to provide sufficient clarity as to the process, the likely charges to be brought and against whom, as well as uncertainties in the sentencing process, all contribute to a reluctance by companies to self-refer cases.
76. Prior to the AG's Guidelines on Pleas the pre-charge process of negotiating pleas was not subject to any protocol. The constitutional position of the prosecutor, the role of the courts in the UK, and the rules relating to plea agreements in the UK³² were given extended comment in Lord Justice Thomas's judgement in *Innospec*.
77. As the title suggests, the AG's Guidelines are restricted to cases of serious or complex fraud including corruption. The Attorney General's Office ("AGO") helpfully clarified to the Court in *M&J* that the scope of the Guidelines specifically included, and were intended to include, corporate defendants.
78. It is clear that these guidelines were introduced with the specific intention of encouraging early pleas of guilty and avoiding unnecessary expense and court time.³³ It was recognised during the consultation on the Guidelines that conducting plea discussions at an early stage of any investigation has inherent dangers, including agreeing to inappropriate charges. The Guidelines seek to address these dangers by emphasising the need to comply with the Code for Crown Prosecutors and by referring to the following matters of principle:

"The prosecutor must act openly, fairly and in the interests of justice. Acting in the interests of justice means ensuring that the plea agreement reflects the seriousness and extent of the offending, gives the court adequate sentencing powers, and enables the court, the public and the victims to have confidence in the outcome. The prosecutor must consider carefully the impact of a proposed plea or basis of plea on the community and the victim, and on the prospects of successfully prosecuting any other person implicated in the offending. The prosecutor must not agree to a reduced basis of plea which is misleading, untrue or illogical."

79. In addition, an equally important principle is that the conduct of the negotiations should be *"open and transparent with the defendant and with the court"*.³⁴ The prosecutor will arrange for the Crown Court judge to receive sufficient background to the plea agreement and case to enable him to *"assess whether the plea agreement is fair and in the interests of justice"*.³⁵
80. Plea discussions should be fair and command public and judicial confidence. To that end, there are extensive disclosure obligations relating to the plea negotiations including presenting all relevant correspondence and minutes of meetings³⁶ to the court.³⁷

³² Para 24 Inn.

³³ A5.

³⁴ B4.

³⁵ E4.

³⁶ C6-C8; D5.

81. When agreement has been reached on the pleas, the prosecutor and defence should make a written submission to the Court listing any aggravating and mitigating factors, and make submissions as to the applicable sentencing range by reference to relevant sentencing guidelines or authorities. This should include consideration of confiscation under the court's asset recovery powers. In the course of the plea discussions, the prosecutor must make it clear to the defence that the joint submission on sentencing is not binding on the court. This part of the AG Guidance was consolidated in the Consolidated Criminal Practice Direction at IV.45.19-28.
82. Lord Justice Thomas himself is the chief architect of the Civil Procedure Rules ("CPR") and his amendment to the CPR to incorporate the AG's Guidelines was circulated within Government and subject to consultation.
83. The AG's Guidelines suggest that in the sentencing memoranda "*the parties should discuss the appropriate sentence... it should make submissions as to the applicable sentencing range in the relevant guideline*".
84. Despite the fact that at the time of sentencing Innospec there was neither a guideline authority nor was the relationship between confiscation and the fine clear, the judgement of Lord Justice Thomas was clear that sentencing is the preserve of the Court. Consequently the role of the sentencing memoranda, which may have been viewed by the defence as something that involved agreement with the prosecutor, was firmly put in its place.
85. The plea agreement must be signed, and the act of signing a plea agreement means that it could be admitted as confession evidence or an admission against the person making it.
86. It is the policy of the SFO to allow companies to undertake internal investigations when they self-refer cases. Whilst this policy and early pleas may lead to cost savings, defendants still face substantial costs. The prosecution costs awarded to the SFO in the M&J case totalled £550,000: £350,000 from the company,³⁸ with the remainder awarded against Richard Forsyth and David Mabey.³⁹ However, the costs incurred by M&J in undertaking the internal investigation were far in excess of these figures. Its annual accounts for the year to 30 September 2008 disclosed a provision of £37.9 million to cover the settlement with the SFO, which totalled £6.6 million. This discrepancy, in excess of £30 million, gives an indication of the huge costs faced by companies in undertaking such investigations and illustrates, to some extent, the costs that a prosecutor could face in the absence of any cooperation by a corporate defendant with access to substantial resources.

2.4 PRINCIPLES OF CIVIL RECOVERY

Proceeds of Crime Act 2002 Part 5

87. Confiscation orders may be used in criminal proceedings but POCA also provides for confiscation under the civil law. The policy of the Government is to confiscate assets that have derived from crime, including in those instances where there is insufficient evidence to bring criminal proceedings. Hence, civil recovery operates against property rather than
88. against the individual. In essence, the Crown contends that certain property derives from crime and it is up to the defendant to prove that he is lawfully entitled to the specified property.
89. Part 5 of POCA deals with the civil proceedings heard before the High Court in confiscating property which is, or represents, property obtained through unlawful conduct. Such unlawful conduct covers offences committed both in the UK and overseas, if such conduct is contrary to UK criminal law. The

³⁷ E4.

³⁸ SFO Press release, 25 September 2009: <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/mabey--johnson-ltd-sentencing-.aspx>

³⁹ SFO Press release, 23 February 2011: <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/mabey--johnson-ltd-former-executives-jailed-for-helping-finance-saddam-hussein's-government.aspx>

court must decide on the balance of probabilities whether it is proved that the matters alleged constitute unlawful conduct.

90. In overseas bribery cases the problems of definition and quantification are similar to those in criminal proceedings: what property was derived from the unlawful conduct and exactly what was, and the extent of, the unlawful conduct.

Attorney General's Guidelines on Asset Recovery

91. Should the SFO decide to proceed with civil recovery it does so using Civil Recovery Orders under POCA. It is not a requirement to first obtain a criminal conviction. The AG has also issued guidelines to prosecutors covering the use of these powers,⁴⁰ and whereas it is stated that *"the reduction of crime is in general best secured by means of criminal investigations and criminal proceedings"* it is acknowledged that non-conviction based asset recovery powers can make an important contribution where:

Use of Civil Recovery Powers

- a) It is not feasible to secure a conviction; or
- b) A person is convicted but a confiscation order is not made; or
- c) The prosecuting agency considers it in the public interest to use these powers rather than pursuing a criminal prosecution.

-
92. The prosecutor should have due regard to the Code for Crown Prosecutors in exercising this judgement. Examples are given in the AG guidance on POCA of the type of circumstance that could help in resolving the public interest test, one being in favour of prosecution if *"there was an element of corruption of the victim in the way the offence was committed"*. Conversely, a factor tending against prosecution would be if:

"the suspect has been subject to any appropriate regulatory proceedings, or any punitive or relevant civil penalty which remains in place or which has been satisfactorily discharged, which adequately addresses the seriousness of the offending and any breach of trust involved."

93. The Code and the AG Guidance on POCA do, therefore, appear to give wide discretionary powers to the Director of the SFO on how to deal with overseas bribery cases, which by their very nature will present challenges in securing convictions and which require serious consideration of public interest issues.

⁴⁰ AG guidance to prosecuting bodies on their asset recovery powers, 5 November 2009.

Section 3 Sentencing

3.1 FINES

94. A company can only be fined. The Court can, in addition, order compensation and make a confiscation order and order costs. The power to fine is contained in Section 163 of the Criminal Justice Act 2003.⁴¹
95. The purpose of sentencing is stated at Section 142 of the Criminal Justice Act 2003: Any Court dealing with an Offender in respect of his offence must have regard to the following purposes of sentencing:
- (a) the punishment of offenders,
 - (b) the reduction of crime (including its reduction by deterrence),
 - (c) the reform and rehabilitation of offenders,
 - (d) the protection of the public, and
 - (e) the making of reparation by offenders to persons affected by their offences.
96. The purpose of criminal sentencing is to remove the criminal benefits of the offending; and to punish and deter the offender and others who might engage in the conduct, in order to protect the public.

Level and computation of fines

97. M&J was the first company convicted of corruption offences to be sentenced in the English courts. At the time of sentencing there were no specific sentencing guidelines covering overseas bribery offences, nor were there sentencing precedents.
98. Recent sentencing decisions in cases of corruption are reviewed in Current Sentencing Practice at B9-1.3A and B. None of the cases set out there are comparable to cases of corporate offending for gain. These cases largely focus on the corrupt employee/official motivated by greed to show favour in breach of trust owed to his employer/the public.⁴²
99. The level of any fine must be fixed by reference to statute. The power to fine is contained in Section 163 of the Criminal Justice Act 2003. Section 164 provides that the level of fines should have regard to the following material factors:
-
- i. The amount of any fine fixed by a Court must be such as, in the opinion of the Court, reflects the seriousness of the offence.
 - ii. In fixing the amount of any fine to be imposed on an offender (whether an individual or other person), a Court must take into account the circumstances of the case including, amongst other things, the financial circumstances of the offender so far as they are known or appear to the Court.
-
100. When determining a fine the court needs to assess of the means of the company. In *Rollco Screw & Rivets Co Ltd* [1999] 2 Cr App R (S) 436, the Court of Appeal quoted with approval the judgement of Scot Baker, J in *S Howes & Sons (Engineers) Ltd* [1992] 2 Cr App R (F) 37:

⁴¹ Page 793 of Archbold 2009.

⁴² In *R v Welcher & Others* (2007) 2 Cr App R (S) 83; *R v Foxley* (1995) Cr App R (S) 879; *R v Tobiasen*, Southwark Crown Court, 26 September 2008 (unreported).

“Any fine should reflect not only the gravity of the offence but also the means of the offender, and this applies as much to corporate defendants as to any other... Difficulty is sometimes found in obtaining timely and accurate information about a corporate defendant’s account. The starting point is its annual accounts... Where accounts or other financial information are deliberately not supplied, the Court will be entitled to conclude that the company is in a position to pay any financial penalty it is minded to impose.”

101. In the case of large companies, the imposition of a substantial fine may nevertheless be modest when set against the company’s overall profitability and turnover. One way in which the courts are able to communicate the seriousness of the offending and bring home the impact of the penalty is to require that the fine be paid either immediately or in a period to be measured in single figure days, unless cogent evidence is provided that more time is needed. This approach was approved in *R v B & Q plc*, *The Times*, 3 November, 2005, CA, and should take place as a matter of course in the cases involving large companies.⁴³
102. According to the Coroners and Justice Act 2009, when sentencing an offence committed on or after 6 April 2010 a court must follow the sentencing guidelines “unless contrary to the interests of justice to do so”.⁴⁴ The guidelines cover most of the common criminal offences that courts hear. Not surprisingly, there are no specific guidelines covering overseas bribery offences, but there are guidelines covering fraud with overarching principles that are relevant to corruption cases.

Assessing the gravity of the offence for the purpose of the fine

103. A financial penalty should seek to punish the offender in a way that is commensurate with the gravity of the offence. It is a matter for the courts to determine in any given circumstances whether there should be a deterrent element in any sentence.
104. Guidance can be found in the case of *Yorkshire Water Services* [2002] 2 Cr App R (S) 37. Although the case dealt with a company which pleaded guilty to 17 counts of supplying water unfit for human consumption, over four separate incidents, Roush, J set out the relevant considerations when setting the fine in such a case. In the absence of more factually analogous case law, the principles may be nevertheless informative. The relevant considerations were:
 - i. the degree of culpability involved in the commission of the offence;
 - ii. the damage done, together with the physical and economic ill effects;
 - iii. the offender’s previous record, including failure to heed warnings;
 - iv. the need to strike a balance between a fitting punishment and avoiding counter-productive effects on the offending organisation; and
 - v. the offender’s plea, attitude, and performance after the event.
105. In determining the appropriate fine, the court should determine the penalty for any one incident rather than “tot up” the various manifestations of that incident.

Mitigation of fines

106. Unlike a corporate body, a person found guilty under the statutory provisions of the Bribery Act 2010 faces a maximum jail sentence on indictment of ten years or a fine. When imposing a custodial sentence the Criminal Justice Act requires that the court must impose the “*shortest term that is commensurate with the seriousness of the offence(s)*”.⁴⁵ A reduction in sentence is appropriate as a guilty plea saves costs, and victims and witnesses do not need to give evidence.
107. The recommended reduction in sentence ranges from one-third, where the plea is entered at the “*first reasonable opportunity*”, to one-quarter if the trial date has been set, to one-tenth when the plea is entered at trial.

⁴³ Archbold, 2008, 6-29.

⁴⁴ Sentencing Council Guidelines: www.sentencingcouncil.org.uk

⁴⁵ Reference to S148 of the Criminal Justice Act 2003.

3.2 CONFISCATION

108. Confiscation is a key policy of the Government to deter future offending; to ensure that criminals do not benefit from their offending; and to remove tainted money from circulation that may be used to fund illegal activities, such as drug trafficking. The confiscation regime is designed to be tough and on occasions has been challenged under Human Rights legislation.
109. Confiscation before the criminal courts is a penalty directed at the defendant, where in certain defined circumstances his entire assets are at risk of confiscation and not just the proceeds of the crime of which he is accused. Confiscation proceedings are normally used when dealing with individuals who have a criminal lifestyle, but the same legislation is used in dealing with the prosecution of companies. This development has given rise to some problems, both in terms of the possible quantum of the amount to be confiscated and, partly as a result of this uncertainty, the conduct of plea negotiations.
110. There have been a number of confiscation regimes over time. The current Proceeds of Crime Act 2002 ("POCA") is a merger and extension of former legislation under the Drug Trafficking Act 1994 and the Criminal Justice Act 1988. These regimes may still apply to cases pre-dating the commencement date of 24 March 2003.
111. Under Section 6(2) of POCA, a confiscation order may be made in the Crown Court against anyone (a) convicted of an offence in the Crown Court; (b) committed to the Crown Court for sentence; or (c) under specific consideration of a confiscation order.⁴⁶ Under Section 6(3), if either the prosecutor asks the Crown Court to proceed, or the court believes it is appropriate for it to do so, the court *must* go on to consider the factors contained in Section 6(4), that require a finding as to whether the defendant has a criminal lifestyle and if so, whether he has benefited from his general criminal conduct. If the court decides that the defendant does not have a criminal lifestyle, it must consider whether he had benefited from his particular criminal conduct [Section 6(4)(c)].
112. The Court of Appeal made it clear in the case of *R v Whittington* [2010] [1 Cr App R (S) 545] that a strict order of events must be followed after conviction or committal. Only after the above stages have been satisfied may the judge determine the value of the defendant's proceeds of crime or benefit, that is, "*the recoverable amount*":
- "In calculating the benefit of 'general criminal conduct' the judge must apply the relevant assumptions as to income and expenditure in the previous six years and as to property 'held' by the defendant on conviction (unless the defendant can show an assumption to be incorrect or that 'there would be a serious risk of injustice if an assumption were made')."*
- The court continued:
- "The judge must then make a confiscation order in that sum unless the defendant can prove that the value of all his existing assets, known as 'the available amount' (including artificial or 'tainted' gifts to others), is less than the value of the benefit. If so, the 'available amount' becomes the 'recoverable amount' and, therefore, is the amount of the confiscation order."*
113. A fine against an individual has a term of imprisonment in default attached. Of course, a fine can also be enforced through the Magistrates Court as a civil debt. However, if the company were to become insolvent the chances of recovering the fine are remote. Although a Confiscation Order is enforceable, in the same way as a fine, there is the additional power to apply to the court for a receiver to be appointed. In a case where funds or assets are at risk of dissipation the appointment of a receiver is more likely.
114. Confiscation also provides an incentive to the prosecution agencies. Under the terms of the Government's incentivisation scheme, 18.75% of the sum confiscated is paid to the investigatory body (such as the police or SFO), the same sum to the prosecutorial body (again the SFO or CPS) and the balance to the Treasury. In *Innospec*, Lord Justice Thomas voiced concern that this incentivisation

⁴⁶ Blackstone's Criminal Practice, 2011, E19.7

gave rise to a conflict of interest on the part of the prosecutor when considering the issue of whether a fine should have primacy over confiscation.

115. Confiscation in criminal proceedings is a powerful weapon, but it is still unclear how best to use the powers under POCA in overseas bribery cases. On what basis should “benefit” be calculated where a company has paid a bribe to acquire a contract? Should this amount be the revenue derived from the contract or the resultant profit? What of the financial benefit gained from subsequent contracts? In some overseas bribery cases there is ample evidence of a culture within the company of bribe-paying. Such behaviour would appear to meet the assumptions in POCA for a “criminal lifestyle”, thus widening the assets available for confiscation.
116. In M&J the role for confiscation was reduced, but nevertheless formed part of the package sanctioned by the court. In Innospec, the proposal to balance fines and confiscation (along with civil recovery) was disapproved of by the judge, placing the fine in the centre ground. As both of those cases involved an “inability to pay” argument, the issue remains unresolved because the fine and associated costs far outstripped the company’s ability to pay a confiscation order.
117. The SFO has stated that it would welcome clarification on the use which may be made of POCA in cases of overseas corruption, “particularly where large contracts have been obtained by relatively small bribes or facilitation payments”.⁴⁷

3.3 REHABILITATION (MONITORS)

118. Rehabilitation is a recognised and valued principle in the English criminal justice system. If there has been significant rehabilitation prior to sentencing, it counts as respectable mitigation of the sentence.
119. There are various mechanisms within the criminal law at sentencing to encourage rehabilitation. These include the use of the suspended sentence, conditional discharges, probation and deferred sentences. In all cases there are mechanisms to bring the offender back before the courts if the attempt at rehabilitation proves unsuccessful. However, these sentencing options have been aimed at individual offenders and have not been created for or used in sentencing companies in the UK.
120. In the US, the development and use of Deferred Prosecution Agreements (“DPAs”) and Non Prosecution Agreements (“NPAs”) in FCPA cases against companies is common. These types of agreement have been developed from sentencing and rehabilitation practices that applied to individual offenders, sometimes for minor crimes.
121. The key aspect of a DPA is that the prosecution of the company is stayed subject to certain agreed terms. A monitor is normally appointed, being an independent third party, to review the company’s compliance programme and to report to the DOJ. If a company complies with the terms of the DPA it will not be prosecuted for the offences to which it pleaded guilty.
122. The use of DPAs is not available under current UK law, albeit that this may change after a review was announced recently by the Attorney General.⁴⁸ However, monitors have been appointed as part of the plea agreement in a number of UK corruption cases. Their role was questioned by Lord Justice Thomas in the Innospec case, and there remains uncertainty as to what sanctions could be taken by the courts should the monitor be dissatisfied with the company’s actions post sentencing.

3.4 RESTITUTION (COMPENSATION)

123. The criminal law permits compensation⁴⁹ to be paid to victims of crime as part of the sentencing process. The compensation order is a simple and effective way for a money sum to be paid to a victim of crime.

⁴⁷ Response by the SFO to this paper.

⁴⁸ Speech to the Cambridge International Symposium on Economic Crime, 5 September 2011.

⁴⁹ Page 800, Archbold 2009, Section 130, the Powers of Criminal Courts (sentencing) Act 2000.

124. There are two methods of making a payment to a victim. A payment may be agreed by consent or it is enforced, whether as a result of civil proceedings or a criminal compensation order. In December 2010, BAE was fined £500,000 for concealing payments of \$12.4 million to a “marketing representative” in connection with the sale of a radar system to Tanzania. BAE had agreed to pay reparations of £30 million to Tanzania, less any financial orders made by the court. In the event, Mr Justice Bean said that the agreement imposed “moral pressure” to keep the fine to a minimum in order to maximise the amount available to the people of Tanzania.
125. In July 2011, BAE was criticised by the International Development Committee for delays in the payment of restitution to Tanzania. This issue is considered in more detail in Section 4.2.7.

3.5 DEBARMENT

126. The effect of Article 45 of European Directive 2004/18 EC⁵⁰ is that any candidate or tenderer who has been subject of a conviction for (a) participation in a criminal organisation, (b) corruption, (c) fraud or (d) money laundering, shall be excluded from participation in public contracts.
127. Under the present UK legislation⁵¹ that implemented the European Directive, it is a mandatory requirement to exclude “economic operators” from public contracts if they have been convicted of certain offences. These offences are not limited to corruption, for example, they also include fraud affecting the financial interests of the EU. The offences must be within the knowledge of the contracting party, hence any public tender pre-qualification questionnaires will ask for any such details to be disclosed.
128. In a written statement to the House of Commons, the Minister of Justice Kenneth Clarke QC, clarified that a company convicted under Section 7 of the Bribery Act would be subject to discretionary debarment and not mandatory exclusion under the EU Procurement Directive. Under the existing criteria for rejecting companies under The Public Contracts Regulations 2006, a contracting authority has the discretionary power to treat an economic operator as ineligible under certain circumstances, including where it “has been convicted of a criminal offence relating to the conduct of his business or profession.”⁵² It appears, therefore, that an offence under Section 7 of the Bribery Act is not viewed as a corruption offence but as a failure by the company to stop bribes being paid.
129. The Sentencing Guidelines, The Code for Crown Prosecutors, the AG’s Guidelines on Pleas and the SFO’s policy re self-referral of corruption cases all stress the need to take into account the public interest in relation to possible debarment.
130. The principal rationale for considering this as a factor in the public interest decision is the effect that debarment might have on innocent third parties, such as the employees and shareholders of the company, which may be a substantially changed company by the time the sentencing exercise is conducted. The view of the SFO is that there are circumstances where mandatory debarment of a company without limit of time would be a disproportionate sanction, giving as an example a large company that had self-reported a relatively low level of criminal conduct involving only a few people, where the company had taken immediate steps to rectify the problem.
131. The risk of debarment is a key issue for any company that is reliant on public contract work. Debarment is a necessary and effective deterrent to future offending but it can also act as a major hindrance during plea negotiations and may lead to unprincipled or unnecessary civil outcomes when there should be criminal charges.

⁵⁰ Article 45, Directive 2004/18 EC, Official Journal of the European Union, 30.04.2004.

⁵¹ Public Contracts and Utilities Contracts Regulations 2006.

⁵² Section 23 (4) (d) Public Contracts Regulations 2006.

Section 4 Alternative Legal Procedures

4.1 PROSECUTIONS IN THE US FOR FCPA OFFENCES

132. The UK has a well-renowned legal system that has been adopted by many countries. However, when it comes to settling overseas bribery cases there may be lessons to be learned from other countries. In particular the country that stands out and shares the common law system with the UK is the US. Whereas the options available to the UK prosecutor are largely limited to criminal pleas (with possible debarment) or civil recovery, the US prosecutor has a range of criminal options, which incentivise self-reporting, properly label corruption as criminal, and meet public policy requirements and sentencing outcomes by encouraging future compliance programmes.
133. The SFO has been reported as favouring the US system for tackling overseas bribery cases. According to the OECD report on enforcement published in June 2010, during the period from 1 January 1998 to 30 April 2010, there were a total of 84 enforcement actions in the US, many involving multiple companies and individual defendants. The report states that the average number of prosecutions had risen from about five per year during 2001 to 2005, to about 19 per year during 2006 to 2009. This was despite having a modest number of attorneys working in a dedicated FCPA unit.
134. The reason that this level of enforcement action is possible with relatively few resources is that in the US most FCPA cases are settled through either Deferred Prosecution Agreements (DPAs) or Non-prosecution Agreements (NPAs), both of which avoid the preparation of casework for a trial by jury. An NPA is a formal written agreement negotiated between the DOJ and the defendant where, in return for cooperation and express undertakings, the DOJ agrees not to pursue a criminal prosecution. NPAs are not filed with a Court. DPAs are also formal written agreements, where the DOJ agrees not to pursue a criminal prosecution for a deferred period of time, normally lasting three to five years, during which time the company is obliged to comply with certain undertakings or face prosecution. DPAs are filed with the Court.
135. The US system does have its detractors.⁵³ It is said that companies have little choice but to enter into an agreement with the DOJ, as pleading not guilty and fighting the prosecution case is tantamount to non-cooperation, which has severe repercussions under the US sentencing regime. Non-cooperation in the UK also leads to heavier sentencing, but not on the same scale as in the US.
136. Prosecutors in the US also have the advantage of being able to charge defendants at an earlier stage in proceedings. They need to have evidence to show whether there is "*probable cause*" to believe that the defendant has committed a crime. This evidence is then laid before a Grand Jury⁵⁴ and if the evidence is sufficient to meet that test, an indictment is issued. In the UK, a prosecutor will only charge defendants after evidence to the criminal standard of "*beyond all reasonable doubt*" has been obtained. The prosecution papers are first before the court on transfer of the case after charge.
137. All of these factors are likely to bring a company to the negotiating table in the US far more quickly than in the UK. However, it has been argued that one result of the wide use of negotiated settlements in the US is that certain interpretations of the FCPA used by the DOJ, for example the definition of an overseas official, have not been fully tested in the courts. Whatever the strength of these arguments it is undoubtedly true that most of the very significant cases in the US were settled by DPAs⁵⁵ whose terms were negotiated by the DOJ and the defendant companies prior to, and without any scrutiny by, the courts.

⁵³ See "The Façade of FCPA Enforcement" by Professor Mike Koehler, November 2010.

⁵⁴ Grand Jury proceedings are not open for public observation.

⁵⁵ Including BAE, KBR, Innospec, Siemens, Daimler.

138. There is, however, much greater predictability and transparency within the US system. The sentencing guidelines, past cases and the opinions rendered on the FCPA by the DOJ all combine to allow defence attorneys to advise clients on the likely civil settlement procedure.
139. This predictability has not yet developed in the UK system, which does not have DPAs or sentencing guidelines for dealing with overseas bribery cases. In the period to 28 May 2010, the UK reported just seven cases to the OECD.⁵⁶ Defendants in five of these cases pleaded guilty; one case was settled by the Financial Services Authority (“FSA”) using its regulatory powers; and one case was settled by the SFO using its civil powers under POCA.⁵⁷ Whilst this increased enforcement of the OECD Convention is welcomed, the manner in which cases in the UK have been settled has not provided the certainty of approach that, arguably, is provided by the US system.
140. In a speech made by the Attorney General in September 2011, he stated that the UK Government had reached no decided view on the merits of introducing DPAs but the issues were being explored with the Ministry of Justice (“MoJ”). He saw merit in having arrangements which would enable the UK to work effectively with the US on trans-jurisdictional matters and address issues such as forum-shopping and double jeopardy. A crucial aspect *“would be the degree of judicial oversight”*.
141. In most FCPA cases the criminal charges are settled by the DOJ whilst civil remedies are sought by the US Securities and Exchange Commission (“SEC”), when the defendant company is subject to US securities laws. This dual approach is rarely seen in the UK. Whilst there is cooperation between the SFO and FSA, it is usually decided which agency should proceed with the investigation, as was the case in Aon.

4.2 OTHER JURISDICTIONS

142. This paper does not cover the legal procedures adopted in other jurisdictions to prosecute overseas bribery cases. Most notably, it does not consider the procedures in countries that use the Civil Code, as do most European countries. There are some that favour the inquisitorial system that enables investigating judges to tackle corruption, but this topic is outside the scope of this paper. However, one issue that may be of some relevance is that in some jurisdictions any actions against a corporate for corruption offences are subject to administrative law. Hence the corporate does not face a criminal charge and may avoid mandatory debarment.

⁵⁶ OECD Enforcement Report June 2010.

⁵⁷ The AMEC case was not covered in the OECD report; this was settled using civil recovery powers. Since May 2010, the SFO has brought criminal prosecutions against four individuals and settled the M W Kellogg case also using civil recovery powers.

Section 5 Case Studies in Criminal Proceedings

143. The SFO had negotiated plea agreements with three companies prior to April 2011. Mabey & Johnson (“M&J”) was the first company to be prosecuted in the UK for overseas bribery offences. This was followed by Innospec, a leading case because of the important sentencing remarks made by Lord Justice Thomas, which included commenting upon the respective roles of the prosecutor and the judiciary in plea agreements and sentencing. There then followed the BAE settlement that was widely criticised. The relevant features of each case are set out below.

5.1 MABEY & JOHNSON – SEPTEMBER 2009

Charges	Corruption offences and breaching UN sanctions
Amount of bribes and kickbacks ⁵⁸	£831,878
Value of contracts ⁵⁹	£44,358,000
Total fines ⁶⁰	£6,613,611
Prosecution of individuals	Yes for breaching UN sanctions
Prosecutions in other countries	No

144. M&J pleaded guilty to two counts of corruption in two jurisdictions, Jamaica and Ghana, between the period of 1993 and 2001. It also pleaded guilty to making funds available to Iraq, a sanctions offence. It was the first overseas bribery case brought by a UK prosecution agency.
145. M&J was a family-owned bridge-building company that employed about 240 people, of whom 210 were based in the UK. Over the years of the indictment period its annual turnover averaged £56 million. It appears that the company decided to carry out an internal investigation and make a voluntary disclosure to the SFO after it became embroiled in litigation with an agent who alleged that M&J paid bribes around the world. This also led to a change of management at the top level.
146. At the sentencing hearing, prosecution counsel for SFO revealed the sums paid to named public officials in Ghana, Madagascar, Jamaica, Angola, Mozambique and Bangladesh. The court was told that the company paid bribes and kickbacks totalling about £832,000 to obtain export orders valued at about £44 million. Of the payments detailed at Court, about £471,000 was paid to officials in Ghana and about £105,000 to officials in Jamaica. Kickbacks paid to the former Iraqi Government in breach of UN and UK sanctions totalled about £256,000. However, these payments were not treated as bribes as they were paid to the Iraqi Government rather than a foreign public official.
147. The company was only charged with the offences that took place in Ghana and Jamaica, although the

⁵⁸ Amount of bribes and kickbacks identified at the Sentencing Hearing.

⁵⁹ Value of the contracts stated at the Sentencing Hearing.

⁶⁰ Total fines include Court fine of £3.5 million; confiscation of £1.1 million; costs award of £350,000; reparations of £1,413,611; and first year monitoring costs of £250,000.

company did accept that bribes had been paid in the other countries, including Madagascar, Mozambique, Bangladesh and substantial sums to officials in Angola.⁶¹

148. Under the terms of the plea agreement M&J agreed to pay the following amounts, which totalled £6.6 million:
- a) Fines of £3.5 million (Ghana £750,000, Jamaica £750,000 and Iraq £2 million);
 - b) Confiscation order of £1.1 million;
 - c) Reparation payments totalling £1,413,000 (Ghana £656,000, Jamaica £139,000 and Iraq £618,000);
 - d) Costs to the SFO of £350,000; and
 - e) First year monitoring costs of £250,000 with provision for a maximum of three years not more than £750,000.

149. The SFO did not publish the plea agreement but it did publish the following from the prosecution opening statement.⁶²

“The policy of the SFO with regard to companies which ‘self-refer’ themselves to the SFO for offences which can be described as – at least, relatively – historic, as in this case, is to apply a proportionate approach to investigation and prosecution, both so as to acknowledge endeavours at remediation, and to encourage other companies which have a history of improper conduct to come forward and ‘clear the slate’. Hence, in the light of the agreement of M&J to institute a system of independent monitoring of its overseas business activities and transactions on the same model as that envisaged in the United States of America under the Foreign Corrupt Practices Act 1977, as well as certain steps it has already taken to remove certain directors it views as ‘involved’ in the corrupt practices, and further improvements to procedures as outlined at paragraphs 19 and 20 above, the SFO is respectfully of the view that the public interest is not best served – as against the Company only – by what might well be long-drawn out litigation over remaining unproven allegations of corrupt practices.”

150. There is no published information by the SFO as to the basis of how the figure of £6.6 million was reached, nor on its constituent parts between fines, confiscation and reparation. The reasoning behind the reparation payments to overseas countries would have been discussed at the sentencing hearing, as would the role of the monitor. However, sentencing hearings do not appear in published law reports, despite the fact that they are conducted in open court.

TI-UK considers that the SFO should assume responsibility for publishing the sentencing remarks on its website and for maintaining them as a permanent source of information and guidance in this developing field.

151. At the sentencing hearing Judge Rivlin referred to the discussions that had taken place between the SFO and the defendant that led to the plea agreement. He commented that he accepted the undertaking given to him by the SFO that no “deals” had been done that could be said to impact upon the administration of justice, and that he was satisfied that the various steps set out in the Attorney General’s guidelines had been met. He also made it quite clear that whatever agreement had been reached it was for the court to decide quite independently of the parties whether the sentence that was proposed was appropriate and in the interests of justice. Judge Rivlin was satisfied that the level of penalties was appropriate to address the seriousness of the offending and to act as an effective deterrent to other companies.⁶³
152. The fines were limited having regard to M&J’s ability to pay. The company’s accounts showed net liabilities of £7.6 million at 30 September 2008 after providing £38 million for the fines and associated costs.

⁶¹ *The Guardian*, 25 September 2009.

⁶² This opening statement is no longer on the SFO website.

⁶³ Taken from extracts of the sentencing hearing supplied by the SFO.

153. The M&J plea also had a number of new features:
- a. The settlement agreement included **reparations** to Ghana and Jamaica. Whilst the recognition of the harm of corruption to victim countries is to be welcomed, it is not clear exactly how such reparations are to be managed. The defendant’s solicitors gave an undertaking to the court to pay the reparation payments to the respective governments but should they refuse to accept payment, it should be made to the SFO. Judge Rivlin made the point that any breach of the formal undertaking would amount to a contempt of court.
 - b. A **monitor** was also appointed as part of the settlement agreement. The exact role of the monitor has not been published and it is not clear exactly what action the SFO could take if the monitor was not satisfied with the action taken by the company. The role of the monitor was touched upon in the Innospec case, which is covered below.
154. On 10 February 2011 three former executives of M&J, David Mabey, Charles Forsyth and Richard Gledhill, were found guilty of making illegal payments to Iraq during 2001/02 in breach of UN sanctions. The sentences ranged from 21 months to eight months imprisonment plus prosecution costs totalling £200,000. Richard Gledhill cooperated with the prosecution, entered a guilty plea and in recognition of this cooperation received a suspended custodial sentence. The court heard that the illegal payments totalled over €420,000, which represented 10% of the contract price to supply 13 bridges. The judge placed most culpability on the former managing director, but also said of David Mabey, the former sales director:⁶⁴ *“When a director of a major company plays even a small part, he can expect to receive a custodial sentence.”*

5.2 INNOSPEC LTD – MARCH 2010

Charges⁶⁵	Conspiracy to corrupt
Amount of bribes	\$2.9 million
Value of contracts	\$170 million
Total fines	\$12.7 million
Prosecution of individuals	Yes⁶⁶
Prosecution in other countries	Yes – US DOJ and SEC

155. In March 2010, Innospec Ltd pleaded guilty to making corrupt payments to public officials of the Government of Indonesia to secure contracts for the supply of a fuel additive called Tetraethyl Lead (“TEL”).
156. Innospec Ltd was a wholly-owned subsidiary of a Delaware company, Innospec Inc. The US holding company had been subject to an investigation by the US DOJ into the Iraq Food for Oil programme (“OFFP”) and breaking sanctions in selling product to Cuba. The SFO investigation followed, which focused on the bribes paid by Innospec Ltd to Indonesian government officials and on breaches of

⁶⁴ SFO press release, 23 February 2011.

⁶⁵ The information in this table relates to the charges brought against Innospec Ltd in the UK courts.

⁶⁶ Ousama Naaman, a Middle East agent acting for Innospec was charged in the US for FCPA and wire fraud offences. Proceedings against two former executives of Innospec Ltd, Paul Jennings and Dennis Kerrison are due to be heard in January 2012.

sanctions against Iraq by Innospec International Ltd. Ultimately, the OFFP proceedings were conducted entirely in the US and the SFO dealt with the Indonesian conduct as part of a “global” settlement.⁶⁷ This was the first ever multi-jurisdictional settlement in a corruption case which involved the interaction of sentencing courts in two jurisdictions. The amount of the fines was limited by the company’s ability to pay, which was recognised at US\$40.2 million.

157. The independent directors cooperated with the DOJ and agreed for the company to plead guilty to criminal offences. On 18 March 2010, Innospec Inc pleaded guilty to various FCPA and wire fraud charges. According to Court documents⁶⁸ it paid a total of at least \$5.6 million to obtain contracts under the OFFP and sold fuel additives to Cuba valued at about \$20 million. In addition, it was noted that the company had acknowledged that it had paid about \$2.9 million as bribes to Indonesian officials.
158. Payments in contravention of the UK sanctions against Iraq were not made by Innospec Ltd but by another group company that was dealt with by the US courts.
159. The SFO and DOJ agreed that the fines and penalties that could be imposed on Innospec might exceed \$400 million in the US and \$150 million in the UK. These amounts vastly exceeded Innospec’s ability to pay, hence the agreement for Innospec to pay \$25.8 million in cash and a further \$14.4 million contingent on the future performance of TEL contracts in Iraq. It was further agreed by the US and UK authorities to settle on the same day in order to avoid a disorderly market in the company’s shares.
160. There followed negotiations between the DOJ and the SFO as to how to split the settlement amount. It was eventually agreed that the SFO would be allocated one-third being \$12.7 million, with the balance going to the DOJ, SEC and the Office of Foreign Assets Control (“OFAC”). The SFO decided that \$6.7 million would be allocated to a fine or confiscation and the balance to a civil settlement; however it subsequently transpired that the entire \$12.7 million was dealt with by way of financial sanctions imposed in the criminal court. By the time of the Crown Court hearing there existed, in accordance with the AG’s Guidelines on Pleas:
 - a) A plea agreement between the SFO and Innospec including a joint submission on sentencing.
 - b) An agreed case statement.
 - c) An admission of facts to which Innospec had pleaded guilty.
 - d) A note on mitigation agreed jointly by the SFO and the company.
 - e) A joint submission on sentencing under which \$6.7 million would be a confiscation penalty in respect of the Indonesian corruption and a civil recovery of \$6 million, of which \$5 million would be paid to the UN Recovery Fund for Iraq.
 - f) An agreement to appoint a monitor.
161. The judge in this case was Lord Justice Thomas, who acknowledged the difficulties of “global” settlements where the law and practice of plea agreements differed in the relevant countries. He acknowledged the discretion afforded to prosecutors to decide on which criminal charges to bring. He referred to the AG Guidelines on Plea Discussions in cases of Serious or Complex Fraud and emphasised the need for the judge to be given the full background to the plea discussions in order that he may assess whether the agreement is fair and in the interests of justice. As regards the Innospec agreement, he made the following points:
 - a) It was not for the prosecutor to agree a penalty – that was for the Court to decide. The prosecutor should set out a range of proposals as recommended by the relevant authorities and not a specific proposal.
 - b) It is in the public interest that *“a court must rigorously scrutinise in open court in the interests of transparency and good governance the basis of that plea and to see whether it reflects public interest”*.

⁶⁷ Although this and other settlements involving more than one jurisdiction are termed “global” settlements they only bind the jurisdictions that were party to the agreement.

⁶⁸ US Department of Justice website.

- c) Re penalties – corruption is at the top end of serious corporate offending both in terms of culpability and harm. Penalties should reflect the serious level of criminality. The fines in the US for the Iraq corruption would have been at least \$101.5 million plus disgorgement of profits. *“Although there may be reason to differentiate the custodial penalties imposed for corruption between the US and England and Wales no-one was able to suggest any reason for differentiating in financial penalties.”* The fine should be comparable to that imposed in the US, in addition to depriving Innospec of the benefits it obtained through criminality.
- d) Re confiscation – under the Criminal Justice Act (“CJA”)1988 confiscation takes primacy over the fine, but in this case there are good reasons for the fine to take primacy where the company has insufficient funds to pay both. In this case, the benefits are not restricted to the profits made on the contracts but extend to the very contracts themselves – valued as much as \$160 million. It is important to levy a high fine in such a case. There may have been a perceived conflict of interest if confiscation took primacy, given that the SFO as the investigating and prosecuting authority would have been entitled to 37.5% of the amounts confiscated under an incentive scheme.
- e) Civil recovery – under POCA 2002 the SFO has the power to recover proceeds of crime before the High Court. These proceedings would be stayed having regard to the agreement between the SFO and Innospec to a civil recovery order in the sum of \$6 million. Lord Justice Thomas could see no proper reason why \$5 million of this sum should be paid to Iraq in preference to the victims in Indonesia.

162. Lord Justice Thomas was also critical of the use of civil settlements in cases of overseas bribery. He made the point that:

“Those who commit such serious crimes as corruption of senior foreign officials must not be viewed or treated in any different way to other criminals. It will therefore rarely be appropriate for criminal conduct by a company to be dealt with by means of a civil recovery order.”

163. He accepted that there may be *“a place for a civil order, for example compensation in addition to a fine. It is therefore plainly desirable that the Lord Chief Justice should consider directions that ensure any civil penalties are heard in conjunction with criminal proceedings”*.

164. Lord Justice Thomas reluctantly agreed to the penalty of \$12.7 million having regard to many factors. He mentioned in passing that Innospec would have been entitled to a reduction of 50% for cooperation and the early plea and the remedial steps that the company had taken. In recognition of the comments made by Lord Justice Thomas, the SFO did not proceed with its application for a Civil Recovery Consent Order.

165. He agreed that the US should lead on the appointment of a monitor and the terms of appointment. He expressed scepticism about the value of monitoring orders in cases where new management had been put in place:

“Imposing an expensive form of ‘probation order’ seems to me unnecessary for a company which will also be audited by auditors well aware of the past conduct... the justification and cost effectiveness of such an agreement was raised by Judge Huvelle [the US Judge]. In my view there is a real case for saying that the resources allocated to this should more properly have been made available for fines, confiscation or compensation.”

He said that any future order for the appointment of a monitor would have to be justified in terms of cost effectiveness.

166. Lord Justice Thomas also disapproved of the concept of an agreed joint press notice: *“It would be inconceivable for a prosecutor to approve a press statement to be made by a person convicted of burglary or rape: companies who are guilty of corruption should be treated no differently to others who commit serious crimes.”*

167. On 27 October 2011 two former chief executives of Innospec Ltd, Dennis Kerrison and Paul Jennings, appeared before the Magistrates Court on charges relating to the bribes paid to Indonesian officials.

Mr Jennings was also charged in relation to Iraq. The case was transferred to Southwark Crown Court and is due to be heard in January 2012.

5.3 THE BAE SYSTEMS CASE – DECEMBER 2010

Charges ⁶⁹	Failure to keep proper books and records
Amount of payments	\$12.4 million ⁷⁰
Value of contracts	\$39.97 million
Total fines	£500,000 ⁷¹
Prosecution of individuals	None
Prosecution in other countries	Yes – US DOJ, OFAC and SEC

168. The BAE Systems (“BAE”) case is, without question, the most controversial overseas bribery case that has come before the UK courts. Much has been written about the case by the media and the NGO community, including by TI-UK, and hence the summarised facts below have been limited to those issues that relate to the handling of the case.
169. The allegations of corruption surrounding BAE were being investigated by the SFO under the previous Director, Robert Wardle. It was a wide ranging investigation including contracts won in Saudi Arabia, South Africa, Tanzania, Austria, the Czech Republic and Hungary. As well as the SFO, a number of overseas prosecution agencies were also investigating the allegations, most notably the DOJ in the US.
170. In the UK, a crisis point was reached when the SFO decided not to proceed with the allegations concerning the contracts to supply military aircraft to Saudi Arabia. This decision was contested, which culminated in the House of Lords ruling in July 2008 that the Director of the SFO had not acted unlawfully in terminating the investigation in the public interest on grounds of national security. Nevertheless, the reputation of the UK Government in tackling overseas bribery took a severe hit.
171. The SFO continued, however, to investigate the remaining allegations involving BAE. By late 2009 no agreement had been reached between the SFO and BAE; indeed, on 29 January 2010 Count Mensdorff was arrested and held in custody on the application of the SFO. Counsel for the SFO told the court that Mensdorff had been part of a “*sophisticated and meticulously planned operation involving very senior BAE executives*” to fund a \$17 million bribery campaign in Austria, the Czech Republic and Hungary, using off-shore company bank accounts held in Switzerland. However, on 4 February 2010 he was granted bail, and on the following day the SFO announced the global settlement with BAE and the withdrawal of the charges against Count Mensdorff.

The prosecution case in the US

172. The global settlement was orchestrated by the DOJ. According to the information posted on the DOJ website, it appears that BAE had agreed to pay the statutory maximum fine of \$400 million for pleading guilty to making false statements to the US Government in relation to certain filings and undertaking. These related to alleged bribes made in connection with contracts in Saudi Arabia,

⁶⁹ The information in this table relates to the charges brought against BAE in the UK courts.

⁷⁰ Total payments made to the overseas agent Vithlani.

⁷¹ BAE agreed to make an ex gratia payment to Tanzania of £30 million less the cost of any fine.

Hungary, and the Czech Republic.

173. BAE pleaded guilty to one offence of conspiring to commit offences against the United States, in violation of 18 United States Code (“U.S.C.”) Section 371, in that it conspired to impair and impede the lawful government functions of the United States, by making false statements contrary to 18 U.S.C. Section 1001 and to violating the Arms Export Control Act and the International Traffic in Arms Regulations. The DOJ website⁷² sets out the settlement as follows:

“from approximately 2000 to 2002, BAE represented to various U.S. government agencies, including the Departments of Defense and Justice, that it would create and implement policies and procedures to ensure its compliance with the anti-bribery provisions of the FCPA, as well as similar, foreign laws implementing the Organization for Economic Cooperation and Development (OECD) Anti-bribery Convention. According to court documents, BAE knowingly and willfully failed to create mechanisms to ensure compliance with these legal prohibitions on foreign bribery.”

174. The actions which were contrary to the FCPA resulted in a gain for BAE of \$200 million. According to court documents,⁷³ BAE funnelled payments to agents through a British Virgin Islands (BVI) entity, which BAE admitted was created *“to conceal its marketing advisor relationships... to create obstacles for investigating authorities... circumvent laws in countries which did not allow such relationship; and to assist advisors in avoiding tax liability for payments from BAE”*.
175. This BVI entity was used by BAE from May 2001 to make payments totalling £135 million, plus \$14 million, despite knowing in certain situations that *“there was a high probability that part of the payments would be used to ensure that BAE was favoured in foreign government decisions regarding the purchase of defense articles”* and *“in many instances, BAE possessed no adequate evidence that its advisors performed any legitimate activities in justification of the substantial payments”*.
176. In addition, BAE provided substantial benefits to a foreign public official of the Kingdom of Saudi Arabia who was *“in a position of influence regarding sales of fighter jets, other defense materials and related support services”*. BAE admitted taking no steps to adequately review or verify more than \$5 million in invoices submitted and to transferring more than £10 million plus \$9 million to a Swiss bank account, being aware that there was a high probability that these payments would be transferred to the same Saudi official.
177. Further admissions were made in relation to making and causing to be made, false, inaccurate or incomplete statements, and failing to make required disclosures to the US Government for various export licences, including one instance relating to a payment of £19 million paid to an intermediary with the high probability that it would be used to influence the tender process for fighter jets in the Czech Republic.

The prosecution case in the UK

178. In the UK, the criminal proceedings were subject to the global plea agreement negotiated by the SFO in February 2010. On 21 December 2010 sentence was finally pronounced by Mr Justice Bean. Under the plea agreement, the charges were limited to allegations of unlawful conduct in relation to contracts in Tanzania. BAE pleaded guilty to an offence of failing to keep proper books and records under the Companies Act, in relation to certain payments made in Tanzania, and agreed to pay £30 million.
179. The essential elements of the charge, which was the subject of substantial criticism,⁷⁴ is set out below; the full version is available on the SFO website:⁷⁵

⁷² DOJ: <http://www.justice.gov/opa/pr/2010/March/10-crm-209.html>

⁷³ Referred to on the DOJ website.

⁷⁴ See the judgement of Mr Justice Bean: <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/r-v-bae-sentencing-remarks.pdf>

⁷⁵ Charge: <http://www.sfo.gov.uk/media/133539/bae%20-%20charge.pdf>

“The particulars of the offence are that, between 1st January 1999 and 31st December 2005, BAE Systems Plc, knowingly procured the failure of British Aerospace Systems Limited to knowingly comply with the provisions of Section 221 of the Companies Act 1985 and thereby aided and abetted, counselled and procured the commission of the offence contrary to Section 221(5) of the Companies Act 1985 and that failure was a failure by British Aerospace Defence Systems Ltd. to keep sufficient accounting records to show and explain payments made pursuant to (a) a contract between Red Diamond Trading Ltd. and Envers Trading Corporation, (b) a further contract between British Aerospace (Operations) Limited and Merlin International Limited.”

180. The opening note⁷⁶ makes it clear that the central issue was payments to “marketing advisors”, in this instance Mr Shailesh Vithlani, in respect of the supply of a radar system. BAE wanted these payments to be made confidentially, and in order to facilitate this aim BAE Plc incorporated Red Diamond Trading Ltd in the BVI, in February 1998. This was only known to a small group of senior executives.

181. From January 2000 to December 2005, approximately \$12.4 million was paid to two companies, Envers Trading Corporation, a “covert” company, and Merlin International Ltd, an “overt” company, both of which were under the control of Shailesh Vithlani. His fee was approximately 30% of the contract price in the former company and 1% in the latter.

182. Paragraph 4.5 of the basis of plea, quoted at paragraph 24 of the Opening Note, states that BAE has accepted:

“There was a high probability that part of the \$12.4 million would be used in the negotiation process to favour British Aerospace Defence Systems Limited.”

183. Paragraph 25 of the Opening Note states that:

“BAE has accepted that there was a high probability that the payments to Vithlani were intended to compensate him for work done in seeking to persuade relevant persons to favour BAEDS in respect of the radar project. It is not now possible to establish precisely what Vithlani did with the money which was paid to him.”

The next paragraph continues:

“However it is no part of the Crown’s case that any part of those payments were in fact improperly used in the negotiation process to favour BAEDS, nor is it any part of the Crown’s case that BAE was party to an agreement to corrupt.”

The settlement agreement

184. The Judge described the settlement agreement as “loosely and perhaps hastily drafted.” He homed in on Point 8 of the agreement, saying:

“... It is relatively common for a prosecuting authority to agree not to prosecute a defendant in respect of specified crimes which are admitted and listed in the agreement... But I am surprised to find a prosecutor granting a blanket indemnity for all offences committed in the past, whether disclosed or otherwise.”

185. The settlement agreement included the following terms:

a) Point 5 – An ex gratia payment by the company of £30 million, less any financial orders imposed by the Court “for the benefit of the people of Tanzania in a manner to be agreed between the SFO and the Company”.

Comment. The price of the contract that was at the heart of this case was \$39.97 million. As the Judge said in sentencing, “The structure of this Settlement places moral pressure on the Court to keep the fine to a minimum so that the reparation is kept to a maximum.”

⁷⁶ Opening note: <http://www.sfo.gov.uk/media/133543/bae%20opening%20statement%2020.12.10.pdf>

- b) Point 6 – The SFO would not prosecute any person in relation to conduct other than conduct connected with the Czech Republic or Hungary.
Comment. By this time the references to the Czech Republic and Hungary were entirely redundant, since the SFO had effectively abandoned that part of its investigation by discharging the case against Count Mensdorff Pouilly.
- c) Point 7 – All investigations into BAE would cease forthwith.
- d) Point 8 – *“There shall be no further investigation or prosecutions of any member of the BAE Systems Group for any conduct proceeding 5th February 2010.”*
- e) Point 9 – There shall be no civil proceedings against any member of the BAE Systems Group in relation to any matters investigated by the SFO.
- f) Point 10 – No member of the BAE Systems Group shall be named as, or alleged to be, an unindicted conspirator or in any other capacity in any prosecution the SFO may bring against any other party.
186. The Judge referred to the fact that he had no power to set aside the agreement and was also powerless to do anything about the SFO’s decision not to charge any individuals, despite the SFO’s statement that Vithlani’s re-appointment had been personally authorised by the Chairman of BAE, Sir Dick Evans, and that the Companies Act offence *“was the result of a deliberate decision by one or more officers”*.
187. The Court, however, did have the power to accept or reject the basis on which a plea had been agreed, since *“Once the criminal courts are involved, sentence cannot be passed on an artificial basis.”*
188. When BAE acquired Siemens Plessey it inherited the agency agreement with Shailesh Vithlani. However, BAE signed a fresh agreement with Vithlani that was approved by *“senior BAE employees”*. This was the agreement which afforded Vithlani 31% of the eventual contract price for the radar deal, of which 1% was paid to Vithlani’s Tanzanian company, whilst the remaining 30% went through a BAE offshore vehicle, to an offshore company controlled by Vithlani. The payments were described in the books of British Aerospace Defence Systems Ltd (“BAEDS”) as for the provision of *“technical services”*.
189. As to whether there was evidence that monies were intended to favour BAEDS in the negotiation process, the Judge commented:

“Indeed there was. Otherwise it is inexplicable on the material before me, why the payments to Mr Vithlani’s companies exceeded \$12 million; and even more inexplicable why 97% of that money should have been channelled via Red Diamond, an offshore company controlled by BAE and paid to Envers, another offshore company controlled by Mr Vithlani.”
190. That being so, he found the SFO’s statement in opening *“to be astonishing”* that *“it is no part of the Crown’s case that any part of those payments were in fact improperly used... To lobby is one thing, to corrupt another.”* The Judge commented *“on the basis of the documents shown to me it seems naïve in the extreme to think that Mr Vithlani was simply a well-paid lobbyist.”*
191. Exceptionally, the Judge had made it clear to the parties that:

“I could not, without hearing evidence accept any interpretation of the basis of plea which suggested that what BAE were concealing by the Section 221 offence was merely a series of payments to an expensive lobbyist. Such evidence might for example have involved witnesses who could testify, if it really is the case, that legitimate lobbyists could be paid 30% of the value of a \$40 million contract simply as recompense for their time and trouble.”

192. He made it clear that he was prepared to grant an adjournment for any such evidence to be called. The Company chose not to avail itself of that opportunity.
193. The second hurdle the parties faced in constructing the charges in the plea agreement, was to provide a logical basis upon which the company could plead to the offence of failing to keep accounting records *“sufficient to show and explain the transactions of the company”* as required by the Act. If there was nothing corrupt or otherwise illegal about the services for which Vithlani had been so handsomely paid why should it matter that they had been described as *“technical”* as opposed to *“marketing”*, or indeed why should it matter how they were described?
194. The SFO asserted, however, that *“the financial position was not stated with reasonable accuracy, since it was not possible for any person considering the accounts to investigate and determine whether the payments were properly accounted for and were lawful.”* The Judge asked counsel for the SFO, in that case what should have been in the accounting records instead of the phrase *“provision of technical services”*. The response was *“something along the lines of public relations and marketing services”*, to which the Judge rejoined that if this were a true description of Vithlani’s services he personally doubted whether it would have been appropriate to prosecute at all.
195. The Judge passed comment on the basis of plea *“by describing the payments in their accounting records as being for the provision of ‘technical services’ the defendants were concealing from auditors and ultimately from the public that fact that they were making payments to Mr Vithlani, 97% of them via two offshore companies, with the intention that he should have free rein to make such payments to such people as he thought fit in order to secure the Radar Contract for the defendants but that the defendants did not want to know the details.”*
196. As to the financial penalty, because of the way that the case had been charged and settled, the Judge had no power to order confiscation or compensation. For a variety of reasons, including the *“moral pressure”* not to reduce the ex gratia payment, he could only fine the Company £500,000 plus £225,000 towards the Prosecution’s costs.
197. By July 2011 BAE had yet to make any payments to Tanzania and was roundly criticised by the International Development Committee. Although the company had agreed to pay the balance of £30 million less the Court-imposed fine as restitution, such sum was an ex gratia payment and did not feature in a court order.

Section 6 Commentary and Issues in Criminal Plea Agreements

6.1 PROSECUTION CONDUCT

Transparency in proceedings

198. The procedure adopted in the pleas agreed in the three criminal cases outlined above is that the prosecution and defence agree a plea agreement and other information which form a suite of documents placed before the Judge. Those include the indictment; statement of facts; admissions; agreed mitigation; memorandum on sentencing; and costs. There is also a transfer or sending bundle with witness statements and exhibits. The statement of facts or opening will refer to certain exhibits and the Judge may be provided with a separate bundle of those key documents.
199. In all criminal cases, the charges and later the indictment are publicly available documents. The prosecution opening is a summary of the case against the defendant and can be reported on, subject to a Contempt of Court Act Order. It has been the practice to issue press releases on the day of sentence. The agreement of a press release with a defendant company was disapproved of in Innospec.
200. In criminal cases, the way in which the prosecution and defence approach the case is relatively open and the facts are ventilated. There are, however, some limitations. The court file is not publicly available.⁷⁷ The opening can be reported, but judicial practice varies and the judge may invite Counsel merely to summarise the statement of facts. In fact that occurred in the M&J case.
201. The SFO later published the agreed statement of facts on its website, a move which is welcomed, as it provided some key pointers to the approach taken by the SFO in the conduct of plea discussions. However, that practice was neither followed in the Innospec case nor in BAE. In the BAE case, the plea agreement was published, whereas in Innospec and M&J it was not.
202. In the cases of M&J and Innospec, where it was anticipated that proceedings against individuals would follow, the opening or agreed statement of facts were anonymised to prevent prejudice to future proceedings. Although there can be room for professional disagreement about whether this practice is unduly conservative, it has to be observed that the loss of transparency is likely to be marginal, as opposed to the potential for damage to future proceedings.

Transparency of charges

203. It is the prosecutor's duty to bring appropriate charges that properly reflect the underlying criminality conduct. It is also important that the prosecutor is free to exercise his discretion in choosing the charges to bring. The cases summarised above illustrate the extent to which prosecutorial discretion has been exercised.
204. In M&J there was a two count indictment in relation to the overseas bribery. However, the opening statement also referenced four other jurisdictions where the conduct, though not indicted, was indicative of corruption. The status of that information and the extent of the corruption was dealt with by a general admission that such practices were "*pervasive*".
205. Since the ultimate financial penalties which were levied on M&J were bound by its ability to pay, it

⁷⁷ *R. (on the application of Guardian News and Media Limited) v. City of Westminster Magistrates Court* [2012] EWCA Civ 420 - see <http://www.acclawyers.org/2012/04/13/disclosure-of-court-documents-in-criminal-proceedings-r-on-the-application-of-guardian-news-and-media-limited-v-city-of-westminster-magistrates-court/>

could be argued that it did not matter how many charges there were for the purposes of sentencing. But such a decision has the effect of failing to bring to the court's attention the full extent of the criminal conduct.

206. As we have seen, the Court does have the ability to question the charges brought or an agreed plea, on a basis which falls below the demonstrated evidence of the transfer bundle.
207. In Innospec, the company conducted a thorough review of its use of agents in numerous jurisdictions; however, evidence was only produced of the breach of sanctions in Iraq and the corruption in Indonesia. There was no criticism of the SFO in dividing the criminality between the US, which prosecuted both sanctions and corruptions offending as wire fraud and FCPA offences respectively, whereas the SFO prosecuted the Indonesian conduct. Nor was there criticism of the selection of charges:

“A prosecutor must, in accordance with the relevant Attorney General’s guidelines... exercise his discretion as to the charges to be preferred. No question arises in this case as to the extent to which his decision may be challenged, as the charge of conspiracy preferred properly reflects the criminality.” (para 25 (i))

208. In addition, Lord Justice Thomas noted there was no issue with the prosecutor's acceptance of the basis for plea (para 25 (ii)). However, the important concept here is the Court's vigilance and role in assessing whether the plea and its basis were *“in the interests of justice”*. The use of the word *“challenged”* seemed particularly strong and seemed to signal an enhanced judicial role in cases of *“pre-charge”* plea agreements, where the judicial role is more problematic, because the judge does not have the statements or other material that he can rely upon to assess whether the charges brought were in the public interest.
209. This theme was returned to in the context of the BAE sentencing hearing. Mr Justice Bean *“challenged”* or criticised the charges brought. He could not understand why, based on the facts of the case, the SFO did not bring corruption charges. Far from the SFO alleging that there were, or may have been corrupt payments made by Mr Vithlani, it in fact asserted the opposite:
- “It is no part of the Crown’s case that any part of those payments were in fact improperly used in the negotiation process to favour BAEDS, nor is it any part of the Crown’s case that BAE was a party to an agreement to corrupt” (para 25)*
210. The SFO argues that a fuller picture of its reasoning on the charges brought would be gleaned from its submissions to Court, where the difficulties of proving beyond reasonable doubt that a company had committed a criminal offence were expanded upon, in particular, the difficulties posed by the *“identification principle”* on corporate liability. However, such reasoning is not on public record.
211. The Judge asked Counsel for the SFO what should have been in the accounting records instead of the phrase *“provision of technical services”*. The response was *“something along the lines of public relations and marketing services”*, to which the Judge rejoined that if this were a true description of Vithlani's services he personally doubted whether it would have been appropriate to prosecute at all.
212. Whereas the judges have the means to criticise the charges on the indictment in criminal cases post transfer, afforded by CCPD IV.45, where the prosecution case can be seen on the papers, it does not work well in cases where pleas have been agreed pre charge. The Judge is essentially speculating about evidence that has not been disclosed to the court because it is not relevant to the charges that have been selected.
213. The exercise of a prosecutor's discretion, whether to prosecute and on what charges, is subject to judicial review, as illustrated by the BAE case. However, the effect of a successful application for judicial review is for the court to direct the prosecuting authority to reconsider its decision. Furthermore, the BAE litigation itself demonstrates how difficult it is for an interested party to challenge successfully a prosecutor's discretion not to prosecute.

214. The CPS⁷⁸ has set out some circumstances where applications for judicial review of prosecutorial decisions are likely to be successful. Circumstances include: where the law has not been properly understood or applied; evidence has not been considered; it can be demonstrated that, in a significant area, there has been an irrational view of the evidence; the decision is perverse, such that no reasonable prosecutor could have arrived at it; prosecution policy has not been properly applied and/or complied with; the policy itself is unlawful; or where *mala fides* can be demonstrated, namely, where there is fraud, corruption or bad faith.

There may be a role to be played by an independent body, such as a parliamentary select committee, in reviewing sensitive cases with a view to making recommendations on any necessary changes of law and practice. However, the effectiveness of such a body in counter-balancing the independent exercise of prosecutorial discretion is dependent on getting full access to case papers, including any unused material that is relevant to establishing the full extent of the criminal conduct of the case.

Bargaining with individuals

215. In the AG's Guidelines on Corporate Prosecutions it is stated:

"A thorough enforcement of the criminal law against corporate offenders, will have deterrent effect, protect the public and support ethical business practices. Prosecuting corporations, where appropriate, will capture the full range of criminality involved and thus lead to increased public confidence in the criminal justice system... Prosecution of a company should not be seen as a substitute for the prosecution of criminally culpable individuals." (7 and 8)

216. In both M&J and Innospec the plea agreement reached with the company was not subject to any agreement not to prosecute the company's employees and executives. In fact, subsequent to the corporate pleas in M&J, David Mabey and Charles Forsythe were

prosecuted successfully in relation to sanctions offences, and there are pending prosecutions against certain executives of Innospec.

217. In the BAE case, proceedings which had commenced against Count Mensdorff Pouilly were discontinued upon the reaching of the global plea agreement, as were the investigations into the conduct of Vithlani and other suspects at BAE.

218. It goes without saying that a company will be concerned about the prosecution of former executives. Any trial will reflect badly on the company and have adverse effects on its business. It is possible that any settlement with the company may be delayed by the impending trials of individuals, which could be prejudicial to the company, and of course there is no certainty that the individuals will be found guilty. Such uncertainties are likely to hinder settlement negotiations but they must not be allowed to undermine the carriage of justice in dealing appropriately with the corporate defendant.

Where there is sufficient evidence to prosecute the company, the individuals who acted as its guiding mind should also be subject to criminal proceedings. Where a settlement or plea agreement is made with the company, a decision to abandon the prosecution of responsible individuals must be subject to rational and consistent criteria, as set out in the Code for Crown Prosecutors, and should be the exception rather than the rule.

⁷⁸ Guidance on Judicial Review of Prosecutorial Decisions:
http://www.cps.gov.uk/legal/a_to_c/appeals_judicial_review_of_prosecution_decisions/

Binding conduct for the future

219. Although there are sound reasons for negotiating with a company and concluding proceedings against it in advance of criminal prosecutions against individuals, there are obvious risks. The company itself will have conducted the investigation and although the terms and conduct of that investigation can be critically assessed or indeed challenged, there is a risk that follow-on prosecutions of individuals will reveal conduct which either contradicts, places in doubt, or adds to the totality of the criminality of the company.
220. In M&J and in Innospec the SFO catered for this possibility:
- “The Director of the SFO wishes to emphasise that by accepting the proposed pleas, the SFO does not fetter itself in any way from investigating (and, if appropriate, prosecuting) undeclared allegations of corruption against the Company if these are discovered at a later stage... However given the admission of the Company of the widespread historical corrupt practices within the indictment in relation to its business affairs in a number of jurisdictions, the SFO accepts that having taken this feature into account in the sentencing of the Company, further undisclosed criminality within the indictment period will not be the subject of prosecution against the Company.”*
221. In M&J, having regard to the extensive internal investigation and the fact that the basis of plea accepted a “pervasive practice” of corruption in other jurisdictions, it was acknowledged that any new evidence would need to have been significant to have justified new proceedings. In practice this meant any offences that occurred outside of the scope of the investigation that covered the period up to 2003.
222. It is not clear if the same approach was adopted in Innospec, because the plea agreement was not made public. However, as can be seen from the DPAs published by the DOJ, companies are obliged to disclose the full extent of offending or face prosecution. Whether this happens in practice is debatable; there is little evidence of subsequent proceedings against companies that were subject to a DPA, but the option to prosecute is quite clear.
223. In the BAE plea agreement the SFO conceded that there would be no prosecutions or naming of BAE employees in any criminal or civil proceedings for any conduct prior to February 2010:
- “There shall be no further investigations or prosecutions of any member of the BAE Systems Group for any conduct predating 5 February 2010.”* (para 8)
- “No member of BAE Systems Group shall be named as, or alleged to be, an unindicted co-conspirator or in any other capacity in any prosecution the SFO may bring against any other party.”* (para 10)
224. The extent to which any such agreement would stand as an effective inhibition against future prosecutions has not been tested; however, breaching representations by a prosecutor may amount to an abuse of process and provide a basis for a judicial review of the decision to commence a further investigation.⁷⁹
225. The Judge described the BAE Agreement as “loosely and perhaps hastily drafted”. He homed in on Point 8, saying: “... *It is relatively common for a prosecuting authority to agree not to prosecute a defendant in respect of specified crimes which are admitted and listed in the agreement... But I am*

⁷⁹ Reneging on a prosecution assurance not to prosecute is subject to review and is capable of founding a stay as an abuse of process. Whilst there is no case law specifically relating to plea agreements, the approach of the courts in relation to other areas gives an indication of the factors that are taken into account. The point is considered in Archbold [2011] at 4-65. The preconditions for an argument to stay proceedings are an unequivocal representation by those with conduct of the investigation or prosecution that the defendant will not be prosecuted and that the defendant acted on that representation to his detriment. However, these are necessary, not sufficient conditions. Where, as in the case of *Abu Hamza* [2007] 1 Cr. App. R 27, CA, new facts come to light after the representation has been made, then the prosecution may be justified in proceeding notwithstanding the assurance given. Archbold also asserts that decisions of prosecutors in foreign jurisdictions “*will not of themselves render a prosecution in England and Wales an abuse of process; the test will be whether the defendant can have a fair trial or whether it would be unfair for him to be tried*”.

surprised to find a prosecutor granting a blanket indemnity for all offences committed in the past, whether disclosed or otherwise.”

226. The solicitors acting for BAE subsequently confirmed to the SFO that the company would not dispute that paragraph 8 of the settlement agreement should be interpreted as meaning *“that the SFO will not prosecute our client’s group in relation to matters which were the subject of its investigations or of which the SFO was otherwise aware before the date of the settlement”*.⁸⁰
227. It has been argued that there is little to be gained by the prosecution expending scarce resources to establish the full extent of the offences if the evidence of offences already in their possession is sufficient for the judge to pass the appropriate sentence. A prosecutor will always have to decide on the scope of the investigation and charges on the indictment but any immunity or indemnity from prosecution can only be made when the defendant is acting in good faith.

TI-UK considers that no plea agreement should include a term granting a blanket indemnity from prosecution for undisclosed criminal acts committed in the past. The SFO should consider including this fundamental principle in its self-reporting Guidelines.

Relationships with other prosecutors: concurrence and primacy

228. Overseas bribery cases will by definition always have at least two different jurisdictions involved. Often because of the nature of international business, or the extent of the criminality, a number of jurisdictions could be implicated.
229. In the EU there are mechanisms available to determine which jurisdiction has primacy in legal proceedings. Eurojust, the EU’s Judicial Cooperation Unit, was established to facilitate greater judicial cooperation between member states. The role of Eurojust in combating crime is set out in the Nice Treaty Amendment to the (Maastricht) Treaty of Europe, Article 31. Under Section 1(d), Eurojust is charged with preventing conflicts of jurisdiction between member states.
230. The Council of Europe Decision that established Eurojust (Decision 2002/187/JHA) states that its function is to reinforce the fight against serious crime by stimulating and improving co-ordination between the judicial authorities of member states. Although an EU body, it has privileged relations with the wider European Judicial Network and with other countries, such as the United States. Under Article 6 Eurojust may require member states:
- 1) to undertake an investigation or;
 - 2) *“to accept that one of them may be in a better position to undertake an investigation or to prosecute specific acts”*; and
 - 3) to give reasons for declining.
231. In the event of conflict between members states Eurojust, acting as a college, can give non-binding opinions. It can be seen, therefore, that it has no binding or sanction imposing authority. However, it has exceptional value as a European centre of excellence and as a forum for member states and third states to meet and exchange information on investigations that impinge on the interests of more than one nation. Its centre at The Hague provides the facility for prosecutors and their national members to sit with interpreters, to share information and to iron out procedural and tactical problems and it has been used to great effect in major cross-border corruption cases.
232. At present, the only mechanism that exists for resolving jurisdictional clashes is confined to extradition and to a set of guidelines issued by the Attorney General to provide for early identification and warning of the need for liaison between prosecutors, and for a mediating role by the Attorney General in the event that they cannot agree.

⁸⁰ Letter from Allen & Overy to the SFO dated 22 February 2011.

233. The issue of “primacy” and how concurrence would be resolved with the US DOJ and other US agencies has been played out in a number of cases, for example, the extradition to the US of Tester & Chodan in the KBR case, with MWKL being subject to a civil recovery order in the UK. This raises the issue as to whether there is a tendency by UK prosecutors not to fully assert the primacy of proceeding being conducted in the UK when working alongside the US DOJ.
234. Innospec aptly typifies this issue. Innospec Inc was the US parent issuer. Innospec Ltd was the UK subsidiary based in Ellesmere Port. It was through predominantly UK nationals operating from the UK and largely through the subsidiary that the corruption and sanctions offences were committed. There were breaches of US sanctions in selling product to Cuba but these were not offences in the UK. Because of its stock market listing in the US and other activities, the DOJ, SEC and OFAC all had jurisdiction over conduct which was primarily conducted in the UK.
235. In the Innospec plea agreement, the available funds were roughly split one-third each between DOJ, SEC and SFO. Lord Justice Thomas believed the division should have been 50% to the UK. Although BAE is rather a unique case, more than 95% of the relative fines were paid in the US, in what must be viewed essentially as an UK case. Lastly, in the Johnson & Johnson/DePuy case the DOJ/SEC settlement was \$70 million, with only £5 million on the UK side. Although the US settlement included FCPA offences committed in other countries that did not feature in the UK prosecution of the corruption in Greece, the corrupt practices were largely conducted through the UK subsidiary and its management.
236. In the DePuy settlement, the SFO specifically refers to the boundaries imposed on the UK settlement by double jeopardy, in effect, justifying civil recovery because appropriate sanctions had been imposed in the US and Greece. The SFO stated: *“It has worked to achieve a sanction in this jurisdiction which will form part of a global settlement that removes all of the traceable unlawful property and at the same time imposes a penalty.”*

TI-UK recognises that primacy of jurisdiction is a complex area. There may be a range of considerations that determine how a dual or multi-jurisdictional case is dealt with. What is clear, however, is that decisions should be taken as far as possible after full bi-lateral or multi-lateral collaboration, on grounds of public interest rather than narrow national self-interest. Furthermore, defendants should not be encouraged to believe that they can forum shop in the expectation that they can play jurisdictions against each other.

Negotiating sentences with the defendant or with other prosecuting authorities

237. Innospec was the first ever global settlement which involved coordinated outcomes in two courts. The principal criticism of the SFO’s approach to this case is that there was an agreed division of the available amount for fines between the four interested parties – the DOJ, SEC, OFAC and SFO. The Court heard accountancy evidence about the maximum available amount that the company could afford, thereby avoiding insolvency. However, the agreement of the share to be allotted to each agency in advance of the Court’s sanction was criticised by Lord Justice Thomas.
238. The appropriate procedure for dealing with plea agreements is set out in the Consolidated Criminal Practice Direction, Part IV.45.25, which provides that: *“prior to pleading guilty in accordance with the plea agreement, the defendant(s) may apply to the court for an indication of the likely maximum sentence...”*
239. However, by Part IV.45.26, where *“the judge indicates a sentence or passes a sentence which is not within the submissions made on sentencing, the plea agreement remains binding”*. Moreover, if the defendant *“does not plead guilty in accordance with the plea agreement or if a defendant who has pleaded guilty in accordance with a plea agreement successfully applies to withdraw his plea under Rule 39.3 of the Criminal Procedure Rules, the signed plea agreement may be treated as confession evidence, and may be used against the defendant at a later stage in these or any other proceedings”*.
240. It is clear that defendant companies will wish to agree the basis of any fine with the prosecutor during plea negotiations. The courts have made it clear that sentencing is their responsibility and that

prosecutors should set out a range of fines based on the recommendations of relevant authorities. Negotiating the level of fines is made easier in the US because of the computational nature of the sentencing guidelines. The same is not true in the UK, where there are no specific guidelines covering overseas bribery cases.

6.2 SENTENCING ISSUES

The seriousness of foreign bribery

241. Although traditionally corruption in the UK was viewed primarily as a breach of the duty that an agent owes to its principal, prior to M&J there was no UK-based articulation of the seriousness of overseas bribery as a crime. In M&J the SFO stated:

“Overseas bribery is not a ‘victimless crime’... the victims are all or any of the proper interests of the governments of the countries where such practices are carried out, the integrity of their civil services and public officials, and – more generally – the peoples of those countries, particularly the poorer and poorest sectors of those populations.” (Appendix 1, para 3)

242. In both *Innospec* and later in *Dougall*, the Lord Chief Justice also quoted Kofi Annan on the serious nature of corruption:

“Corruption is an insidious plague that has a wide range of corrosive effects on society. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organised crime, terrorism and other threats to human security to flourish. This evil phenomenon is found in all countries – big and small, rich and poor... corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government’s ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic under-performance and a major obstacle to poverty alleviation and development.”

Whilst the harmful effects of public corruption is gaining momentum on the international stage, it has only attracted a lot of media and business attention in the UK with the passing of the Bribery Act. The corporate offence under the Act will ease the evidential burden on the SFO in commencing proceedings against companies that are involved with corrupt practices. It is hard to predict whether the number of prosecutions will increase dramatically but it is clear that the Sentencing Guidelines Council should issue guidance on sentencing in overseas bribery cases.

Comparative seriousness

243. In sentencing M&J, Judge Rivlin apportioned the available amount equally between the breach of sanctions offences and the overseas bribery offences, although he expressed strong views about the gravity of sanctions offences.
244. In the *Innospec* case, Lord Justice Thomas placed overseas bribery at the top of the criminal calendar in terms of economic offending:

“There can be no doubt that corruption of foreign government officials or foreign government ministers is at the top end of serious corporate offending both in terms of culpability and harm. It is deliberate and intentional wrongdoing. It causes serious harm... It is no mitigation to say others do it or it is a way of doing business.” (para 30)

245. He stated that, in his view, this type of offending was more serious than cartel offences as *“one of its many effects is to distort competition; the level of fines in cartel cases is now very substantial and measured in tens of millions. It is self-evident that corruption is much more serious in terms both of culpability and harm caused.”* (para 31)

Assessing amount available to be paid by a company

246. In M&J and Innospec the SFO produced accounting evidence to demonstrate the financial position of the defendant companies. Prior to the sentencing hearing, the SFO and the defendant companies had engaged in an exhaustive process of determining the maximum penalty available to the court, without putting the company at risk of administration.
247. In neither case did the court seek to test the evidence put before it and accepted the figures presented as a “*maximum available amount*”. This exercise was not necessary in the BAE case, as there were more than sufficient funds to pay the fines imposed.

Calculation of fines

248. Having established the seriousness of the offending, the question as to how to calculate the fine was discussed in Innospec. However, only broad principles were canvassed.
249. It was noted that a fine must be “*effective, proportionate and dissuasive in the sense of having a deterrent element*” (para 32). Lord Justice Thomas also recognised that public policy required that sentencing must be broadly comparative to other jurisdictions, to avoid injustice or “forum shopping”:

“There is every reason for states to adopt a uniform approach to financial penalties for corruption...so that the penalties in each country do not discriminate either favourably or unfavourably against a company in a particular state” (para 31)

250. He suggested, therefore, that in relation to the Indonesian conduct the fine would have started at approximately the same level as the outturn of the US Federal Sentencing Guidelines sentencing matrix. However, this would have exceeded the total amount that all parties accepted was available.
251. Guidance was placed before the Judge on the different bases for sentencing companies, drawn from regulatory and corporate manslaughter cases, as well as from international approaches. In the end, the Court did not determine what approach was approved, given that the maximum fine was above that which the company could pay.
252. What remains unclear is on what basis the fine should be calculated; whether it should be guided by the benefit to the company (profitability or revenue); what features of aggravation and mitigation might exist outside of the general principles of public interest set out in the Code, the AG’s Guidance and now the Joint Prosecution Guidance; and how to take account of the harm to victim countries and provide an effective deterrent factor.

Relationship between fines and confiscation

253. Prior to M&J there was no certainty concerning the respective roles of fines and confiscation. Indeed, the closest comparator for fines in England and Wales in relation to corporate entities was perhaps that levied on Balfour Beatty in the wake of the Hatfield rail crash: £10 million, with a further £3.5 million against Network Rail. Arguably, prior to the Innospec case there was little certainty as to the possible quantum of corporate fines.
254. Conversely, the POCA 2002 sets out the basis for confiscation and there had been a number of cases that questioned the basis upon which “benefit” should be calculated: whether it should be the revenue generated by the illegal conduct as opposed to the profit generated by it. Perhaps, therefore, it was not surprising that in the M&J case the SFO sought to prioritise confiscation in the way in which it proposed the breakdown of the overall financial penalty.
255. This approach was the subject of adverse comment by Judge Rivlin, but not entirely rejected. However in general terms, Judge Rivlin wanted to preserve the traditional role of the court to punish by way of fine.
256. In the Innospec case the SFO approached sentencing in the same way, by prioritising confiscation. Again, the SFO’s approach did not commend itself to the judiciary.

257. In both M&J and Innospec, because the criminality in part predated the introduction of the Proceeds of Crime Act 2002, the provisions of the Criminal Justice Act 1988 applied. Under that regime, confiscation would be triggered by the prosecutor serving a written notice on the court to initiate confiscation proceedings.
258. There were no confiscation proceedings in BAE. It is more difficult to establish that an accounting irregularity resulted in a benefit to the company. This appears to have been the position adopted by the SFO, which found that the benefit to BAE from the criminal conduct was zero and hence imposed on the company an obligation to make an ex gratia payment.
259. In M&J, the Court considered confiscation and then set the fine. The SFO agreed not to pursue confiscation unless the Court was content with the sentencing range that had been proposed. In Innospec, the Director of the SFO was “guided” towards not triggering confiscation proceedings under the Criminal Justice Act 1988.
260. It was recognised that the Director could have triggered the confiscation regime and as a consequence the court would have been duty bound to consider confiscation first, and as a priority over a fine. However, in the view of Lord Justice Thomas this course would have been inappropriate:

“It is very important and in the public interest and as a signal of deterrence to others that a fine of very considerable magnitude is imposed and is seen to be imposed as a mark of the very serious criminal conduct of which the company is guilty. The conduct must be severely punished irrespective of whether it has produced a benefit.” (para 36 (i))

261. Under POCA 2002, the discretion that the prosecution once had to initiate confiscation by the service of a notice has been removed. It is clear that under the older regimes, where a company cannot afford to pay both a fine and confiscation, that the fine should be prioritised. However, under POCA the process occurs automatically and the court has to consider confiscation.
262. The leading case is *R v May* [2008] 1 AC 1028. Through it, the House of Lords reviewed the principles of confiscation and set out three questions:

- (a) has the defendant (D) benefited from the relevant criminal conduct;
- (b) if so, what is the value of the benefit D has so obtained; and
- (c) what sum is recoverable from D?

In the case of *R v Jennings* [2008] 1 AC 1046, it was held that the phrase “obtains” necessarily connotes “a power of disposition or control”.

263. Difficult issues involving the interpretation of “benefit” can arise where unlawful conduct has contributed in part to the profit-making of otherwise legitimate companies (see *Blackstone’s*⁸¹). Many of the examples do not translate well to international corruption cases, but they do nevertheless give an indication of the approach adopted. The case of *R v Seager* [2010] 1 WLR 815 demonstrates that whilst the turnover of a company may be relevant to ascertaining the benefit of a disqualified director, it is not necessarily correct to equate turnover with the benefit obtained.
264. *R v Xu* [2008] EWCA Crim 2372 concerned the benefit obtained by employing illegal workers in a restaurant, which could be viewed as amounting to the receipts generated or the expenses avoided. However, it was held neither to be realistic nor just to find that the total receipts of the restaurant were generated from the employment of the illegal immigrants, since they accounted for one-quarter of the workforce and as such, the Court of Appeal reduced the benefit figure to one-quarter of the receipts.
265. The Court of Appeal has given guidance in respect of the assessment of benefit under POCA. In *R v Sivaraman* [2009] 1 Cr App R (S) 80, the defendant worked in a fuel filling station. He agreed to take delivery of “red diesel” enabling the owner to evade excise duty and giving him a pecuniary advantage of £128,520; Sivaraman was paid £15,000 for his part. The Court of Appeal reduced the assessment of his benefit, from the full pecuniary advantage to £15,000. Toulson L.J., made the following point:

⁸¹ Blackstone’s Criminal Practice, 2011; E19.15.

“the proposition that a person acting purely in the capacity of employee, who receives a consignment of illicit fuel on behalf of his employer, and who, as a reward for doing so, received only an enhanced wage or cash payment, must necessarily as a matter of law be taken to profit to the same extent as his employer does from the purchase and sale of the consignment is unsound.”

266. The point was affirmed in *Allpress, Symeou, Casal, Martin and Morris* [2009] EWCA CRIM 8. The Court of Appeal has made it clear that an approach which is more representative of the actual benefit accrued to the offender is appropriate; when assessing benefit, the crucial consideration is the extent to which the offender has obtained an interest in the property under consideration.

It would appear therefore, that as far as confiscation in criminal proceedings is concerned under Part 2 of POCA 2002, that the “benefit” to a company is likely to be based mainly on the profit generated from the contracts obtained through the payment of bribes. If this interpretation is correct it places greater emphasis on the need to ensure that fines and restitution payments adequately reflect the harm done by overseas bribery.

Monitorships

267. The punishment for corporate criminality will often require systemic changes to be made of personnel, systems and controls as well as substantive decisions about certain company projects or business. Monitors in the UK have been appointed in two cases.⁸² The first was in Balfour Beatty where the charges were “books and records” offences. The second was in M&J, where the company had begun a process of “remediation” and the imposition of the monitor was to assist the company in continuing the process already begun before sentence.
268. In M&J the press release by the SFO⁸³ merely stated that the company “will submit its internal compliance programme to an SFO approved independent monitor”. The appointment of the monitor was agreed with the SFO as part of the settlement agreement. However, in neither case was the scope of the monitors duties publicised.
269. In both Balfour Beatty and M&J the appointed monitor was the same person. In Innospec, BAE and Johnson & Johnson the SFO agreed to the US authorities appointing the monitor.

Experience of the use of monitors in the US

270. The use of monitors has been a feature of many DPAs in the US. This is perhaps not surprising given the very nature of the deferred prosecution – a company gives undertaking as to remediation over a given period of time prior to the case being formally dropped. On 10 March 2008, Acting Deputy Attorney General Craig S. Morford released a memorandum (“The Morford Memorandum”), outlining nine principles to be considered by the DOJ when negotiating and finalising monitor provisions:

a. Monitor selection

Prior to initiating the search for an appropriate monitor, the DOJ and corporation should discuss the “*necessary qualifications*” of the monitor. Primary objectives when selecting a monitor are avoiding potential and actual conflicts of interest, identifying respected and well-qualified individuals, and maintaining public confidence in the selection process.

271. The Morford Memorandum does not include a specific procedure for selecting a monitor, but it recommends that, “[w]here practicable” the corporation be allowed to choose between at least three monitor candidates. The Morford Memorandum does not address monitor compensation.

⁸² A monitor was also appointed in the SFO case of Macmillan Publishers and there may be subsequent cases.

⁸³ <http://www.sfo.gov.uk/press-room>

272. The most significant change to prior procedure is the new requirement of approval of a monitor by the Office of the Deputy Attorney General. As a general matter, a company that is considering entering into a DPA or NPA with the DOJ should document the process it employs to identify and propose potential monitor candidates.

b. Monitor is an independent third-party

The monitor must be “an independent third-party, not an employee or agent of the corporation or of the Government.” Nor is the monitor an attorney for the corporation and, therefore, the corporation may not request or obtain legal advice from the monitor. From the perspective of the corporation, this requirement makes clear that there is no attorney-client privilege between the monitor and the corporation. Accordingly, information gathered by or provided to the monitor would not be protected by disclosure to third parties by virtue of the attorney-client privilege.

c. Tailor monitor’s duties to monitor compliance with the agreement

The DOJ recognizes that a monitor’s primary responsibility should be to assess and monitor the internal controls and compliance improvements to reduce the risk of future recurrence of the conduct subject to the deferred or non-prosecution agreement. Too narrow a scope may prevent the monitor from effectively evaluating the corporation’s policies and procedures. Conversely, too broad a scope may drain resources from the corporation’s remediation and reform efforts.

d. The time period of the monitor’s review also may be limited

The monitor’s mandate is not to investigate historical conduct except under “appropriate circumstances” when knowledge of past events may assist the monitor to evaluate and assess the corporation’s compliance with the agreement.

e. Communication with the DOJ and the corporation

The monitor, the Government and the corporation shall communicate openly. It may be appropriate for the monitor to draft periodic written reports to the corporation and the DOJ regarding the monitor’s activities, the corporation’s compliance with the agreement, and/or any changes necessary to foster the corporation’s compliance with the agreement.

273. Recent monitoring agreements have required an initial report, and specified periodic follow-up reports. For example, several recent FCPA agreements required the monitor to complete a written report within 120 days of retention. In each case, the agreement provided that an extension could be granted with the DOJ’s prior written approval. In addition, follow-up reviews commenced annually after the monitor’s appointment. Recent agreements have also stipulated that reports should be provided contemporaneously to the DOJ and Board of Directors of each company.

f. When the corporation disagrees with the monitor’s suggestions

The corporation needs to determine whether to adopt a monitor’s recommendation and that there may be instances when a corporation disagrees with a monitor’s recommendation. If the recommendation is declined, the Government will review the recommendation and the company’s reasons for declining “in determining whether the corporation is complying with the agreement”.

g. Monitor has discretion to disclose previously undisclosed conduct

Monitors should have discretion to report undisclosed misconduct to the DOJ, to the corporation, or to both. Deferred and non-prosecution agreements also should specify the type of conduct that must be reported to the DOJ. In some instances, the monitor should immediately report “misconduct directly to the Government and not to the corporation”.

274. The concept of reporting to the Government and not the company has not been a part of prior deferred or non-prosecution agreements. Several recent FCPA agreements (for example, those with Baker Hughes Inc, Aibel Group Ltd, and Schnitzer Steel Inc) state that if “questionable or corrupt payments” are discovered, the monitor will “promptly” report such payments to the company for investigation, unless the monitor believes that disclosure should be made directly to the DOJ. If the monitor refers the matter only to the company, the company must report the matter to the DOJ within ten calendar days or the monitor will independently disclose the findings to the DOJ.

h. Duration of agreement

The Morford Memorandum provides criteria that should be considered when determining the agreement's duration. Recent FCPA DPAs and NPAs have had terms of 18 months to three years.

i. Flexibility of monitor's term

Finally, the Morford Memorandum recommends flexibility in the monitor's term to allow both (1) an extension of the monitor's term if the corporation has not satisfied its obligations under the agreement; and (2) early termination of the monitor if *"there exists a change in circumstances sufficient to eliminate the need for a monitor"*.

275. In the Innospec case, Lord Justice Thomas was critical of the *"monitor industry"*. He expressed scepticism about the value of monitoring orders in cases where new management had been put in place:

"Imposing an expensive form of 'probation order' seems to me unnecessary for a company which will also be audited by auditors well aware of the past conduct... the justification and cost effectiveness of such an agreement was raised by Judge Huvelle [the US Judge]. In my view there is a real case for saying that the resources allocated to this should more properly have been made available for fines, confiscation or compensation."

276. Lord Justice Thomas said that any future order for the appointment of a monitor would have to be justified in terms of cost effectiveness. He suggested an augmented audit process as a possible option. However, it is not exactly clear how that would operate and whether in fact the scope of work could, in fact, duplicate that of a monitorship.
277. In the US there has been criticism of the lack of judicial oversight of the selection process which is agreed between the prosecutor and the other involved US agencies. There are also signs of increasing resistance by companies of the appointment and role of monitors. It is interesting that in the Johnson & Johnson case the agreed compliance programme was to be managed internally and a monitor was not appointed.
278. The primary difficulty in the UK is there is no framework within which to place monitor agreements within the criminal law and sentencing practice. Companies have agreed to appoint a monitor on a voluntary basis as part of the plea negotiations. In the US, the position of the monitor is strengthened by the terms of the DPA and the possibility, albeit perhaps a remote one, of a criminal prosecution. In the UK, monitors report to the SFO, which is essentially a prosecution agency, and it is far from clear what sanctions it could seek to impose through the courts if the monitor was not satisfied with a company's compliance programme.

TI-UK believes that the appointment of carefully selected independent monitors is necessary in those cases where remediation is an important issue. However, the process by which they are appointed, their terms of reference, their powers and reporting need to be subject to some clear and published guidelines. It is also necessary to consider if the present law and practice needs to be changed in order to support the work of monitors by the imposition of appropriate sanctions.

Compensation

279. The SFO has prioritised compensation for victims as part of its evolving approach to overseas bribery cases. Over the last decade, the role of the victim in criminal justice has been given progressively more prominence. Consequently, the criminal justice principle of restitution to victims has gained currency and can be applied to the area of overseas bribery.
280. Conversely, there is some evidence to suggest that within the business community there is growing scepticism about the role of settlements, with companies viewing fines as no more than a cost of doing business. Sentencing can and should be more than that; it should act as a deterrent to

corporate criminality, encourage a change of attitudes at Board level and satisfy public opinion.

281. Despite voluntary compensation being a feature of both M&J and BAE (and presumably Innospec had it had the ability to pay) neither of these cases have involved a compensation order. In reality, the concept of compensation orders was fashioned for much more simple criminal cases.
282. In M&J it was agreed that the company would make voluntary payments to the victim Governments of Jamaica and Ghana. Those payments represented the identifiable bribes paid to public servants. M&J undertook to use its best efforts to enter into an agreement with the victim Governments. It was provided a window, the civil liability time period, to negotiate and pay. Its solicitors gave an undertaking to retain the funds in its client account until payment was made. If payment could not be made, they were to pay the funds to the SFO. The Jamaican money has been transferred into an escrow account controlled by the Jamaican authorities; the Ghanaian money is still held by the lawyers.
283. In BAE the entire settlement reached in the UK was meant to be dominated by the principle of compensation. Recognising, on current sentencing authority, that a sentence for a books and records offence under Section 211 Companies Act would be de minimus an ex gratia sum of £30 million was agreed. Any fine was to be subtracted from this sum.
284. There is no published information describing the basis upon which the overall sum of £30 million was calculated, or what benefit was gained by BAE by winning the contract to supply the air traffic control system to Tanzania. However, the SFO did seek to improve the mechanism by which this compensation payment should be made by enlisting the assistance of the Department for International Development (“DFID”).
285. The BAE compensation was considered by the International Development Committee (“IDC”) on 19 July 2011, members of which criticised the company for delays in paying reparations to Tanzania. BAE explained that it had set up an internal advisory board to guide the company on the optimum means of applying the £29.5 million. Meanwhile, DFID had been working with the Government of Tanzania to decide how the money should be spent. The Director of the SFO was reported as saying that the handling of the payment was unsatisfactory and frustrating,⁸⁴ and said that he was prepared to take the case to “*the next stage*” if he felt this was required.
286. TI-UK published its views on the issues raised by the IDC⁸⁵ and recommended that convicted companies should not have any role in the modalities for the implementation of reparation payments. Unfortunately in the BAE case, the reparation payment was not subject to a specific court order that dictated the terms and timing of the payment. In addition, BAE appeared to be arguing that the payment to Tanzania did not constitute reparations but a voluntary payment, which the company was required to control as the money was shareholder funds.

There is no doubt that the reparation payment was one of the principle elements of the plea agreement sanctioned by the Court, albeit that the Court was restricted in fining BAE £500,000. The argument appears to centre, therefore, on who should control the subsequent payment. In the view of TI-UK, this matter should have been defined in the signed plea agreement and been subject to judicial oversight. It is not acceptable that compensation payments should be agreed on a voluntary basis where the convicted company has any element of control over subsequent disbursement and payment. It can also be offensive to the public of victim countries and hand a convicted company an unmerited PR advantage.

⁸⁴ www.telegraph.co.uk/finance/newsbysector/industry/defence/8648409/MPs-demand-BAE-pays-30m

⁸⁵ www.transparency.org.uk/publications

Section 7 Case Studies in Civil Settlements

287. There is an apparent increasing trend for the SFO to settle cases with corporates using its civil powers under POCA rather than to conclude a criminal outcome. The FSA has fined two companies for failure to have adequate systems in place to stop bribes being paid. It tends to publish more material than the SFO on the cases in question.

7.1 BALFOUR BEATTY – OCTOBER 2008

Criminal conduct	Failure to keep proper books and records
Amount of payments	Not published
Contract value	In excess of £100 million
Amount confiscated	£2.25 million
Criminal prosecutions	None
Prosecutions in other countries	None
Monitor appointed	Yes

288. The Balfour Beatty civil settlement was the first time that the SFO used civil recovery powers under POCA which were made available from April 2008. According to the SFO press release, Balfour Beatty made a voluntary disclosure to the SFO of certain “*payment irregularities*” in respect of a contract to build a library in Cairo for a sum in excess of £100 million. The consent order was for a civil settlement payment of £2.25 million. The SFO press release stated:

“Having itself brought these matters to the attention of the SFO, Balfour Beatty plc has accepted that unlawful conduct, in the form of inaccurate accounting records arising from certain payment irregularities, occurred within a subsidiary entity, during the construction of The Bibliotheca Project in Alexandria, Egypt, completed over seven years ago. The project was undertaken by a Balfour Beatty subsidiary in a joint venture with an Egyptian company. The unlawful conduct relates to entries in a subsidiary company’s records in respect of payment irregularities, in respect of the execution of the contract. The documentation prepared in connection with these payments did not comply with the requirements for accurate business records to be kept in accordance with S221 Companies Act 1985.”

289. Balfour Beatty self-reported the payment irregularities to the SFO in April 2005, following which the SFO launched an investigation. It is not clear why the SFO criminal investigation was stopped after more than three years, although that decision is likely to have been influenced by the SFO gaining civil powers under POCA in April 2008. The SFO press statement reported: *“The SFO investigation concluded that there was no financial benefit to any individual employee and most of the relevant individuals have long since left the company. The main work undertaken by the joint venture took place between 1998 and 2000, with the project being completed in 2001.”*

290. Under POCA it is necessary to establish the criminal conduct that gave rise to the property that is subject to confiscation. In this case the criminal conduct was a failure to keep proper books and records contrary to Section 221 Companies Act 1985.

291. Under the terms of the civil settlement a monitor was appointed. However, no details were published as to the scope of the compliance programme that was agreed to by the company.

7.2 AMEC – OCTOBER 2009

Criminal conduct	Failure to keep proper books and records
Amount of payments	\$9 million
Contract value	Not known
Amount confiscated	£4.9 million
Criminal prosecutions	None
Prosecutions in other countries	None
Monitor appointed	Yes

292. The AMEC civil settlement took place about one year after Balfour Beatty and there are some similarities between the cases. The SFO agreed a £4.9 million civil recovery order with AMEC over “irregular receipts” received between November 2005 and early 2007, amounting to some US\$9 million.⁸⁶ These receipts were in respect of the company’s project management of the \$1.4 billion construction of the Incheon bridge in Korea. The SFO press release stated that AMEC:

“made a referral to the SFO in March 2008 following an internal investigation into the receipt of irregular payments. The payments, which were made between November 2005 and March 2007 were associated with a project in which AMEC is a shareholder.”

293. The unlawful conduct upon which the Consent Order was based, was once again on a failure to keep proper books and records under Section 221 of the Companies Act 1985. The SFO went on to record that AMEC acted “promptly and responsibly”, had cooperated with the SFO, is improving its ethics and compliance functions and had agreed to the appointment of a monitor.
294. AMEC’s press statement recorded that the irregular receipts had been identified in “late 2007” and following an internal enquiry it had self-reported its findings to the SFO in March 2008. It was also stated that “no improper overall commercial advantage accrued to AMEC in connection with the receipts and no adjustment is required to any AMEC financial statements”.
295. It doesn’t appear, or at least it was not recorded, that AMEC and the SFO had agreed the wording of their respective press statements, which appear difficult to reconcile.

⁸⁶ AMEC press statement 26 October 2009.

7.3 AON SETTLEMENT WITH THE FSA – JANUARY 2009

Regulatory failure	Inadequate risk management procedures
Amount of payments	\$2.5 million and €3.4 million
Benefit gained	\$7.2 million and €1 million
Amount fined	£5.25 million
Criminal prosecutions	None
Prosecutions in other countries	None
Monitor appointed	No

296. The handling of this overseas bribery case is somewhat unusual, in that it was settled by the FSA. The FSA had been lobbying for some time for statutory powers to use the promise of lesser sentences or, in appropriate cases, immunity from prosecution for co-operating witnesses, in order to obtain successful outcomes in market abuse cases. This has now been achieved: from April 2010 the FSA may use the powers under Sections 71 to 74 of SOCPA.⁸⁷ However, in the case of Aon, the FSA chose to use its regulatory powers as it did not have a remit to prosecute corruption cases.
297. The FSA fined Aon, an international insurer, £5.25 million for its failure in not having adequate risk management procedures in place to control payments to overseas agents.

This control failure led to suspicious payments being made over a number of years. The published notice of the fine stated:

“During the Relevant Period, Aon Ltd breached Principle 3 by failing to take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems. Aon Ltd did not take reasonable care to establish and maintain effective systems and controls for countering the risks of bribery and corruption associated with making payments to non FSA-authorized overseas third parties (Overseas Third Parties) who assisted Aon Ltd in winning business from overseas clients, particularly in high risk jurisdictions. As a result, Aon Ltd made various suspicious payments to a number of Overseas Third Parties amounting to approximately \$2.5 million and €3.4 million during the Relevant Period.”

298. The FSA conducted its investigation pursuant to its powers under the Financial Services and Markets Act 2000, under which the FSA has a statutory responsibility for market confidence and the reduction of financial crime. Principle 3 in the above quote refers to the FSA’s Principles for Business which inter alia requires regulated companies to take reasonable care to organise and control their affairs responsibly and effectively, with adequate risk management systems.
299. Under Section 206(1) of the Act the FSA imposed a penalty of £5.25 million on Aon, having regard to the serious nature of the case. Although Aon was not considered to have been reckless in allowing corrupt payments to be made by third parties it was clear that the control weaknesses had existed for a number of years despite earlier instances of bribes being known. The FSA stated:
“Aon Ltd agreed to settle at an early stage of the FSA’s investigation. It therefore qualified for a 30% (Stage 1) discount under the FSA’s executive civil settlement procedures. Were it not for this

⁸⁷ The FSA requires the consent of the Attorney General where it offers a full immunity.

discount, the FSA would have imposed a financial penalty of £7.5 million on Aon Ltd. The FSA has made clear on a number of occasions that it will seek to impose higher fines in order to achieve its objective of credible deterrence. The level of this penalty reflects that stated objective.

The involvement of UK financial institutions in corrupt or potentially corrupt practices overseas undermines the integrity of the UK financial services sector. Unless they have in place robust systems and controls which govern the circumstances in which payments may be made to third parties, UK financial services firms risk contravening UK and/or overseas anti-bribery laws. The FSA's financial crime and market confidence statutory objectives are both endangered by UK firms' failures in this regard."

300. The FSA noted that the benefit to Aon in terms of the commission or brokerage that it may have earned on account of the business secured or retained as a result of suspicious payments amounted to approximately \$7.2 million and €1 million. This appears to equate to the sum of £7.5 million which the FSA stated it could have fined Aon.
301. Although this case was settled by the FSA using its regulatory powers rather than through the criminal courts it has set down some interesting markers:
 - a) Using regulatory powers where a company had insufficient procedures in place to stop bribe payments being made (similar to the corporate offence under Section 7 of the Bribery Act 2010).
 - b) Basing the fine on the equivalent to the benefit gained.
 - c) 30% discount for self-reporting and early civil settlement.
 - d) Publicising a very full statement describing the circumstances of the case and the reasoning for the civil settlement.
 - e) Positive consideration of proactive changes made and steps taken by the company to remedy failings.
302. The FSA also made clear the basis on which the financial penalty was determined. Reference was made to the Decisions Procedure and Penalties Manual ('DEPP')⁸⁸ part of the FSA Handbook of Rules and Guidance and the Enforcement Manual which formed part of the Handbook at the relevant time. DEPP 6.5 sets out some of the factors that may be relevant when determining the appropriate level of financial penalty.

⁸⁸ <https://fsahandbook.info/FSA/handbook/DEPP/6/5A.pdf>

7.4 M W KELLOGG LTD – FEBRUARY 2011

Criminal conduct	Payments received generated from the criminal conduct of others
Amount of payments	\$132 million⁸⁹
Contract value	\$6 billion
Amount confiscated	£7 million⁹⁰
Criminal prosecutions	No
Prosecutions in other countries	Yes – in the US
Monitor appointed	Yes – in the US

303. On 16 February 2011 the SFO announced that it had agreed a civil settlement with M W Kellogg Ltd (“MWKL”), a former UK subsidiary of the US company Halliburton. Under the agreement MWKL will pay about £7 million, which represents the funds that the company was due to receive in connection with the criminal activities of third parties.
304. In February 2009 the US DOJ charged Kellogg Brown & Root (“KBR”) LLC, a former subsidiary of Halliburton, with offences under the FCPA. It was alleged that KBR bribed Nigerian officials in excess of \$132 million in order to obtain contracts valued in excess of \$6 billion to build liquefied natural gas facilities on Bonny Island. It was further alleged that the former CEO of KBR, Albert Stanley, was personally involved in the scheme whereby the bribe payments were routed through an agent, involving the participation of two UK citizens, Jeffrey Tessler, the agent, and Wojciech Chodan who was an employee of MWKL.
305. KBR pleaded guilty and agreed to pay a \$402 million criminal fine. A monitor was also appointed to design and implement KBR’s compliance programme. As part of the plea agreement with Stanley he agreed to a sentence of 84 months and restitution of \$10.8 million. Both Tessler and Chodan were extradited to the US. In addition the SEC fined KBR and Halliburton \$177 million, representing disgorgement of profits.
306. In essence, this is a US case but one where the parent company used a UK subsidiary to facilitate the bribery scheme. The SFO accepted that the UK company was not part of the criminality, but nevertheless sought to claim any benefit that the company may have received through a civil settlement. There is little information in the public domain about the civil settlement agreement.

⁸⁹ Refers to the suspicious payments in the KBR case.

⁹⁰ Refers to the confiscation of MWKL in the UK.

7.5 DePUY – APRIL 2011

Criminal conduct	Illegal payments
Amount of payments	\$16.4 million⁹¹
Contract value	£14.8 million⁹²
Amount confiscated	£4.829 million
Criminal prosecutions	Yes – Robert Dougall
Prosecutions in other countries	Yes – DPA in US
Monitor appointed	No⁹³

307. The DePuy case has three parts, an investigation and subsequent DPA into various FCPA offences conducted by the DOJ, a criminal investigation into the part played by Robert Dougall that led to his conviction and a civil recovery order against the UK subsidiary. Full details of the facts of the case can be found on the US DOJ website which includes details of the DPA.
308. DePuy International Ltd is a subsidiary of Johnson & Johnson which self-reported the results of an internal investigation to the US DOJ and SEC. It was found that during the period from 1998 to 2006 DePuy had paid commissions totalling about \$16.4 million to two agents, knowing that a significant portion was to be used to pay cash incentives to publicly-employed health care officials. On 14 January 2011 a DPA was agreed with Johnson & Johnson which covered the above bribes and further FCPA offences (not involving DePuy International) in Poland, Romania and under the OFFP.
309. Under the DPA, the base fine, calculated in accordance with US sentencing guidelines, was \$28.5 million, slightly more than the estimated benefit to the company of about \$24 million. This attracted a 25% discount for cooperation which reduced the fine to \$21.4 million.⁹⁴ There was also a civil settlement with the SEC of \$24.3 million plus interest of \$6.3 million.
310. Robert Dougall was director of marketing at DePuy International (DPI), the Leeds-based subsidiary of Johnson & Johnson, which is listed on the New York stock exchange. In December 2009 Dougall pleaded guilty to conspiracy to corrupt. The facts in the case are the same as those in the US action; however the period of indictment in the Dougall case only covered the period from February 2002 to December 2005 when it was estimated that the commission payments totalled about £4.5 million.
311. The SFO investigation followed a referral by the US DOJ in October 2007. The SFO press release stated that Dougall had cooperated fully and had provided substantial assistance, subject to an agreement under Section 73 SOCPA 2005. The courts are entitled to recognise such assistance when passing sentence. In this case, the SFO submitted that a suspended sentence would be appropriate, but in fact Mr Justice Bean sentenced Dougall to 12 months immediate imprisonment saying that a suspended sentence was not suitable:

⁹¹Total commissions per the DPA as published by the DOJ.

⁹² Per the SFO press release dated 8 April 2011.

⁹³ Under the terms of the DPA there was an agreed compliance programme.

⁹⁴ DPA published on the DOJ website.

“in a case where corruption was systemic and long-term and involved several million pounds in corrupt payments. The public would simply not accept if someone involved in long term criminality on this scale was not given an immediate sentence of imprisonment.”

312. On appeal the suspended sentence was re-imposed. The appeal court judges cited the OECD Convention and laid out some of the aggravating features of the cases: the corruption was endemic, persistent, carried on for over four years, involved substantial sums, funded by public money and was carried out *“systematically, deliberately and intentionally by those seeking to make profits”*. In mitigation, it was accepted that the system was in place before Dougall's involvement, that he wasn't a statutory director, that persons more senior to him knew of, consented and participated in the scheme, that he received no direct benefit and that he had fully cooperated.

313. In April 2011 the SFO obtained a Civil Recovery Order against DePuy International Ltd. The company will pay £4.829 million, plus prosecution costs, in recognition of unlawful conduct relating to the sale of orthopaedic products in Greece between 1998 and 2006.

314. In the SFO press release it was stated that:

“The Serious Fraud Office is of the view that those who commit serious fraud and/or corruption offences must not be viewed or treated in any different way to other criminals; serious criminality should be made patent for all to see. On the facts of this case, criminal sanction of the Greek conduct has been achieved by the conclusion of a Deferred Prosecution Agreement with DePuy International Limited's parent company and the DOJ. The Director of the Serious Fraud Office has concluded that a prosecution was therefore prevented in this jurisdiction by the principles of double jeopardy.”

315. The press release also referred to the level of fines in the US and stated: *“The Serious Fraud Office has considered the matter from a global perspective. It has worked to achieve a sanction in this jurisdiction which will form part of a global settlement that removes all of the traceable unlawful property and at the same time imposes a penalty.”* The SFO stated that the sales to the Greek public hospitals totalled about £33.5 million, of which about £14.8 million passed to DePuy International and could be said to be tainted by criminal conduct.

316. The basis upon which the financial penalty of £4.8 million was calculated is still not clear. The SFO refers to the global settlement, the fines imposed in the US and assets frozen in Greece. There would seem to be some consideration of these amounts in settling for £4.8 million. The SFO press release is also not categorical about the *“criminal conduct”* except to refer to the facts contained within the statement. It would appear, therefore, that whereas there is plenty of evidence to base a criminal charge of corruption against DePuy International it was decided not to do so because of *“the principles of double jeopardy”*.

7.6 MACMILLAN PUBLISHERS LTD – JULY 2011

Criminal conduct	Not specified
Amount of payments	Not specified
Contract value	Not specified
Amount confiscated	£11.3 million
Criminal prosecutions	No
Prosecutions in other countries	Not known
Monitor appointed	Yes ⁹⁵

317. In April 2010 the World Bank Group debarred Macmillan Publishers Ltd (“Macmillan”) from Bank-financed contracts for a period of six years following the company’s admission of bribery payments related to an education project in Sudan,⁹⁶ a contract that the company failed to win. Following the investigation by the World Bank it referred its findings to the UK authorities that resulted in search warrants being executed by the City of London Police in December 2009. In March 2010, Macmillan reported the corporate case to the SFO, which required the company to follow the procedure set out in its published protocol document.⁹⁷
318. Macmillan instructed its external lawyers to conduct a review of corruption risk, following which the SFO, in cooperation with the City of London Police and the World Bank Group, selected three countries (Rwanda, Uganda and Zambia) for the external lawyers to conduct more detailed investigations. These investigations were focused on Macmillan’s Education Division operating in East and West Africa over the period of 2002 to 2009.
319. The investigations were completed to the satisfaction of the SFO, which stated in relation to certain contracts: *“Such public tender processes were susceptible to improper relationships being formed and corruption taking place. It was impossible to be sure that the awards of tenders to the Company in the three jurisdictions were not accompanied by a corrupt relationship.”*
320. Despite the above statement, which appears to suggest that evidence to a criminal standard had not been obtained, the SFO statement continued: *“Accordingly it was plain that the company may have received revenue that had been derived from unlawful conduct. Following an accounting examination and taking an aggressive approach to the revenue received in order to capture all potential unlawful conduct the SFO was in a position to determine the appropriate amount to be recovered. The value of the Order made by the High Court is £11,263,852.28. MPL [Macmillan Publishers Ltd] will also pay the SFO costs of pursuing the order which amount to £27,000.”*
321. In making the decision to settle the case by way of a Civil Recovery Order, the SFO referred to the cooperation provided by the company; the appointment of external consultants to implement anti-bribery compliance procedures; the appointment of a monitor; the debarment from World Bank projects for at least three years; the decision to withdraw from public tenders in its East and West Africa Education Division; and that the products supplied were of good quality and not overpriced.

⁹⁵ The monitor is to report to the SFO and to the World Bank.

⁹⁶ <http://web.worldbank.org>

⁹⁷ <http://www.sfo.gov.uk>

322. The Macmillan case is important as it reflects the current thinking and practice of the SFO. It is inconceivable that the company would agree to a settlement exceeding £11 million in the absence of substantive evidence that bribery had taken place. Yet there is no published information on either the extent of the criminal conduct or the role played by possible individual defendants, or why criminal proceedings were considered not to be the more appropriate sanction.

7.7 WILLIS SETTLEMENT WITH THE FSA – JULY 2011

Regulatory failure	Inadequate risk management procedures
Amount of payments	£27 million ⁹⁸
Benefit gained	£32.7 million ⁹⁹
Amount fined	£6.9 million
Criminal prosecutions	None
Prosecutions in other countries	None
Monitor appointed	No

323. On 21 July 2011 the FSA fined Willis Ltd (“Willis”) £6.9 million for failings in its anti-bribery and corruption systems and controls.¹⁰⁰ Again, the FSA published details of the offence. Willis had made payments to overseas parties totalling £27 million between January 2005 and December 2009 to win business, and had failed to put in place adequate due diligence procedures to avoid the risk that the payments could be made for corrupt purposes. During the FSA investigation, suspicious payments totalling \$227,000 were reported to the Serious Organised Crime Agency (“SOCA”). Willis cooperated with the FSA and qualified for a 30% discount, reducing the fine from £9.9 million to £6.9 million.
324. In the FSA press release the Aon case is referred to and the subsequent thematic review on control systems published by the FSA in May 2010. The thematic review concluded that many insurance broker firms did not carry out sufficient due diligence on payments to third parties and recommended a risk-based approach similar to that adopted for meeting adequate procedures under the Bribery Act. The fact that Willis failed to adopt these recommendations was highlighted by the FSA. Tracey McDermott, acting head of enforcement and financial crime stated: “*This is particularly disappointing as we have repeatedly communicated with the industry on this issue and have previously taken action for failings in this area.*”
325. The FSA did not publish details of the basis upon which the fine was calculated, however, the underlying practice is set out in the FSA Handbook (DEPP 6.5). The three principle considerations when setting the fine are disgorgement of any benefit, a penalty for wrongdoing, and a penalty to deter the firm and others from future breaches. In the Willis case, the FSA found the breaches to be of a serious nature but did not consider that the misconduct was deliberate or reckless.¹⁰¹ The level of the fine appears to be largely based on providing a deterrent to any future offending that could undermine the integrity of the UK financial services sector.

⁹⁸ Total payments to overseas parties, of which \$227,000 was reported to SOCA as suspicious.

⁹⁹ Gross commission earned from business introduced by Overseas Third Parties was £59.7 million less commission paid of £27 million [FSA final notice to Willis].

¹⁰⁰ <http://www.fsa.gov.uk/pages/Library/Communication/PR/2011/066.shtml>

¹⁰¹ Final notice to Willis, <http://www.fsa.gov.uk/pubs/final/willis-ltd.pdf>

Section 8 Commentary and Issues on Civil Settlements

8.1 USE OF CIVIL POWERS UNDER POCA

326. POCA provides a means for prosecutors to confiscate property derived from crime through a Civil Recovery Order in the High Court, in cases where the tests set out in the Code for Crown Prosecutors cannot be met in proceeding through the criminal courts. As already discussed in this paper, this hybrid law has been used by the SFO to settle a number of overseas bribery cases. There is a natural aversion to settle criminal cases by way of financial penalty through the civil courts. There is less transparency with very little judicial oversight, which undermines public confidence in the process. It may be seen as a way by which a company can buy its way out of a prosecution. On the other hand, there are cases where a civil settlement is appropriate and in the absence of which no action would have been taken against the company.
327. The above views are not entirely shared by the SFO, which views civil settlements as an alternative to criminal prosecutions in those cases where either the evidential or public interest tests, as set out in the Code for Crown Prosecutors, cannot be met. It argues that it is still learning about how best to use these civil powers but accepts the need for greater transparency.

8.2 PROSECUTION PRACTICE

Pleading the unlawful conduct

328. It seemed that when the Balfour Beatty case was settled, the SFO had used POCA as another useful tool to settle cases which, for one reason or another, could not be brought before the UK criminal courts, for example due to the lack of necessary cooperation from overseas authorities. However, it is important to establish in what circumstances civil powers are being used, and the underlying criminality in the cases settled via this route.
329. On 6 October 2008,¹⁰² the SFO obtained the first Civil Recovery Order involving a major listed company, Balfour Beatty, for £2.25 million, plus a contribution to the costs of the hearing. In that case, the unlawful conduct was described as:
- “entries in a subsidiary company’s records in respect of payment irregularities, in respect of the execution of the contract. The documentation prepared in connection with these payments did not comply with the requirements for accurate business records to be kept in accordance with S221 Companies Act 1985.”*
330. The conduct was described by the SFO as *“improper corporate behaviour”* rather than criminal; yet the next sentence went on to describe such civil recovery as a means by which to *“enhance the criminal justice process”*. The SFO concluded that in the circumstances of this case the prosecution of any individual or corporate entity was not merited. Although little detail is given about the decision-making process, the decisive factors would seem to be the *“transparent and responsible approach”* taken by the company, the lack of evidence of any personal benefit to employees and the fact that most of the relevant individuals had *“long since left the company”*.
331. On 26 October 2009, the SFO obtained a Civil Recovery Order against AMEC for nearly £5 million, plus costs. In a very short press release,¹⁰³ the unlawful conduct was again characterised as being connected with the *“description entered into AMEC’s books and records of the payments in question which amounted to failure to comply with the requirements of Section 221 of the Companies Act 1985”*. Very few details of the unlawful conduct or the settlement were given in the press release.

¹⁰² Press release: <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2008/balfour-beatty-plc.aspx>

¹⁰³ <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/sfo-obtains-civil-recovery-order-against-amec-plc.aspx>

332. In DePuy, the SFO characterised the unlawful conduct as consisting of “*payments made by DePuy International Limited to intermediaries for the purpose of making corrupt payments to Greek medical professionals working in the Greek public health system.*” The press release¹⁰⁴ states in the Section entitled “Factors taken into account”, that “*those who commit serious fraud and/or corruption offences must not be viewed or treated in any different way to other criminals; serious criminality should be made patent for all to see*”, yet no criminal penalty was imposed by the SFO. The reasoning for this was:

“criminal sanction of the Greek conduct has been achieved by the conclusion of a Deferred Prosecution Agreement with DePuy International Limited’s parent company and the DOJ. The Director of the Serious Fraud Office has concluded that a prosecution was therefore prevented in this jurisdiction by the principles of double jeopardy.”

It continued:

“Combined criminal and civil sanctions have therefore been imposed in the United States in respect of DePuy International Limited’s parent and assets have been frozen in the ongoing Greek investigation, all relating to the same conduct in Greece. Consequently the Serious Fraud Office is satisfied that the most appropriate sanction is a Civil Recovery Order, under the Proceeds of Crime Act 2002.”

333. In the Macmillan case it was stated that it was impossible to be sure that the tender process did not involve corrupt relationships and “*Accordingly it was plain that the company may have received revenue that had been derived from unlawful conduct*”. This is a somewhat obscure description of the criminal conduct in a case where the company had admitted the payment of a bribe on a World Bank tender.
334. It would seem that where the SFO settles cases through civil means there is a reluctance to describe the “*unlawful conduct*” as the proceeds from bribery, perhaps because of possible debarment by certain international bodies, such as the World Bank, and other public bodies, or perhaps for other commercial reasons argued by defendant companies.

There is a danger that the comparative ease by which civil settlements may be reached compared to a costly criminal trial may lead to inappropriate use of prosecutorial discretion, particularly when the decision-making process and the terms of the settlement are not subject to judicial or public scrutiny. TI-UK is of the view that the nature of the underlying criminal conduct should be accurately and fully described in the documents placed before the court. There may be some concerns expressed by companies about the ramifications of possible debarment from public contracts but this should not deflect the prosecutor from properly describing the alleged offence in the interests of transparency and proper sentencing.

Transparency of decision-making

335. Whilst there is guidance issued by the various prosecution authorities in respect of plea agreements, there is little guidance or transparency where the matter does not go before a criminal tribunal and a civil recovery order is sought. The complete evidential picture, the agreements made and the reasons for making them are not only hidden from view, but in the absence of a successful application for judicial review, take place without independent scrutiny and oversight.
336. Moreover, this lack of transparency has the potential to produce inconsistencies of application and outcome. Not only is it unclear whether the conduct will be fully and accurately described, the lack of transparency is such that it will be most difficult to assess the appropriateness of the recoverable sums agreed.

¹⁰⁴ 8 April 2011: <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/deputy-international-limited-ordered-to-pay-£4829-million-in-civil-recovery-order.aspx>

337. The differences between criminal prosecution and a civil remedy are significant in many respects. Criminal censure is much further reaching in its purpose and its effect on the lives of citizens than the resolution of civil disputes. Prosecution guidelines advocate, on the one hand, a preference for a criminal remedy where an offence is made out, and an intention to view those who self-report in a favourable light on the other. Yet there would seem to be little clarity as to how decisions are made in practice or how conflicts are settled when there is tension between a criminal or civil disposal.

Transparency of information provided to the public

338. At present, the particulars of claim and compromise agreement will be subject to the Civil Procedure Rules (“CvPR”) and may be subject to confidentiality agreements. Under the CvPR¹⁰⁵ a party that is not a party to proceedings may obtain from court records a copy of the case statement and the judgement or order. However, access to such documents is neither likely to fully explain the reasoning behind the decision to use civil powers, nor to disclose the full terms of the compromise agreement.
339. The SFO has not published any guidance on how it approaches these negotiations, neither has it published the settlement papers, which will include particulars of claim and a supporting affidavit and documents.
340. Whereas the terms of the plea agreements in three corruption cases heard before the criminal courts may be criticised as being too lenient, they do at least have some transparency. What is of more concern is the use of “civil powers” to settle criminal cases which permit, if not encourage, secrecy.
341. In the Balfour Beatty case it is noteworthy that the civil settlement amount of £2.25 million is far less than what could have been imposed under POCA as, arguably, the entire proceeds of the contract could be said to have been derived from the improper conduct. However, there is no public explanation as to the basis of the civil settlement amount. There was more explanation by the SFO as to the recovery order imposed on DePuy, but again the basis of the calculation is not clear.
342. What is even more worrying is those cases that have been disposed of by the SFO without any judicial involvement. In an interview with Professor Koehler held on 29 August 2010,¹⁰⁶ Richard Alderman was questioned about the comment that he had made in a letter addressed to Arnold & Porter dated 7 December 2009 that the SFO had a few cases where it “*simply terminated [its] involvement following the offer by the corporate to pay suitable remediation to the country involved*”. Richard Alderman was quoted as replying:
- “The cases involved small companies in financial difficulties. Resolutions were agreed that allowed the companies to keep trading but with suitable changes of personnel and monitoring arrangements together with training. In the special circumstances here, publication was not required as a condition of the settlement because of the risks to the companies’ businesses.”*
343. There is no official, publically available information at all about the use of this practice by the SFO, how many times it has been used and in what circumstances. This lack of transparency was questioned by Professor Koehler when he referred to the practice of the DOJ and SEC publically stating in a thorough and transparent manner the facts of a self-referred case and the reasons why the agencies declined enforcement, and questioned whether the SFO supported such a stance. Richard Alderman responded that there were circumstances where the SFO had agreed to a press statement being issued by a corporate admitting certain facts and “*Questions on this would be for the company but the SFO could, and has in exceptional cases, made it clear that it is not investigating and the reasons why.*”
344. Although prosecutorial discretion is a well-established principle in the UK, it needs to be exercised in accordance with well laid down guidance. In the two cases referred to above, where there were remediation payments, it would appear that the decision not to prosecute and to avoid any publicity

¹⁰⁵ General rule under CPR 5.4C.

¹⁰⁶ <http://fcpaprofessor.blogspot.com> – a conversation with Richard Alderman posted on 5 October 2010.

was made having regard to the possible disproportionate damage that such action would cause to the company. Of course, it is possible that any allegations involving corruption against a company would have commercial ramifications, but it should only be in the rarest of circumstances that the commercial interests of a company should outweigh transparency in the interests of justice.

345. In his response to Professor Koehler, Richard Alderman also stated that a member of the public, or NGO, or a competitor could initiate a judicial review requiring the SFO to take some action. In such circumstances, the SFO would need to explain to the court its reasons for taking no action. Judicial reviews do provide a remedy against a charge of abuse of office but it is an exceedingly difficult and expensive route for interested parties to take; is unlikely to be successful in challenging the exercise of prosecutorial discretion; and is not a process that should be used to gain access to information that should be readily transparent.
346. The need to improve transparency is acknowledged by the Director of SFO. However, despite acknowledging the critical remarks made by Lord Justice Thomas and the need for greater transparency in civil recovery cases, the SFO continues to publish comparatively little factual information on each case and explanation for the stance that it has taken, other than a relatively short press release, for example as in the DePuy case.¹⁰⁷ Even in the recent case of Macmillan there was no information published on the individuals involved in the bribe paying or the extent of the criminal conduct.

Bargaining with individuals

347. The lack of transparency in relation to the civil agreements reached with companies thus far, makes it difficult to assess the extent to which the SFO has engaged in bargaining with individuals. Although the matter was touched upon in the press release issued by the SFO in relation to the Balfour Beatty case, where the “*SFO investigation concluded that there was no financial benefit to any individual employee and most of the relevant individuals have long since left the company*”, it is not clear what the decision-making process was in relation to other cases such as AMEC, where extremely limited information was made public.

8.3 SENTENCING ISSUES

Good labelling

348. In Innospec, Lord Justice Thomas expressed the importance of “*good labelling*” in criminal law when assessing the role of the civil recovery order:

“However there is a more important general principle. Those who commit such serious crimes as corruption of senior foreign government officials must not be viewed or treated in any different way to other criminals... It is of the greatest public interest that the serious criminality of any, including companies, who engage in the corruption of foreign governments, is made patent for all to see by the imposition of criminal and not civil sanctions. It would be inconsistent with basic principles of justice for the criminality of corporations to be glossed over by a civil as opposed to a criminal sanction.”

TI-UK agrees with the above view, namely that criminal prosecutions should be the norm. A common feature in some of the cases settled by civil means, is the explanation that the offences took place many years ago, that offenders were no longer with the company and that the company had cooperated in remediation. Such features may have persuaded the SFO not to have prosecuted the company in the public interest. However, this does not excuse the company from its past actions which should be properly labelled in the civil proceedings.

¹⁰⁷ On 8 April 2011: <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/depuy-international-limited-ordered-to-pay-£4.829-million-in-civil-recovery-order.aspx>

Assessing amount payable by a company – the concept of “recoverable amount”

349. Civil Recovery Orders under POCA provide a means to “*recover property*” that the prosecutor believes was derived from criminal conduct. It is up to the defendant to prove otherwise. The model is aimed at acquisitive crime, at tracing tangible assets and stripping criminals of their use by taking them out of circulation.
350. This is not a model that is easily transposable to corporate corruption cases, where the property obtained could be, for example, the proceeds of a contract that had been won by corrupt means. The company may argue that the property obtained was reflective of its profit, or indeed the loss, on the contract, or that money was disbursed in the ordinary course of the company’s otherwise legitimate activities; or that the “victim” had received appreciable value for money, for example, in the form of fighter planes, hospitals or bridges. Such arguments have thrown doubt on the basis for calculating the appropriate recoverable amount in corruption cases.
351. There have been several court cases clarifying the effect of the confiscation provisions under POCA, but little in relation to overseas bribery cases. In the Balfour Beatty case the civil settlement was for £2.25 million in relation to a contract of over £100 million. In the AMEC case the civil settlement of £4.9 million was in relation to irregular payments of about £5.5 million; it is not clear which contracts these payments may have related to. Both of these cases were settled between the parties by way of civil recovery orders in the High Court. In consequence, any published detail of the terms of these civil settlements is sparse.
352. In those cases of corporate overseas bribery where the SFO decides it appropriate to use civil remedies under POCA, the confiscated assets must meet the criteria as set down in the legislation and clarified by case law. POCA does not provide for a penalty or for restitution, as would be the case under criminal proceedings.

TI-UK is of the view that there should be published guidance on what factors to take into account when determining the “recoverable amount” for the purposes of civil settlements under POCA in foreign bribery cases. TI-UK does not consider that it is appropriate to set the recoverable amount at the net profit obtained by the company in all cases. To do so would limit restitution to the disgorgement of profits and fail to provide an effective deterrent to future offending.

Double jeopardy

353. Double jeopardy is often cited as a reason for the considerable differences in outcome in cases, most notably when compared to the US. The press release in the case of DePuy stated:
- “The Director of the Serious Fraud Office has concluded that a prosecution was therefore prevented in this jurisdiction by the principles of double jeopardy. The underlying purpose of the rule against double jeopardy is to stop a defendant from being prosecuted twice for the same offence in different jurisdictions. The DOJ Deferred Prosecution Agreement has the legal character of a formally concluded prosecution and punishes the same conduct in Greece that had formed the basis of the Serious Fraud Office investigation.”*
354. The law on double jeopardy is long established in the UK and many other jurisdictions, including the US, but it remains a complex area of law. In 1991 the Law Commission issued its report on Double Jeopardy and Prosecution Appeals, which led to changes in the law enacted in the Criminal Justice Act 2003. However, these changes mainly related to the ability of the prosecution to instigate new proceedings following an acquittal based on new evidence in serious cases such as murder.
355. The underlying principles of double jeopardy remain largely unchanged; namely, a person may not be put in peril twice for the same offence. Accordingly, where a person has been acquitted or convicted of an offence and is later charged on indictment with the same offence, double jeopardy, known as a plea of “*autrefois*” will bar the prosecution. Case law has tested the extent of the double jeopardy defence and this is where complexities of application have arisen.

356. Some issues are clear. For example, in the case of *Treacy* [1971] AC 537, Lord Diplock said that double jeopardy “has always applied whether the previous conviction of acquittal based on the same facts was by an English court or by a foreign court”. The Law Commission report states: “For a plea of *autrefois* to succeed there must previously have been a valid acquittal or conviction. This means, first, that the defendant must have been acquitted or convicted by a court of competent jurisdiction and the proceedings must not have been *ultra vires*”. There is no doubt that the US courts meet the competent jurisdiction test but it is questionable whether a DPA meets the requirement of a “valid acquittal or conviction”, despite the view of the SFO that the DPA “has the legal character of a formally concluded prosecution”.
357. Such technical legal arguments may have little merit if the full facts of the criminal conduct are laid before the Court and reflected in the charges. But what if that is not the case? The rules on double jeopardy can have a narrow interpretation, for example, “the offence with which the defendant is now charged must be identical to the offence of which he or she was previously acquitted or convicted”. This may seem to open the defendant to different charges in different jurisdictions, but that is not necessarily the case. Firstly, as Lord Devlin explained in *Connelly* that the word “offence” embraces both the facts which constitute the crime and the legal characteristics that make it an offence. Secondly, under the general principles of abuse of process it is prima facie oppressive to put a person on trial a second time in relation to the same facts, albeit on a different charge. This principle was endorsed by the “Court of Appeal in *Beedie* where it was held that while the *autrefois* rule did not protect against subsequent prosecution for a different offence on the same facts, the defendant in such a case is instead protected by a presumption that the proceedings should be stayed in the absence of special circumstances to justify them.”¹⁰⁸
358. The principles of abuse have also been enshrined in the European Convention on Human Rights and the Charter of Fundamental Rights. Although the UK has not ratified the optional Article 4 of Seventh Protocol to the European Convention on Human Rights, it deals explicitly with double jeopardy in the following terms:
- “No one shall be liable to be tried or punished again in criminal proceedings **under the jurisdiction of the same State** for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure **of that State** [emphasis added].”*
359. Article 50 of the Charter of Fundamental Rights of the European Union, which was brought into force by the Treaty of Lisbon on 1 December 2009, asserts the right not be tried or punished twice in criminal proceedings for the same criminal offence:
- “No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.”*
360. The above cases that have framed the law on double jeopardy in the UK are relatively simple when compared to the prosecution of corporate bodies for overseas bribery. Firstly, there is always an international aspect, which necessarily involves other jurisdictions where the law on double jeopardy is likely to vary. Secondly, large cases are likely to involve some form of plea bargain, or in the US a DPA, which is likely to limit the facts supporting the offence(s) and charge(s) that are laid before the court. The very nature of this complexity and the plea negotiation process potentially undermines the strict application of the double jeopardy defence.
361. Double jeopardy is an important principle of law framed to protect the rights of defendants, but it is also an area of law that has been cited by the SFO as a reason for failing to launch certain UK prosecutions, especially those involving the US. To the extent that this is an important issue of law that appears to have been a critical factor to the way in which the SFO has determined more than one case, TI-UK considers that the SFO should contribute to the legal debate by publically explaining its view on the application of double jeopardy in US and European cases.

¹⁰⁸ The references to case law have been extracted from the Law Commission Report on Double Jeopardy.

The key issue is that the concept of double jeopardy should not be used to frustrate criminal proceedings in the UK, in those cases where there is a strong public interest to argue for primacy of the UK courts. In those cases where double jeopardy is pleaded as a reason for not proceeding with criminal charges it should be fully reasoned and publicly justified. TI-UK is not advocating prosecuting and fining companies for the same offence in multi-jurisdictions but there are instances where companies within the same group, or individual defendants, should be prosecuted in their home countries.

Debarment

362. Under present UK law, in the absence of a plea of guilty in criminal proceedings, civil recovery is the only other available settlement option. Whereas it is clear that mandatory debarment follows the criminal prosecution of a company for corruption offences, it is not entirely clear whether a public body would debar a company party to a civil settlement that describes the criminal conduct as corruption. Clearly there is that risk, and as a result companies will be reluctant to agree to such a description in any compromise agreement. This does not promote proper labelling of offending and may explain those cases where the unlawful conduct was described as a failure to keep proper books and records.
-

Debarment provides a very strong deterrent to corporate offending. It becomes ineffective if prosecutors agree not to properly label corruption offences. In certain of the criminal cases, for example, Johnson & Johnson, companies were debarred from bidding for certain contracts. Whilst this sanction can be harsh, it is meant to be. When a prosecutor agrees with a company to settle by way of civil recovery the company may avoid mandatory debarment, but the settlement agreement should not be devised in such a way so as to promote this outcome at the expense of proper labelling of the criminal conduct.

8.4 THE ROLE OF THE FSA

363. The Aon and Willis cases raise the question of the role of the FSA in bribery cases, and whether this role should be enhanced in some way. These two cases were settled by the FSA using its regulatory powers, in effect charging the companies concerned for failures in their risk management and compliance functions. Neither case was taken up by the SFO.
364. In both cases, suspicious transactions were identified, more so in the case of Aon than Willis. However, both cases appear to relate to poor due diligence procedures as against deliberate or reckless conduct by senior management. The FSA does not have a remit to prosecute corruption cases. It does have arrangements in place with the SFO to report suspicions of bribery when they emerge from its work with firms or from its intelligence work. Where it forms the view that there are compliance failures, the FSA will take regulatory action, but where there is direct evidence of bribery the case will be referred to the SFO, with the FSA taking care of any subsequent regulatory action.
365. In March 2010, the FSA published its revised penalties policy which sought to establish a more transparent framework for the calculation of financial penalties. This revised policy was subject to consultation; the FSA director of enforcement said:

“Despite industry opposition we have decided to implement these proposals as we believe enforcement penalties are a powerful tool to help change behaviour in the industry... We have repeatedly seen breaches in particular areas where insufficient account has been taken of previous enforcement action. As well as delivering increased levels of fines, we believe that our new framework offers substantially more clarity and transparency around the penalty-setting process and will reap rewards in terms of an increase in compliant behaviour.”¹⁰⁹

¹⁰⁹ <http://www.fsa.gov.uk/pages/Library/Communication/PR/20>

366. The new policy was reflected in the FSA's Decisions Procedure and Penalties Manual ("DEPP"). DEPP 6.5 sets out the three principles on which a fine is based, namely: 1) Disgorgement of any benefit derived from any breach; 2) Discipline for wrongdoing; and 3) Deterrence for future offending by the individual or firm and any others. DEPP 6.5A sets out the factors that the FSA will take into account in calculating the penalty:
- a) Disgorgement of any financial benefit derived or loss avoided directly from the breach, plus interest.
 - b) An amount that reflects the seriousness of the breach. In appropriate cases this may be based on a percentage of the firm's revenue associated with the breach, which may range from 0% to 20% depending on the seriousness of the breach. The factors that determine the level of seriousness are also set out in the DEPP.
 - c) The amount in (b) above may be increased or decreased having regard to a number of published mitigating and aggravating factors. These are mainly about level of cooperation provided by the firm and remediation action.
 - d) The fine calculated in accordance with the above factors may be increased if the FSA considers that the fine is insufficient to be a credible deterrence.
367. In appropriate cases, the FSA will negotiate the financial penalty in accordance with the settlement discount scheme (DEPP 6.7). The percentage reduction is 0% to 30% depending on what stage the FSA enforcement action has reached – the earlier the breach is settled, the greater the discount. If the action proceeds to a Tribunal hearing there is no discount.
368. This penalty regime does benefit from transparency and it does set out some factors that should allow companies and individuals to understand the penalties that they face for breaches of the FSA rules. However, it also provides scope for the exercise of discretion by the FSA. In both the Aon and Willis cases the fines were reduced by 30% under the settlement discount scheme, a strong indication that both companies fully co-operated with the FSA. It is not possible to determine what proportion of the fines were based on disgorgement of the financial benefit as against the seriousness of the regulatory breaches; this detail does not appear to be published. Although the Willis investigation uncovered fewer suspicious payments than in the case of Aon, the amount of the commission paid to third-party agents appears to have been very much higher. In addition, the FSA increased the fine against Willis given its warnings to industry on the importance of adequate due diligence after the Aon case.
369. What is clear in comparing published information on these two FSA cases and the civil settlements on SFO bribery cases is that far more information is available on the FSA cases, both as regards to the nature of the regulatory breach and the basis of the fine.
370. In the US, the SEC is responsible for civilly enforcing US securities laws; in much the same way, the FSA in the UK is responsible for regulating those operating within the UK financial services sector. One difference is that the FSA can initiate criminal proceedings, whereas the SEC defers to the DOJ. However, in most of the FCPA cases the DOJ brings criminal charges (with resultant fines) and at the same time the SEC settles the regulatory breaches and tends to base a fine on disgorgement of profits.
371. This dual approach of the prosecutor and regulator does not appear to take place in the UK. However, the Aon and Willis cases raise a number of issues about the use of regulatory sanctions in bribery cases:
- a) What was the level of coordination between the FSA and the SFO in making the decision that a civil settlement using FSA powers was the most appropriate course to take?
 - b) Was there any consideration of parallel investigations; the FSA to deal with offences committed by the company and the SFO to investigate individual suspects?
 - c) Do the different civil settlement regimes under POCA and use of FSA powers provide alternative solutions, or should they be used in tandem?
 - d) Did the FSA have regard to the AG's Guidelines on Pleas and consider the impact of its civil settlement on investigations that may have been conducted by overseas agencies?
372. It may be the case that criminal action was not warranted in either the Aon or Willis cases, but there does appear to be evidence of suspicious payments, which brings into play the above considerations.

Section 9 Emerging Issues and Recommendations

373. There are a number of recurring themes that emerge from the UK cases settled to date that give rise to a number of issues that require serious consideration by the Government, the judiciary, prosecutors and other stakeholders, if the new Bribery Act is to achieve its objectives. These are set out below.

9.1 PRIMACY OF CRIMINAL SETTLEMENTS

374. The judiciary has been consistent in recent cases (Innospec, Dougall and BAE) in indicating that bribery is a serious offence and should be dealt with by the criminal courts, and that the incentive for pleading guilty should be a reduced sentence and not a civil settlement under POCA. However, the reality of investigating and prosecuting these lengthy and complex cases inclines the prosecution towards settlements, whether by way of a plea or through a civil recovery order.
375. Overseas bribery cases are always likely to be complex and costly, and the SFO needs the proper resources to deal with these important cases. In addition to problems associated with the identification principle re prosecuting corporates, there is always likely to be substantial pressure from the defence to try to bring the prosecutor to the negotiating table, either by using delaying tactics and frustrating the progress of the investigation or by providing the opportunity to reach a financial settlement, thus relieving pressure on stretched public resources. The reality is that settlements appear attractive, but at what cost?

The decision to prosecute is guided by the Code for Crown Prosecutors. The decision as to whether to accept a plea or go for a civil settlement is subject to a raft of guidance that has been outlined in this paper. Yet, despite all this guidance, there have been a number of cases settled through the civil courts where the outcome is questionable. The present level of uncertainty concerning the rationale for civil settlements brings into question whether the current procedures governing civil settlements are sufficiently robust and transparent for dealing with such serious offending.

9.2 TRANSPARENCY

376. One of the key features of criminal proceeding is transparency. Of course, certain information may be withheld for legal reasons but on the whole the process is subject to public scrutiny. Such transparency enables the public to challenge the process, it promotes confidence in the prosecutor and the judiciary, and it also acts as a deterrent to future offending.
377. The same is not true of civil settlements. There is little consistency in the information provided by the SFO, neither in respect of the reasoning not to prosecute; nor in respect of the full extent of the criminal conduct, the terms of the compromise agreement, and the basis of amount confiscated. In criminal plea discussions at least there is an obligation to make available to the court the plea discussion, meetings and correspondence. However, in the SFO's civil settlements almost no details of the case are put in the public domain. Nor are there any guidelines on the conduct of civil settlement discussions and, as a consequence, little is known of the settlement process.

TI-UK acknowledges the extent and value of the present AG Guidelines that govern civil settlements. However, the internal processes of the SFO which govern criminal plea negotiations, knowing that they are to be scrutinised by the Court, are equally applicable to civil settlements and the SFO should be prepared to make the process as transparent as possible. Powerful companies will wish for minimal publicity but this should not be negotiable. TI-UK would encourage the SFO to publish far more information on all civil settlements as do, for example, the FSA and DOJ.

9.3 THE RESPECTIVE ROLES OF THE JUDICIARY AND PROSECUTOR IN CRIMINAL PLEA AGREEMENTS

378. Whilst acknowledging the complex issues faced by prosecutors it is clear that the judiciary has expressed disquiet about certain of the criminal plea agreements put before them.
379. In the Innospec case, this may have been due to the settlement being overly structured and consequently the SFO transgressed into areas of sentencing discretion. In the case of BAE the criticism related to the charges brought, the basis for plea, the broad immunities given in those agreements, and allowing BAE to take the lead role in deciding how the restitution monies should be paid.
380. What is clear is that companies will only self-refer or agree to early pleas of guilty if the prosecution process is sufficiently certain and consistent to enable the associated risks to be managed effectively. There are already incentives for companies to enter an early plea, but there is insufficient certainty in the sentencing of overseas bribery cases. Defendants can gain access to a judge in order to obtain an indication of sentence, but only where a case has been transferred to Crown Court. However, TI-UK recognises the paramount importance of the separation of powers. If an enhanced role can be performed by the judiciary, this principle and that of the independence of the prosecutor, together with prosecutorial discretion, must be preserved.

Access to the Court at an earlier stage in plea agreement discussions would be of value. At present, there is no procedure to involve the judiciary at a much earlier stage to give tacit approval of plea agreements or to give an indication of the fine and confiscation. It is important that whatever extended role is played by the judiciary, the independence and separation of powers between judges and prosecutors is not undermined.

381. Prosecutors acting in accordance with the Code for Crown Prosecutors use their discretion as to which persons to prosecute and on what charges. The judiciary and the public must have confidence that prosecutors will fulfil their duty with integrity and skill in the interests of justice. The judiciary are only able to pass judgement and sentence based on the charges and evidence put before them. As illustrated most graphically in the BAE case, there may be times when the judiciary expresses serious concerns that the charges do not adequately reflect the underlying criminal conduct.
382. The plea negotiations undertaken by the SFO should be conducted in accordance with the AG's Guidelines on Plea Agreements in cases of Serious or Complex Fraud. These Guidelines enable the SFO to conduct plea negotiations at an early stage of the investigation and prove useful where companies self-refer instances of corruption. The judiciary expressed some concern about the dangers associated with early pleas during the consultation period on the Guidelines, in particular that in the absence of a full criminal investigation, the plea would not address the full criminality of the company's conduct.
383. In the Innospec and M&J cases, both companies carried out extensive internal investigations at great cost to themselves. This approach saved valuable public resources and, given the high level of cooperation by the companies, uncovered the full extent of the offending. Such cases deserve some incentivisation in sentencing. The same could not be said about the BAE case.
384. In BAE, the SFO agreed to the plea agreement in February 2010 after several years of investigation with little or no cooperation from the company. The plea was agreed at a time when BAE were

actively negotiating a settlement with the DOJ, which culminated in a criminal fine of \$400 million, being the maximum possible. In the UK case, the judge was critical of the plea agreement that provided for restitution of £30 million, both in terms of the charges of false accounting, the extent of the immunities given, and the moral pressure exerted by restitution on the fine that he could impose.

385. The BAE case aptly illustrates the relatively weak position of prosecutors in the UK when faced by a major corporation determined to put up an aggressive defence. In the US, the DOJ had the benefit of a history of dealing with such large cases and had in its armoury clear sentencing guidelines and sentencing disposals, which limit uncertainty in the eventual outcome. Companies find it necessary to settle with the US authorities as a priority to any other prosecuting authority. In the UK the outcome was far from clear. The SFO was faced with bringing criminal proceedings, with all the inherent difficulties of a contested trial against a corporate defendant, or agree to a plea on a global basis.
386. Whereas such decisions rightly fall to be made by the prosecutor, TI-UK believes that some of the dangers associated with early pleas could be better managed if the SFO conducted plea negotiations in accordance with a protocol that clearly set out a number of non-negotiable principles, for example: a requirement for the defendant to plead guilty to the underlying criminal conduct; no immunities for offences not disclosed; no immunities for individuals; cooperation to be provided in associated investigations; the appointment of a monitor in appropriate cases; and agreement on a range of fines and restitution.
387. TI-UK recognises that at times prosecutors are faced with difficult dilemmas in exercising their prosecutorial discretion. It is important that prosecutors are able to fulfil their function without interference from the Executive or the judiciary. However, it is also important that in extreme cases there is a means by which their decision-making can be scrutinised. There have been some rare instances where decisions have been challenged by judicial review. However, as we have seen, interested parties who try to use the judicial review route face formidable obstacles. They also need considerable funding.

TI-UK believes that what is required is some form of independent parliamentary body, not to second guess and undermine prosecutorial discretion, but to subsequently review the conduct and resolution of important cases in order to enhance transparency and help to develop the law and practice in the complex area of overseas bribery.

388. TI-UK welcomes the recent formation of The All-Party Parliamentary Group on Anti-Corruption and supports its aim to enhance and strengthen the parliamentary scrutiny of the UK's anti-corruption policies and mechanisms. It is not clear at this early stage whether such a group could fulfil the above recommended role.

9.4 SERIOUSNESS OF OVERSEAS BRIBERY

389. Overseas bribery is now firmly recognised as a serious criminal offence, following the sentencing remarks of the judges in the cases of M&J and Innospec.
390. TI-UK believes that prosecution should be the norm in overseas bribery cases and that the level of penalties should be sufficiently high to provide an effective deterrent. In respect of deterrence, two important sentencing principles have been set down by the Innospec case. Firstly, overseas bribery is at the top of the criminal scale and secondly, national sentencing scales should deter forum shopping in global settlements.
391. Despite the sentencing principles enunciated by the judges in M&J and Innospec, the BAE case illustrated the limited power of the court to impose an adequate sentence if the charges agreed between by the prosecution and the defence failed to adequately address the criminal conduct. Furthermore, the agreement to pay an ex gratia payment of £30 million as restitution placed ethical constraints on the court not to impose a heavy fine. However, these cases have failed to clarify the principles underlying fines in overseas bribery cases other than placing corporate offences at the highest level.

Fines

392. The sentencing remarks in Innospec stressed the importance of imposing commensurate fines. However, the basis upon which the fine was calculated has not been transparent in any of the three corporate cases brought to date. The Sentencing Guidelines Council issued a definitive guideline on statutory offences of fraud where these are sentenced on or after 26 October 2009. There is no comparative guideline for overseas bribery cases.
393. This uncertainty inhibits companies from self-referring instances of corruption to the authorities, as well as falling below the standards expected of a modern legal system to provide certainty.
394. TI-UK advocates a more structured approach to fines in this area. The approach of the FSA in the AON and Willis cases goes some way towards demonstrating that there can be a structured approach to establishing the level of fines in the UK, in so far as the seriousness of the offence and deterrence is taken into account. Transposing the underlying principles behind regulatory fines to the criminal arena may have its difficulties, but the present sentencing regime provides little certainty of outcome and in the view of TI-UK has failed in some cases to provide an adequate form of deterrence.
395. The US system facilitates plea bargaining at a much earlier stage because of the level of certainty that is provided through the use of the United States Sentencing Guidelines. In the UK, the Sentencing Commission Working Group rejected the US “grid” model because of its inflexibility and the loss of discretion that it afforded to judges in sentencing. These concerns may still hold true as far as the prosecution of individuals are concerned, but there is at least an argument for introducing a more structured framework for fining companies in overseas bribery cases.
396. As is well publicised, some of the fines in the US for FCPA offences run to hundreds of millions of dollars, for example in the cases of Siemens, Halliburton and BAE. Under the US Sentencing Guidelines such fines are calculated on the base fine for the offence and then increased having regard to such issues as the number of bribes, the value received and the culpability of the organisation. Such a system provides the prosecutor with some flexibility in agreeing to certain factors that have an impact on the calculation of the fine. However, more importantly, the system is based on certain underlying principles and results in fines that are a real deterrent.

In the UK, there is a lack of clarity and certainty over the level of fines and the method of calculation, and to some extent the aggravating/mitigating factors that should be taken into account in the sentencing of companies in overseas bribery cases. TI-UK believes that the Sentencing Council should review this position and issue guidelines as soon as possible.

397. Prosecuting legal entities under UK law is inherently difficult because of the identification principle. This difficulty was overcome in corporate manslaughter cases with the passing of the Corporate Manslaughter and Corporate Homicide Act 2007 on 6 April 2008. However, the work of the Law Commission on corporate prosecutions is still ongoing. In overseas bribery cases it remains necessary to prove under common law that the “controlling mind” of the company was culpable of the offence. This is often very difficult when prosecuting large companies with complex and international management structures; compare, for example, the differing outcomes in the M&J and BAE cases. This position should be alleviated to some extent through the use of Section 7 of the Bribery Act, but TI-UK considers that if criminal sanctions against corporates in overseas bribery cases are to be effective, this area of the law needs to be clarified as soon as practicable.

Confiscation

398. It has long been Government policy to deprive persons convicted of criminal offences of the proceeds of their crime. This applies to companies as well as to individuals. As a company can only be fined and not imprisoned, it follows that confiscation proceedings should be in addition to the imposition of fines. Following the Innospec case, there is now a degree of clarity about the relationship of these two overlapping financial penalties; where there are limited funds available to pay both, the fine takes primacy.
399. However, the basis upon which confiscation under Part 2 of POCA 2002 is to be calculated in overseas bribery cases is unclear. This legislation works well when applied to the “benefit” that an individual obtains from criminal conduct, but it is not easily applied to corporate offending. It is important to distinguish confiscation in criminal proceedings, which is likely to be accompanied by fines and restitution, against confiscation under Part 5 of POCA, which applies to property tainted by criminal conduct.
400. TI-UK believes that in criminal proceedings the underlying principle of confiscation is the disgorgement of any financial benefit accrued by the company through the payment of bribes. This appears to be the stance taken by the SFO in some of its settlements. However, when charges fail to reflect the overall criminal conduct, it follows that confiscation will be eroded or extinguished entirely, as was the case in BAE.

Compensation/restitution

401. Corruption does great harm in developing countries, where the services or goods provided by companies paying bribes are either unsuitable or, overly expensive or sub-standard. TI-UK believes that victim countries should receive restitution and that prosecutors should work with development agencies, such as DFID, to manage this process. Convicted companies should not be allowed to play any role in devising and implementing compensation arrangements.

9.5 REHABILITATION – APPOINTMENT OF MONITORS

402. TI-UK supports the appointment of monitors in appropriate cases. However, there is a need to ensure that effective sanctions are available to prosecutors should there be breaches of the agreed terms of compliance programmes that were an integral part of the criminal plea agreement or compromise agreement under a civil settlement.
403. In the UK there is provision for “conditional sentencing”. Under these provisions, a sentence can be deferred in order to promote rehabilitation and a person can be brought back to court for breaching the terms of an order. This type of sentencing practice has been developed in the US and is used in DPAs with companies in FCPA cases. But it has not been developed in the UK to deal with corporate offending. If monitorships are to be effective the terms should be enforceable in the courts.

9.6 BRIBERY OFFENCES AND DEBARMENT

404. On 30 March 2011, the Government issued guidance on the Bribery Act. In respect of debarment, the Secretary of State for Justice made the following statement to Parliament:
405. *“The Government have also decided that a conviction of a commercial organisation under Section 7 of the Act in respect of a failure to prevent bribery will attract discretionary rather than mandatory exclusion from public procurement under the UK’s implementation of the EU Procurement Directive (Directive 2004/18). The relevant regulations will be amended to reflect this.”*
406. Nevertheless, the possibility of debarment, albeit discretionary, represents a strong disincentive to take part in bribe-paying. If it is to be effective, companies have to accept that it is a consequence that they have to face. The Office of Government Commerce (“OGC”) has issued guidelines on

- debarment, and a useful paper on the subject has been published by Corruption Watch.¹¹⁰
407. TI published its recommendations on the development of EU debarment systems in March 2006. It was recognised that any debarment system needed to be fair and proportionate, and that whereas there should be mandatory debarment following a criminal conviction for corruption, it was noted that this sanction could be ineffective in cases where conviction took place many years after the offence took place.
408. TI-UK is in favour of debarment, in that it acts as a major deterrent to overseas bribery. But it also recognises that the risk of debarment can play a disproportionate role in plea negotiations, which may result in an inappropriate charge being laid before the court. There needs to be more clarity on the process for entering and exiting the debarment process, including taking into account any remedial action taken by the company.
409. The fact that an offence under Section 7 of the Bribery Act will not give rise to mandatory debarment provides some scope for the prosecutor to bring appropriate charges where a company has failed to take adequate procedures to stop bribes being paid. In those cases where offences of corruption took place many years ago and the company has taken steps to remediate the action, the prosecutor can use his discretion to opt for a civil settlement in the public interest. In such cases, debarment appears unlikely. Where a prosecutor decides it is appropriate to bring criminal proceedings and decides that the company should face corruption charges under Section 1 of the Bribery Act, mandatory debarment is a consequence that the company will have to face.

9.7 LIMITATIONS OF CIVIL SETTLEMENTS

410. In this paper TI-UK has been critical of the use of civil powers to settle criminal cases for a number of reasons, including lack of transparency, poor labelling of the criminal conduct, unclear principles for determining the amount to be confiscated, and other issues. However, TI-UK does accept that in some cases it is in the public interest to settle cases using these civil powers, if the alternative is no resolution of the case at all.
411. TI-UK believes that there still exists a lack of clarity and transparency on the principles adopted by prosecutors in deciding when to use civil recovery in overseas bribery cases. The SFO has published a policy document but its reasoning on a case-by-case basis is unclear. There is no published protocol for conducting civil recovery negotiations, as there is for criminal plea discussions, and there is no obligation to explain prosecutorial decision-making in the civil court proceedings. For example: the degree of cooperation required of the defendant company to admit certain facts; a requirement to provide evidence in the prosecution of other defendants; the degree of transparency in subsequent civil proceedings; and other such issues.
412. In the absence of such a protocol, serious cases of overseas bribery are merely subject to the Civil Procedure Rules of the civil courts, which in essence apply the same rules and criteria as those applicable to a routine commercial dispute where agreement has been reached between the parties with minimal involvement of the judiciary. In the view of TI-UK, this represents a major gap in criminal legal procedures for dealing with overseas bribery cases when they are settled through the civil courts.
413. Confiscation under Part 5 of POCA is also not easily adaptable for overseas bribery cases. Under that legislation the prosecutor seeks to make a claim against the “recoverable property” derived from crime, for example the payment of bribes. Exactly what this recoverable property could be is open to interpretation, perhaps the entire money flow from the tainted contract, perhaps the profit. However, such a formula,
- whilst it can be harsh, can fail to take into account the seriousness of corruption offence where a substantial fine would be more appropriate.
414. TI-UK recommends that cases brought by the SFO should be demonstrably in accordance with the

¹¹⁰ <http://hawleyfeinstein.files.wordpress.com/2010/02/debarment-as-a-corporate-sanction-the-issues.pdf>

Code for Crown Prosecutors. There must be good and published criteria to depart from a criminal prosecution. Civil recovery should only be used where either it is not feasible to secure a conviction or it is in the public interest to use civil powers. The SFO should as a matter of standard practice publish its reasoning for using civil powers and be prepared to disclose details of the compromise agreement in much the same way as the DOJ does with DPAs.

9.8 DEFERRED PROSECUTIONS

415. Deferred Prosecution Agreements have proved to be a useful way of settling FCPA cases in the US. The benefit to the company is to avoid prosecution but the fines are very heavy and remediation is required. There is always the possibility of a prosecution if the terms of the DPA are breached.
416. The Director of the SFO has spoken in favour of such a system, one that incentivises self-reporting and encourages better corporate governance. However, there are also critics of the system, who argue that the balance of power is weighed too heavily in favour of the prosecutors, thereby forcing a company to agree to an unjust plea. Either way, DPAs are a form of conditional sentencing and, as noted above, there is nothing similar in use in the UK in dealing with serious corporate offending. TI-UK believes that the Government should consider the introduction of DPAs or some similar sentencing procedure after a thorough assessment of the alternatives.

9.9 INTERNATIONAL COOPERATION ON INVESTIGATIONS AND PROSECUTIONS

417. All overseas bribery cases involve other jurisdictions and prosecutors. In the EU the principle of primacy has been adopted, first through Eurojust and later through the Convention. Consequently, there is both a protocol and a way of agreeing which country takes primacy in criminal cases in the EU.
418. So far as the US is concerned, the AG's Guidelines covering the conduct of Concurrent Jurisdiction Cases provides a procedural framework for resolving concurrence issues and there is an escalation process in those cases where line prosecutors cannot agree on the outcomes. However, the Guidance is a procedural tool only and is confined to extradition; it does not give guidance on how to resolve problems substantively. As the US does not recognise convictions of foreign states it is likely that arguments of "primacy" by foreign states will not work if it excludes US enforcement.
419. The SFO has worked with the US in settling cases, but the basis upon which primacy is decided and the division of penalties is far from clear. There is no agreed protocol. The absence of clear principles to resolve jurisdictional issues in concurrent cases that have at their core the wider public interest as against more narrow national interests, or those of prosecution agencies, is a pressing requirement. The current process is confusing and unclear to participants. The outcomes have varied enormously. Failure to address this issue may leave the UK in a position where it is unable to either secure a conviction or to levy an appropriate sentence against UK companies which public interest demands, as was the case in BAE and DePuy.
420. TI-UK recognises that international cooperation is a complex area but in cases of international corruption it is vital to have some form of protocol or Memorandum of Understanding agreed between the respective Attorneys General, especially with the US, which deals with the underlying principles of settling concurrent jurisdictional issues.





Transparency International UK

32-36 Loman Street,

London SE1 0EH

Tel: 020 7922 7906

Fax: 020 7922 7907

info@transparency.org.uk

www.transparency.org.uk