

U.K. BRIBERY ACT

Are U.K. Enforcement Authorities Sending the Wrong Message to Companies?

By Mark Handley, Gibson, Dunn & Crutcher, Patrick Doris, Gibson, Dunn & Crutcher

To date, 2017 has been a record year for anti-corruption enforcement in the U.K. In the last eight months, we have witnessed the largest-ever fines for a company, the longest-ever sentences for individuals, the greatest number of individuals convicted, and so on. In this context one judgment from this year, in which a company obtained an unusually light sentence, is an anomaly and will not be followed if the U.K. is to maintain its progress towards being a recognized enforcement jurisdiction.

This article analyzes the recent developments and explains what the two most recent convictions of companies for corruption tell us about the current state of enforcement in the U.K.

See "[SFO Arrives in the Anti-Corruption Premier League With Rolls-Royce Settlement](#)" (Mar. 1, 2017).

Rolls-Royce Solidifies the U.K.'s Position on the Anti-Corruption Enforcement Stage

Those buried in a deep hole at the start of the year may have missed the U.K.'s Serious Fraud Office entering into a deferred prosecution agreement with the aircraft engine manufacturer Rolls-Royce. The company admitted to paying bribes in seven countries (Indonesia, Thailand, India, Russia, Nigeria, China and Malaysia) to win contracts worth hundreds of millions of pounds.

In total, the company was fined or ordered to disgorge some £497 million, plus interest, plus £13 million in the SFO's legal costs. That payment of £13 million in legal costs alone would have been fourth in the list of all-time U.K. corporate corruption fines. The previous highest fine was £72 million imposed as a civil penalty by the Financial Conduct Authority. The Rolls-Royce DPA was a penalty of a completely different order of magnitude.

The judgment by Mr. Justice Leveson goes into significant detail as to the application in practice of the sentencing guidelines for corporate bribery offenders coupled with the judge's discretion to reward co-operation and remediation. As a result we know that the DPA included the disgorgement of £258,170,000 – the entire gross profits from the contracts

– and a fine of £239,082,645, already inclusive of a 50% reduction incorporating a 33.3% reduction for an early guilty plea and a 16.7% reduction for cooperation. Without these reductions the fine element alone would have been £478,165,290.

Remarkably the Rolls-Royce DPA may itself soon be dwarfed. Press reports have suggested that the SFO is currently negotiating the terms of another bribery DPA, this time with a penalty in the region of £1 billion.

See "[Rolls Settlement Illuminates SFO Expectations for Cooperation and Compliance](#)" (Mar. 15, 2017).

Individual Prosecutions Carry Stiff Penalties

While the Rolls-Royce DPA has understandably caught a lot of the headlines and commentary, there are other trends arising from the year's enforcement actions which have attracted far less commentary. For instance during 2017 there have been, so far, 26 individuals convicted of bribery or corruption offences in the United Kingdom. This is more than in any other year in the last decade. Indeed in the last decade a total of 117 individuals have been convicted of bribery/corruption offences. An equivalent of the U.S. Yates Memo is not needed in the U.K. – there is no doubt that the prosecuting agencies in the U.K. have the pursuit of individual defendants as a strong priority.

It is important to note the emphasis on the word "agencies," as it is not just the SFO which has been responsible for securing these convictions. This has been a trend for some time, but it continues this year unabated. While the SFO has been responsible for eight of 2017's individual convictions,^[1] the City of London Police was responsible for seven,^[2] the [British Transport Police for four](#), and the [Thames Valley Police for four](#). In addition, [the Crown Prosecution Service \(CPS\), Leicestershire Police, and Avon and Somerset Police each secured one conviction](#).

The choice of prosecuting agency may not be arbitrary, but nor is it possible to point to a particular threshold and say that bribes over that value will be investigated by the SFO. As a case in point, the bribes which led to the convictions by the SFO of Stephen Dartnell and Simon Mundy totalled

£900,000, but it was the CPS which investigated the £2 million in bribes paid to Andrey Ryjenko. Similarly, the £1.7 million in bribes paid to Wasim Tappuni were investigated by the City of London Police. Geography is also no determinant of prosecutor, as the cross-border CPS prosecution of Ryjenko and the U.K.-specific SFO prosecution of Dartnell and Mundy make clear.

This is of more than academic interest. A company or individual relying upon the SFO's guidance on the kinds of cases that the SFO will prosecute can be fooled into thinking that other U.K. prosecutors will take the same approach. This is not so. A case which the SFO would not dream of prosecuting may still be prosecuted by others. Cases in point from this year are the suspended custodial sentences given to Androulla Farr and Tracy Miller for receiving bribes of £2,000 and £4,500, respectively. In both cases the payments were to secure the release of what should have been confidential information.

The large number of convictions enables other trends to become apparent. For instance, of the eight longest custodial sentences handed down since 2008, seven of those have been this year. Moreover, before this year the longest sentence over that same period since 2008 had been six years. By contrast 2017 has seen sentences of 10 years, 11 years and 15 years.

While noteworthy in themselves, these very long sentences are also symptomatic of a trend towards longer sentences. In 2008, the average bribery/corruption sentence was 13.3 months. As of today, the cumulative average sentence for the whole period since 2008 has reached slightly over 28 months with a near-perfect pattern of steady year-on-year increase. In other words, the average sentence length has doubled in the last decade, and now stands at just short of two and a half years.

The Alandale Matter: A Troubling Outlier

On July 24th of this year, Alandale Rail Limited (Alandale) was convicted of one count of making corrupt payments contrary to section 1 of the Prevention of Corruption Act 1906. This was one of the acts in force prior to the Bribery Act 2010, but because English law has no statute of limitations for corruption or bribery offences, it remains a valid statute for pre-Bribery Act offenses.

In the case of Alandale, the contract obtained was initially worth some £2.1 million, but over time its value rose to approximately £5.2 million. The scheme concerned contracts for the upgrade of Farringdon railway station in London.

The scheme involved two directors of Alandale making payments to the senior manager of the joint venture overseeing the award of contracts on the project in order to rig the bidding for the particular contract in question. After improperly obtaining the contract, the three then colluded in manufacturing false invoices to enable Alandale to recoup the costs of its bribes. When the scheme started to be uncovered, the bribes continued to be paid through an intermediary. None of those involved self-reported; instead the conduct was only fully uncovered through the actions of a whistleblower from within Alandale itself.

The case was not prosecuted by the SFO, but by the Specialist Fraud Division of the CPS, after an investigation by the British Transport Police.

The two directors of Alandale, the recipient of the bribes, and the intermediary all pleaded guilty and were sentenced. The bribe-paying directors received 12 months and two years respectively. The bribe recipient was sentenced to 12 months' in jail, and the intermediary was sentenced to two years.

That the intermediary received a sentence twice as long as the recipient of the bribes is not the most surprising aspect of the sentencing in this case. The company, which did not plead guilty but which was found guilty of one count of corruption after a trial at Blackfriars Crown Court, was sentenced to pay a fine of just £25,000.

The sentencing guidelines, which are binding on the courts and which cover corporate offenders, require that the base number used for calculating the fine for a corporation guilty of bribery or corruption would "normally be the gross profit from the contract obtained, retained or sought as a result of the offending." The standard application of this guideline would mean that the base figure for Alandale's fine should have been £5.2 million. This would then be increased or decreased depending on the presence of aggravating or mitigating circumstances. Even if the conduct was held to be of the lowest available grade of culpability, and even if mitigation was maximised, under the sentencing guidelines the lowest fine available should have been 20 percent of the £5.2 million, or £1,040,000. Moreover, a guilty plea cannot explain the low penalty in this case. Because it never entered a guilty plea, Alandale could not obtain any sort of discount on its fine such as that obtained by Rolls-Royce and mentioned above.

In addition to determining the level of fine, the same sentencing guidelines require that a convicted company should disgorge its gross profits from the improperly-obtained contract. This was what happened in the Rolls-Royce case. No such order for disgorgement was imposed on Alandale.

The U.K.'s efforts to become established as a jurisdiction with an appetite for anti-corruption enforcement, as headlined through cases such as Rolls-Royce, are undermined if a non-self-reporting company can be found guilty of corruptly obtaining a contract and then be fined less than half of one percent of the value of that contract.

The U.K. prosecuting agencies obtain no benefit from the idea that a company can achieve a significantly better outcome, and with no mainstream press coverage, if it is investigated by an agency other than the SFO, and with a trial at a court other than Southwark Crown Court – London's main white-collar crime court. Incentivising the gaming of the system should not be one of the outcomes of a successful prosecution of a company for corruption.

F.H. Bertling Limited: Convicted for Making a Facilitation Payment?

The third company to be convicted of bribery or corruption so far this year is F.H. Bertling Limited. The company pleaded guilty to making a payment of £250,000 in relation to a contract with Sonangol, the state oil company in Angola.

As of the publication of this article, the company has not been sentenced, but a feature that makes this case noteworthy is the dueling press statements that the SFO and the company issued on September 26, 2017. The SFO's press release included a statement from the Director of the SFO that: "F.H. Bertling sought to obtain contracts through bribery." The same day, the Bertling Group issued a reply statement saying: "The payment was made to a third party in Angola to enable release of a payment for work contractually done by the former subsidiary and to protect the livelihoods of its employees in the country."

Based on the publicly available information it is difficult to know which of these versions is correct. The sentencing hearing, as yet unscheduled, should help to resolve this, or perhaps the SFO will correct the statement on its website (it has not done so yet).

To the extent that the Bertling Group's version of events is correct, this would be a conviction of particular significance because it would be a conviction for a facilitation payment. The payment of the £250,000 was not to obtain a contract, but simply to obtain the release of a contractually-due payment.

When the Bribery Act was first introduced, one of the differences compared to the FCPA that was routinely commented on was that while the FCPA allows for facilitation payments, the Bribery Act does not. As stated in the SFO's own guidance on facilitation payments: "Facilitation payments were illegal before the Bribery Act came into force and they are illegal under the Bribery Act, regardless of their size or frequency."

While that statement of the law is undoubtedly correct, it has always been difficult to point to any actual instances of the prosecution of facilitation payments. There was a case from the 1970s in which a couple were prosecuted for paying £4 to expedite a marriage license, but other than that it has not always been easy to convince a client that English prosecuting agencies actually meant what they said. With the prosecution of F.H. Bertling Limited, and six related individuals, for paying a facilitation payment, companies should no longer doubt the appetite of the SFO for prosecuting a facilitation payment in the appropriate circumstances.

Close attention will, however, need to be paid to the sentencing of this company. As already mentioned, the sentencing guidelines state that the appropriate figure to use as the base for a fine will "normally be the gross profit from the contract obtained, retained or sought as a result of the offending." In this case, no contract was obtained, retained or sought as a result of the payment of the £250,000. The guidelines, however, also talk about the fine being based on the size of the "loss avoided or intended to be avoided." It may be, therefore, that F.H. Bertling Limited will be sentenced to pay a fine equal to the value of the contractual payment that it was seeking to release.

Conclusion

Even if the remaining months of 2017 involve no further convictions for bribery and corruption offences, it will still be a watershed year for U.K. enforcement. The Rolls-Royce DPA inserted the U.K. authorities into the Major Leagues for enforcement penalties. Similarly, the conviction of two other companies in the same year, and the sentencing of 26 individuals is more than enough to demonstrate that the U.K.'s various enforcement agencies are flexing their prosecuting muscles to good effect.

Against this narrative of vigorous enforcement, the sentence of £25,000 given to Alandale Rail Limited is an aberration. The system should be predictable: for lawyers, for prosecutors and, most importantly, for clients. If U.K. enforcement is to stay on the right track, the example of Alandale will need to become the exception that proves the rule.

Patrick Doris is partner and Mark Handley is of counsel with Gibson Dunn & Crutcher's white collar defense and investigations practice in London. Doris' practice includes white collar and regulatory investigations, extending to bribery and corruption matters, sanctions, money laundering, insider dealing, financial sector wrongdoing, accounting violations and major cross-border tax matters. Handley has significant experience advising on the U.K.'s anti-corruption legislation including the Bribery Act, the U.K. and E.U.'s financial and trade sanctions regimes, and on civil fraud claims.

[1] The eight convictions arose in two separate cases. See [SFO secures seven convictions in \\$20m F.H. Bertling corruption case](#) and [Four found guilty in £160m financing fraud](#).

[2] These seven convictions arose in three separate cases. See [Insurance industry employee sentenced for selling customer information](#), [Man sentenced for £1.7 corruption involving the World Bank](#) and [Five people sentenced for leaking customer data](#).