

**SUMMARY OF WORKSHOP CONTENT**  
of the UK Anti-Corruption Forum’s Workshop  
**“CORPORATE ANTI-CORRUPTION ACTIONS”**  
which took place on Friday 17th October 2008

**INDEX:**

<b><u>ITEM:</u></b>	<b><u>PAGES:</u></b>
<b>Copy of Workshop Programme:</b>	2 - 3
<b>The law of bribery and fraud - Its effect on companies and employees</b>	4 - 9
<b>Gifts, hospitality and facilitation payments</b>	10 - 14
<ul style="list-style-type: none"> <li>• When do gifts and hospitality become bribes?</li> <li>• What limits should be put on gifts and hospitality?</li> <li>• How should gifts and hospitality be controlled and recorded?</li> <li>• How can you avoid making facilitation payments, and still get the required service?</li> <li>• How to record and account for facilitation payments?</li> <li>• Should facilitation payments be criminal offences?</li> </ul>	
<b>Due Diligence</b>	15 - 19
<ul style="list-style-type: none"> <li>• Why is due diligence necessary to prevent corruption?</li> <li>• What due diligence should be undertaken before: <ul style="list-style-type: none"> <li>○ Working in a new country</li> <li>○ Working with a new client</li> <li>○ Working with a new business partner (consortium or joint venture partner, contractor, consultant, sub-contractor, agent)</li> <li>○ Taking on a new employee</li> </ul> </li> </ul>	
<b>Internal monitoring and Whistle-blowing</b>	20 - 22
<ul style="list-style-type: none"> <li>• What monitoring systems should you put in place in your company to prevent/uncover corruption?</li> <li>• What reporting systems should a company put in place?</li> <li>• How does a company deal with reports?</li> </ul>	
<b>Crisis management</b>	23 - 26
<ul style="list-style-type: none"> <li>• What do you do if you discover corruption: <ul style="list-style-type: none"> <li>○ Perpetrated by a member of your organisation</li> <li>○ Perpetrated against your organisation</li> <li>○ On a project you are involved in, but where the corruption does not affect you?</li> </ul> </li> </ul>	



## Anti-Corruption Workshop

# “CORPORATE ANTI-CORRUPTION ACTIONS”

Friday 17th October 2008: 09.00 to 16.00

Venue: Institution of Mechanical Engineers, 1 Birdcage Walk, Westminster, London, SW1 (020 7973 1253)

Time	Topic	Panellists
08.30 – 09.00	<b>Registration and coffee</b>	
09.00 – 09.05	<b>Welcome</b>	Peter Gammie Group Chief Executive - Halcrow Group
09.05 – 09.20	<b>The law of bribery and fraud - Its effect on companies and employees</b>	Mark Carroll Senior Crown Prosecutor - Crown Prosecution Service
09.20 – 10.35	<b>Gifts and hospitality</b> <ul style="list-style-type: none"> <li>• When do gifts and hospitality become bribes?</li> <li>• What limits should be put on gifts and hospitality?</li> <li>• How should gifts and hospitality be controlled and recorded?</li> </ul> <b>Facilitation payments</b> <ul style="list-style-type: none"> <li>• How can you avoid making facilitation payments, and still get the required service?</li> <li>• How to record and account for facilitation payments?</li> <li>• Should facilitation payments be criminal offences?</li> </ul>	<b>Panel chair:</b> Graham Hand Chief Executive - British Expertise  <b>Panel:</b> Gary Taylor Managing Director - I.T. Transport Hamish Goldie-Scot Pro-Poor Development Unit - Scott Wilson Group James Maton Partner - Edwards Angell Palmer & Dodge
10.35 – 10.55	<b>Coffee</b>	
10.55 – 12.15	<b>Due Diligence</b> <ul style="list-style-type: none"> <li>• Why is due diligence necessary to prevent corruption?</li> <li>• What due diligence should be undertaken before:               <ul style="list-style-type: none"> <li>○ Working in a new country</li> <li>○ Working with a new client</li> <li>○ Working with a new business partner (consortium or joint venture partner, contractor, consultant, sub-contractor, agent)</li> <li>○ Taking on a new employee</li> </ul> </li> </ul>	<b>Panel chair:</b> Bob McKittrick Former Director Scott Wilson Group; Past President - IStructE  <b>Panel:</b> Kevin Stovell Group Development Director - Mott MacDonald Group Gordon Masterton Vice President - Jacobs; Past President ICE Adrian Davidson Director - EMCIIIS Neill Stansbury Director - Global Infrastructure Anti-Corruption Centre
12.15 - 13.00	<b>Lunch</b>	

13.00 – 14.15	<p><b>Internal monitoring</b></p> <ul style="list-style-type: none"> <li>• What monitoring systems should you put in place in your company to prevent/uncover corruption?</li> </ul> <p><b>Whistle-blowing</b></p> <ul style="list-style-type: none"> <li>• What reporting systems should a company put in place?</li> <li>• How does a company deal with reports?</li> </ul>	<p><b>Panel chair:</b> Nelson Ogunshakin Chief Executive - Association for Consultancy and Engineering)</p> <p><b>Panel:</b> Peter Welch Group Commercial Director - WSP Group Tom Osorio Auditor - BP International Jermyn Brooks Director of Private Sector Programmes - Transparency International; ex-Global Managing Partner - PWC</p>
14.15 - 14.35	<b>Coffee</b>	
14.35 – 15.55	<p><b>Crisis management</b></p> <ul style="list-style-type: none"> <li>• What do you do if you discover corruption: <ul style="list-style-type: none"> <li>○ Perpetrated by a member of your organisation</li> <li>○ Perpetrated against your organisation</li> <li>○ On a project you are involved in, but where the corruption does not affect you?</li> </ul> </li> </ul>	<p><b>Panel chair:</b> Jean Venables OBE Chairman - Crane Environmental; President elect - ICE</p> <p><b>Panel</b> Chris Vaughan General Counsel - Balfour Beatty Neil Holt Group Board Director - Halcrow Group Gavin English Managing Director - WSP International Management Consulting</p>
15.55 – 16.00	<b>Closing remarks</b>	Peter Gammie Group Chief Executive - Halcrow Group

This Anti-Corruption Workshop is organised on behalf of the Anti-Corruption Forum by:



This Anti-Corruption Workshop is sponsored by:				
--	--	--	--	--

**The UK Anti-Corruption Forum** is an alliance of UK business associations, professional institutions, civil society organisations and companies with interests in the domestic and international infrastructure, construction and engineering sectors. The purpose of the Forum is to promote industry-led actions which can help to eliminate corruption. The members of the Forum believe that corruption can only be eliminated if governments, banks, business and professional associations, and companies working in these sectors co-operate in the development and implementation of effective anti-corruption actions. [www.anticorruptionforum.org.uk](http://www.anticorruptionforum.org.uk)



# The Law of Bribery and Fraud: Its Effect on Companies and Employees

## Bribery

- A1. Bribery offences in England and Wales are criminalised by what has been described as a “patchwork quilt” of common law and statute. I recognise that, sometimes, “bribery” and “corruption” are used interchangeably, but I shall try to avoid entering into the debate of whether, whilst all bribery offences amount to corruption, any corruption offence must necessarily include a bribe.
- A2. Bribery is a common law offence. It is limited to the bribing of, or the acceptance of a bribe by, a public office holder or official. In addition, there are two main criminalisation statutes: the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1906. There are also some amendments to those by legislation, in 1916 and 2001 respectively. We shall look at those in due course. In addition, bribery, and indeed wider corrupt practices, are also found in at least 11 other statutes, ranging from the Sale of Offices Act 1809, through the Licensing Act 1964 to the Representation of the People Act 1983. For present purposes, you may be relieved to know that I will be putting those firmly to one side!
- A3. Just as the common law offence of bribery is limited to the public sector, so the Public Bodies Corrupt Practices Act 1889, introduced by Randolph Churchill MP, is also limited to public sector bribery; in particular, to the officers and employees of public bodies. The 1906 Prevention of Corruption Act, meanwhile, focuses on corruption by agents and covers both the public and private sectors. The 1916 Act of the same name did not create any new offences, but did extend the meaning of “public bodies” and introduced a presumption of corruption when money has been received by employees of public bodies in connection with public contracts. I mentioned a 2001 amendment: as many of you will probably be aware, part 12 of the Anti Terrorism, Crime and Security Act 2001, which came into force on Valentines Day (14 February) 2002, extended the jurisdiction of English courts over bribery and corruption offences to include corruption involving foreign public officials aboard. In other words, a criminal offence may now be tried in England and Wales if it is alleged it has been committed by a UK national or corporation engaged in corruption outside the United Kingdom.

## ***Common law bribery***

- A4. We shall look at the potential for criminal liability of both the company (the legal person), and the officer or employee (the natural person). Before we do, what of the criminal offences themselves? Bribery at common law is an offence that has developed over centuries. It criminalises the offering or receiving of any undue reward, by or to any person whatsoever in a public office, in order to influence his behaviour in office, and to incline him to act contrary to the known rules of honesty and integrity.<sup>1</sup> It is an offence at common law not only to give or receive a bribe, but also to offer or solicit a bribe. Offering, or indeed receiving, are each regarded as unilateral acts and do not depend on the state of mind of the person offering the bribe or the person solicited.
- A5. A bribe, then, is “any undue reward”. Thus, a reward which is so small as not to be considered a reward at all cannot be considered as “undue” at common law. The throw away biro, therefore, embossed with a company's name and logo given away as an advertising ploy is quite obviously not an undue reward. The question, though, will, I know, arise: how does one distinguish, for instance, entertainment from bribery? An entertainment or, quaintly, a treat is a thing of small value which cannot be regarded as having been conferred in order to influence a person or to incline him to act contrary to the known rules of honesty and integrity.<sup>2</sup> In each case, however, the distinction must depend on the particular circumstances. I realise that that is very much a lawyer's answer, but nonetheless that is the position we all face.
- A6. If the first question is to entertainment, the second question is probably as to the so-called “facilitation payment”. The common law definition of bribery will, I am sure you will agree, cover facilitation payments. In other words a payment made to a petty official to induce him or her to perform his duty or duties where otherwise he/she might be disinclined to do so. Interestingly, UK law has never recognised facilitation payments (nor, indeed, corporate hospitality gifts) as a distinct category of payment or reward. It will, however, be recalled that the previous Attorney General Lord Goldsmith, stated it is difficult to envisage circumstances in which the making of a small facilitation payment extorted by a foreign official in a country

---

<sup>1</sup> A definition which follows that of David Lanham in “Essays in Honour of JC Smith”. A definition that itself follows the definition given in “Russell on Crime”.

<sup>2</sup> Woodward v Maltby [1959] VR 794.

where this is normal practice, would of itself give rise to a prosecution in the UK. Notwithstanding that statement, however, I think that many would say that a zero tolerance policy should be operated, save, perhaps, in exceptional circumstances where the life of an employee may be at risk if a payment is not made.

- A7. It will be apparent that, although a bribe will usually take a tangible form, such as cash, it can also take the form of a service, including sexual services.<sup>3</sup>
- A8. The offence of common law bribery is limited to persons acting in an official capacity or performing public functions. It does not extend to a public official performing private functions, although there will be times when even such private functions are indistinguishable from the official's post or position; in such circumstances he will be liable.
- A9. It is perhaps worth mentioning that receipt of a bribe by a public official may also be charged as the common law offence of misconduct in public office. A person who is not a public official may also be charged with that offence as a secondary party of a conspirator.

### ***The statutory offences***

- A10. Turning to the statutory offences under the 1889 and 1906 Acts. The 1889 Act makes it an offence for any person to corruptly solicit or receive, or agree to receive, for himself or another, any gift, loan, fee, reward or advantage as an inducement to or reward for doing or forbearing to do anything, in respect of any matter or transaction in which the said public body is concerned. Similarly, anyone who gives, promises or offers any gift etc in the same terms is also caught by the Act. When first introduced, the 1889 Act was limited to corruption in local bodies, but, in its amended form, it also covers corruption in central government. You will see that the "advantage" be it a gift, loan, reward etc is defined very widely.
- A11. A similar, broad, definition of what can constitute a bribe is there for the offences created under the 1906 Act. That Act creates two offences of corruption with agents and a further offence relating to false documentation. The offences with agents cover the agent who corruptly obtains, or agrees to accept, or attempts to obtain, from any person and whether for himself or for another, any gift or consideration as an inducement or reward for doing or forbearing to do any act in relation to his principal's affairs or business; whilst the second agent offence criminalises the person who corruptly gives or agrees to give, or offers any gift or consideration; again in largely the same terms as the first offence.
- A12. The statutory corruption offences carry a maximum sentence of seven years, Common law bribery and misconduct in public office, as common law offences, carry a maximum of life imprisonment. However, as a matter of parity, a sentencing court in a common law bribery case will confine itself to a range up to the statutory maximum of seven years.
- A13. On the subject of punishment, the 1889 Act provides for various disqualifications, including a disqualification from ever holding public office, whilst the 1906 Act provides for no such bars. However, the provisions relating to the disqualification of company directors and the confiscation provisions which appear in the Proceeds of Crime Act 2002 apply as appropriate.
- A14. The statutory offences require the consent of the Attorney General before a prosecution may take place; the common law offence of bribery requires only notification to the Attorney General.

### ***Jurisdiction***

- A15. In this age of international transactions, what of questions of jurisdiction? The common law rule is that, subject to certain well-known exceptions such as that relating to murder, English courts have jurisdiction over an offence if any part of it, either the prohibited conduct or its consequences, takes place in England or Wales. That means, as far as the common law offence of bribery and the statutory offences of bribery/corruption are concerned, that the jurisdiction of English courts is limited to acts committed in England and Wales except insofar as English jurisdiction has been extended by statute. Therefore an English court will have jurisdiction wherever an offer, acceptance or agreement to offer or accept a bribe takes place in England or Wales. Sending an email or making a telephone call into England or Wales, or indeed an act committed while a person is abroad through the agency of a person in England or Wales, will suffice to confer jurisdiction, whatever the nationality of the offender and whether the agent, in the case of an intermediary, has committed an offence. It is immaterial whether the intent, which is an element of the offence, is to do something outside the jurisdiction. I have spoken about England and Wales, but, of course, corresponding rules apply to the jurisdiction of both the Scottish and Northern Ireland courts. Indeed the statutory

---

<sup>3</sup> Scott v State 141 NE 19 (1923), Supreme Court of Ohio.

provisions, of the Prevention of Corruption Acts (i.e the 1889, 1906 & 1916 legislation) as a whole, apply in both Scotland and Northern Ireland.

- A16. In an age of increasing international business, what of extraterritorial jurisdiction? Section 1A of the Criminal Law Act 1977 extends the jurisdiction of English courts to include conspiracies to commit statutory offence abroad, provided that the intended conduct would amount to an offence in the State where it is to be committed and that a party to the agreement has done something in England relating to the agreement before its formation, or a party became a party to the agreement in England or Wales by joining it in person or through an agent, or where a party has done or omitted to do something in England or Wales in pursuance of the agreement. The provisions would, therefore, apply to cases of a conspiracy to bribe a foreign public official.
- A17. More importantly perhaps, the 2001 provisions, of which I have already made mention, extend the jurisdiction of English courts in respect of offences committed after 14 February 2002 to include the corruption of foreign officials abroad and corruption abroad by UK nationals and UK incorporated companies. It is worth noting that for the purposes of common law offence of bribery, it is immaterial if the functions of the person who receives, or indeed is offered a bribe, have no connections with the UK and are carried out entirely outside the UK. Similarly, the 1889 Act definition of "public body" now includes any body which exists in a country outside the UK and is equivalent to a body defined in the 1889 Act. The extended jurisdiction also encompasses the bribery offences under 1906 Act.
- A18. From the point of view of the international business person, it should be highlighted that the effect of the 2001 Act that has put beyond doubt that the statutory offences enacted between 1889 and 1916 (including amendments) apply to the bribery of foreign public officials in respect of offence committed after 14 February 2002. As to earlier offences, however, there are differing views as to whether allegations of corruption in relation to matters occurring before that date require either a relevant act of bribery to occur within the UK in order to trigger an investigation, or need to be prosecuted as other offences, such as false accounting or money laundering. The Home Office, for its part, has argued consistently that earlier offences occurring extraterritorially could have been prosecuted so long as they satisfied the common law principles of jurisdiction. The Serious Fraud Office, meanwhile, has long expressed the view that there remains a fundamental uncertainty as to whether, prior to 2001, the statutory offences apply to a foreign public official's offence.

## **Fraud**

- A19. Before turning to look at some particular issues in respect of the liability of companies and of their individual employees, I want to turn to fraud. It is sometimes said that every act of bribery or corrupt practice inevitably includes the commission of an offence of fraud. Certainly, on many occasions, that seems to be true. It is hard to envisage, for instance, a bribe in the commercial setting where there has not been a false accounting offence committed. A number of us here today will have come across instances where corrupt behaviour has, in fact, been perfectly, properly and adequately reflected by a charge of conspiracy to defraud.
- A20. As to fraud offences: since 2006, we have had the Fraud Act. Under that Act a person can commit fraud in three different ways. All three ways require the element of dishonesty. It should be noted, in contrast, that a bribery or corruption offence does not necessarily involve the element of dishonesty. Fraud under the Fraud Act may be committed by false representation (section 2) by failing to disclose information (section 3), or by abuse of position (section 4).
- A21. A person who is guilty of fraud is liable on a conviction on indictment, to imprisonment for a term not exceeding 10 years and/or an unlimited fine.
- A22. In addition to fraud, a natural legal person who commits an offence of bribery at common law or an offence under one of the corruption statutes will usually also have committed an offence involving dishonesty in the course of his corrupt conduct. Such offences will typically, in addition to fraud, include theft or false accounting. Further, if two or more people are involved, there may be a conspiracy to defraud.
- A23. False accounting, in particular, is worth focusing on for a moment or two. In circumstances where there has been an off the books payment or a disguised commission, false accounting will usually be one of the offences committed. It is criminalised by virtue of section 17 of the Theft Act 1968 and makes it an offence for a person dishonestly, and with a view to gain for himself or another or with intent to cause loss to another, to destroy, deface, conceal or falsify any account, record or document made or required for any accounting purpose. In addition, section 17 also criminalises the person who, again, dishonestly, and with a view to gain for himself or another or intent to cause loss to another, furnishes information and in doing so produces or makes use of any account, or record or document which, to his knowledge, is, or may be, misleading, false or

deceptive in a material particular. The false accounting offence carries, on conviction, a maximum sentence of seven years and/or an unlimited fine. In the event of conviction, one disadvantage, from a prosecutor's point of view, of prosecuting corrupt behaviour by virtue of the dishonesty offences is that, on conviction, disqualification from public office and similar sanctions which can be imposed for bribery and for corruption under the 1889 Act, are not available to the sentencing court.

### **Liability of the legal and natural person**

- A24. In looking at the effect of bribery and fraud law on companies and employees, we must now turn to the question of corporate and individual liability.
- A25. Turning first to corporations, English law recognises various types of legal persons, all of whom are regarded as being entirely distinct from their members and as being capable of being involved in corrupt transactions, either as offenders or victims. In the main, when we think of the legal person, we think of the public or private company, the limited liability partnership (where partners enjoy limited liability), and European Economic Interest Groupings (EEIGs).<sup>4</sup>
- A26. Subject to certain exceptions (such as murder) that need not trouble us here, the criminal liability of corporations for crimes of intent or *mens rea* crimes, is the same as that for a natural person. A legal person or corporation may be convicted of common law and statutory offences, and those include offences requiring a mental element or *mens rea*. Many of you will have come across some statutes, such as the Companies Act, which expressly impose criminal liability on corporations. But in other Acts of Parliament, unless otherwise indicated, the word "person" is understood to include corporations and, indeed, bodies incorporate (the latter since 1889).
- A27. In the case of, for instance, a corruption or fraud offence, a corporation is vicariously liable for criminal offences committed by its servants or agents in the same way as a natural person would be if that natural person committed the criminal offence. However, for the corporation, that liability is subject to it possessing the necessary mental element or *mens rea*. The corporation is also liable when an offence is committed in the course of its business by a person who can be said to be in control of its affairs; that is to say a situation where it can be concluded that the corporation thinks and acts through a particular person and that person's actions and intent are, therefore, fairly the actions and intent of the corporation. In such a case, a person, the natural person, whose action and intent are the action and intent of the corporation is criminally liable, but so is the corporation itself.
- A28. The test of attribution for that second basis of liability is, in the UK, the common law test of controlling or directing mind. Not every executive or agent acting on behalf of a company can be said to be of such a position that the corporation thinks and acts through him. Thus, not every agent or executive acting on behalf of a company can, by his actions, make a company criminally liable. In a trial in a crown court, let us say for a corruption offence, it will be necessary for the judge to invite the jury to consider whether or not the prosecution has established, as a matter of fact, that a particular person who performed, or directed, or authorised the prohibited act, with the requisite state of mind, actually had such a position and exercised such a function within the corporation that he can be said to be its controlling mind or its will. In attributing, criminal liability in that way, no intention to benefit the legal person or indeed any of its principal natural persons needs to be proved. A legal person can, in theory at least, be convicted even though no proceedings have been brought against the natural person.
- A29. It will come as no surprise that, given the way in which responsibilities and duties are spread horizontally in large corporations, in particular in the modern world, that it is rare for a legal person to be prosecuted for offences such as corruption. The reality is that the officer or employee will usually be prosecuted for his individual criminal act.
- A30. In the context of the offence of bribery of a foreign public official, the issue of criminal liability of the legal person and, in particular, that of whether the test of attribution is a workable one has been the subject of much contention and international adverse comment. Many of you will be aware that the UK is a party to the OECD Convention. Article 2 of that Convention requires State Parties to take such measures as may be necessary to ensure that legal persons can be held liable for foreign bribery. In the case of a State, such as the UK, where there is criminal liability for the legal person in general criminal law, so, for the purposes of foreign bribery, the OECD Convention will require that criminal liability for the legal person is not only established but is, actually, workable.

---

<sup>4</sup> EEIGs are a form of associations by companies or other legal bodies of individuals in different EU States where there is a need to cooperate together across national frontiers. EEIGs have unlimited liability status and are governed by Council Regulation (EEC) No 2137/85 SI 1989/638.

- A31. It will come as no surprise that some States with a common law tradition have departed from the common law attribution of criminal liability and have devised new tests set out in statute. For example, the government of Canada, in 2002, accepted the findings of a Standing Committee and decided to introduce legislation on the liability of legal persons. As a result, legislation came into force on 31 March 2004 in Canada which establishes new rules for attributing to organisations, including corporations, criminal liability. In essence, the base of criminalisation in Canada is now that when a senior person with policy or operational authority commits an offence personally, or has the necessary intent and directs the affairs of the corporation in order that lower level employees carry out the illegal act, or fails to take action to stop criminal conduct of which he is aware or in respect of which he is wilfully blind, then criminal liability will be attributed to the corporation.
- A32. In England and Wales the penalty for a corporation found guilty of corruption or fraud is an unlimited fine. It is also worth remembering that, apart from that penalty, in the case of banks and financial institutions, there may be liability under the money laundering provisions contained in the Proceeds of Crime Act 2002.
- A33. Turning to any potential liability of UK corporations for offences committed by intermediaries, it is interesting to note that in the year the text of the OECD Convention was agreed, 1997, a survey found that 56% of European corporations and 70% of US corporations said that they would “occasionally” use middle men such as agents, joint venture partners or subsidiaries to make corrupt payments. 44% of the European bodies questioned and 22% of their US colleagues admitted doing so regularly.
- A34. English law does not automatically impute to UK corporations absolute control over, or knowledge of, the actions of their intermediaries or subsidiaries. Thus, for criminal liability to be incurred, evidence would be needed that a corporation had, in some regard, directed, encouraged or otherwise influenced a subsidiary to commit the offence. Alternatively, of course, there could be false accounting offences if the corporation played a part in hiding bribes or commission payments.
- A35. When the draft Corruption Bill was being discussed in 2003, Transparency International recommended that the extraterritorial provisions relating to corruption outside the UK should be extended to include subsidiary companies of UK companies where those subsidiaries are under the control of the parent company and that, in the case of other subsidiaries, associated companies and joint ventures, UK incorporated companies should be held responsible if they fail to take adequate measures to satisfy themselves that a foreign registered company or joint venture is implementing suitable anti-corruption policies in the conduct of its business. That approach mirrors to a great extent that of the exports credit guarantee department (ECGD) which requires applicants for support to make a warranty that neither they nor anyone acting on their behalf have engaged, or will engage, in any corrupt activity in connection with the supply contract in question. The contrary argument, of course, is that such provisions should not apply in respect of overseas subsidiaries if they are, in any event, subject to the law of another State and have distinct duties and responsibilities in respect of that law. As to the approach of the UK courts hitherto, they have generally shown themselves to be reluctant to assume jurisdiction simply on the grounds that a multinational parent company is based in this jurisdiction.<sup>5</sup>
- A36. What of a company that seeks to avoid liability through company restructuring? Here one has to look beyond the criminal law. English Company and Insolvency Law provides a wide range of investigative powers and sanctions to ensure that companies and officers of companies are unable to evade penalty through restructuring. However, the leave of the court is required before proceedings can be commenced against a company which is the subject of an administration or winding up order. The powers which are able to be invoked, subject to leave being given, include investigative powers for the mandatory production of documents (under the Companies Act), a restriction on the reuse of the company name (by virtue of sections 216-217 of the Insolvency Act 1986) and the disqualification of company directors (under the Company Directors Disqualification Act 1986). Other risks that a restructured company will face include the provisions under the Income and Corporations Taxes Act 1988 (section 557A(1)(b)) which denies tax relief for any payment the making of which constitutes a criminal offence, the Finance Act 2002 (section 68) which has the effect of extending the provisions of section 557A to include payments which take place wholly outside the UK, and the wide ranging powers of HMRC, since 2001, to disclose information to other law enforcement bodies in respect to any crime, including corruption.
- A37. Finally, what of the unincorporated body? It was mentioned earlier that unincorporated bodies have been regarded as legal person only since 1889. Consequently an unincorporated body is not a legal person for the purposes of the common law offence of bribery (although, members, may, of course, be personally liable). Such bodies are liable for offence of corruption contrary to the 1889 and the 1906 Acts however.

---

<sup>5</sup> See Connelly v RTZ [1998] AC 854 (House of Lords).

## Cartels

- A38. The Competition Act 1998 and Article 81 of the EC Treaty prohibit cartels. The 1998 Act provides for the imposition of civil sanctions, but criminalisation was introduced by The Enterprise Act 2002, which contains a 'cartel offence'.
- A39. The criminal offence is committed when an 'individual' dishonestly engages in a cartel agreement. The offence is set out in section 188 of the Act, which provides that individual is guilty of an offence if he dishonestly agrees with one or more other persons that undertakings will engage in one or more of the prohibited cartel activities: price-fixing, limitation of supply or production, market-sharing, or bid-rigging. It should be noted that the offence only applies in respect of agreements between undertakings at the same level in the supply chain, known as horizontal agreements. Vertical agreements are not criminalised.
- A40. The offence is made out whether or not the agreement reached between the individuals is actually implemented by the undertakings and whether or not the persons involved have the authority to act on behalf of the undertakings at the time of the agreement.
- A41. As to jurisdiction, if the agreement is made outside the UK, proceedings may only be brought where the agreement has been implemented in whole or in part in the UK. The offence is triable either in a magistrates' court or in the Crown Court. The maximum penalty at the Crown Court is five years' imprisonment and/or an unlimited fine.

This Paper presented at the Forum Workshop by:  
Mark Carroll: Senior Crown Prosecutor  
Special Crime Division  
UK Crown Prosecution Service

17<sup>th</sup> October 2008

## Gifts, hospitality and facilitation payments

### Session Topic:

#### **Gifts and hospitality**

- When do gifts and hospitality become bribes?
- What limits should be put on gifts and hospitality?
- How should gifts and hospitality be controlled and recorded?

#### **Facilitation payments**

- How can you avoid making facilitation payments, and still get the required service?
- How to record and account for facilitation payments?
- Should facilitation payments be criminal offences?

### Session Panel:

Gary Taylor  
Managing Director - I.T. Transport

Hamish Goldie-Scot  
Pro-Poor Development Unit - Scott Wilson Group

James Maton  
Partner - Edwards Angell Palmer & Dodge

\*\*\*\*\*

### Summary of content of session

**Note:** This summary contains a selection of comments made by the panellists and by participants during floor discussion. It does not attempt to be a full transcript, or a complete record of all comments made. Nor does it attempt to provide comprehensive and complete advice on the issues in question. As the workshop was held under the Chatham House Rule, the person making each point has not been identified. The comments made do not necessarily represent the views of all members of the UK Anti-Corruption Forum.

#### General principles on gifts and hospitality:

1. There is nothing legally wrong with gifts and hospitality in concept. They are an important part of building business relationships. It is important that this can continue. They only become illegal when they are bribes.
2. It is therefore important for a company and its staff to be able to distinguish between when a gift/hospitality is legal and when it is a bribe.
3. There is a need for clear leadership from the very top of an organisation on gifts and hospitality.
4. Clear guidelines should be issued to all staff, especially new staff. Important that all staff clearly understand the policy.
5. Common sense dictates when a gift/hospitality is a bribe. Probably the three key factors are:
  - Motivation for gift/hospitality
  - Timing
  - Size
6. Always ask what the motivation is, whether receiving or giving gifts or hospitality.
7. The timing is important in avoiding misinterpretation of your motivation to give or receive. For example, a moratorium can be applied on the giving of gifts and hospitality to clients if the company is in a bidding process. Giving gifts/hospitality once a project has been won and is being implemented is easier to explain as building a relationship rather than gaining an unfair advantage over competitors.

8. Common sense should prevail over the size of the gift. It should not be of a size which could in practice influence the recipient. A good rule is that the smaller the expenditure, the simpler it is to explain it as a gift not a bribe.
9. The frequency and scale of hospitality accepted and business gifts received should not be greater than the employee would routinely be permitted to provide in return.
10. There should be sensitivity to cultural differences with respect to gifts and hospitality – avoiding causing offence.
11. Need to be aware of local laws, so that you understand when a gift or hospitality may be illegal.
12. You could be asked to give a gift to the community, rather than to an individual. This can still be a bribe, depending on the circumstances. If a gift is given to the community, try to ensure that it is properly spent.
13. Use the newspaper test: how would a gift or hospitality be perceived by the public if it was reported in the newspaper?
14. Recording gifts and hospitality – transparency and traceability: All expenditure should be recorded in personal expenses forms and be charged to an appropriate accounting code. This allows the company to extract information on what expenditure has been made, by whom, to whom and when.
15. The giving and receipt of gifts and hospitality can also be recorded in a register open to all staff and the auditors. Having to record them will make staff think more carefully before giving or accepting the gift or hospitality.
16. Company reward structures must not favour those who choose to bend the rules.
17. The UK tax authorities have requested that companies write on receipts for e.g. meals the names of all those who attended.
18. A small company can afford to have simple systems, as management is very closely involved in most issues. Larger organisations require more comprehensive systems. Whether the company is small or large, the key lies in the clear communication of policy by senior management. If a senior manager hesitates over where to draw the line, there is bound to be a problem further down the line.

**General principles on facilitation payments:**

19. The term “facilitation payment” is normally used to describe a minor payment made to an official to obtain a service to which you are entitled (e.g. a visa or work permit).
20. Facilitation payments are normally illegal in the country in which they are paid. In the UK they are also illegal when paid by a UK company or national overseas.
21. There is a need for clear leadership from the very top of an organisation on facilitation payments.
22. Mixed messages on facilitation payments should be avoided – e.g. zero tolerance from the top management but acceptance of the practice if carried out by local management.
23. Clear guidelines should be issued to all staff, especially new staff. Important that all staff clearly understand the policy.
24. Need to be aware of local laws, so that you understand when a payment may be illegal.
25. Consider declaring facilitation payments in the bid = be open and up front.
26. Some companies prohibit bribes, but tolerate facilitation payments under controlled conditions (i.e. they only pay them under exceptional circumstances). Other companies totally prohibit both bribes and facilitation payments, and this policy normally means that they do not work in countries where facilitation payments are necessary for effective business.

## Possible ways to try to avoid paying facilitation payments

### **A: Introduction**

27. When dealing with a public official who is asking for (or more likely hinting at the need for) a facilitation payment, it is helpful to be mindful of:
- The **R**eadon. What is likely to be driving his or her demands?
  - The **R**elationship. How can more clarity and mutual respect be brought to bear?
  - The **R**isks. What are the risks (both personal, and for the company)?
28. Sections B and C below deal respectively with situations concerning procurement/project implementation issues, and with the more general situations arising when travelling and passing through road blocks or other security checks. Though many of the same principles apply to both scenarios, the primary focus needed tends to be counter-intuitive in that:
- when dealing with project matters, where developing a good client relationship is normally uppermost in your mind, it is particularly important to be mindful of the underlying risks; while
  - when facing a potentially risky situation at a road block, it is particularly important to be mindful of your relationship with whoever is threatening or antagonising you.
29. Particular care should be taken in relation to the Health & Safety aspects of implementing the ethical policy. As a basic rule, H&S considerations trump ethical or legal considerations. Do not do or say anything which could put you or someone else in physical danger. Particular care should be taken when the officials involved are armed and/or perceived to be drunk or high on drugs.

### **B: In procurement and project implementation**

30. Concentrate more on the **R**isks rather than the **R**elationships.
31. Helpful practical measures include:
- Be **P**repared.
    - o Have all documentation in order, keeping multiple copies to be sure of never being left without hard evidence that all procedures have been followed correctly.
    - o Know the rules well, and be prepared if necessary to use them to your advantage.
    - o Make an earlier investment in developing a good relationship with people in government (and civil society) with a reputation for quietly acting with integrity.
  - Be **P**olite, understanding and respectful. When an official hints at the need for some grease money, don't take it out on him or her. Assume that they find it as distasteful as you do.
  - Be **P**atient. As time passes the official demanding (or more likely just hinting at) the need for a facilitation payment will start to become anxious if the matter is not quickly resolved.
  - Other helpful principles include:
    - o **Don't** follow official FCO guidance, which suggests quickly taking the matter up directly through official channels. This could lead to additional risks and problems.
    - o **Don't** be aggressive, dismissive or arrogant in rejecting the approach. Remember that the official holds most of the cards, and *in extremis* can (for instance) easily arrange for life to be made very difficult for you.
    - o **Do** seek to discretely clarify the situation so that there is no possible misunderstanding as to whether or not a facilitation payment is being sought. Make sure that you have your facts absolutely straight before discussing the incident with anyone else.

- **Do** ask informally for advice from existing influential contacts in government and civil society. They will have seen it all before, will know what course of action is most likely to succeed, and may even be prepared to take up the issue on your behalf behind the scenes.
  - **Do** keep good records and be prepared to let the law take its course. Even in the most corrupt countries it is quite possible for justice to be done.
32. It remains possible that all of these techniques fail, and you find yourself in a situation where project progress is being undermined as a direct result of the stance being taken. If this occurs during procurement (e.g. refusal to provide certain information on evaluation criteria) then a carefully worded report to the donor involved (provided through a third party, so that the firm being blocked is not identified) can result in a re-launch of the tender. If co-operation is being withheld in terms of access to information, approval or reports, or settlement of invoices, it is generally sufficient to draw attention to what is happening (focusing on the facts rather than the motives) so that the obstruction/delays melt away.
33. The circumstances of any significant demand for a facilitation payment should be reported to management. If a payment is made, full details should be recorded in order if necessary to defend the action taken.

**C: While travelling (at police checkpoints, border controls etc)**

34. Concentrate more on the **R**elationships rather than the **R**isks.
35. Helpful practical measures include:
- Be **P**repared.
    - Make sure your driver does not break any traffic rules, and that all the necessary vehicle documentation etc. is in order.
    - Particularly in a relief situation, where many NGOs are active, check whether arrangements have been made to adopt an agreed semi-official co-ordinated approach when responding to demands for payments.
    - Keep some small items of nominal value available for use as a last resort (see below).
  - Be **P**olite, understanding and respectful. Take a few moments to have a chat, and if possible find some genuine kind words to say to the official. This can have a disarming effect, discouraging even the toughest official from trying to solicit a bribe. Never antagonise an official – it is all too easy for them to arrange for drugs to be planted on you.
  - Be **P**atient. Appearing impatient is one sure way to raise expectations that you will, if pressed, succumb to the pressure to pay a bribe. Give the impression of being in no hurry, even if you are. As time passes the official demanding (or more likely just hinting at) the need for a facilitation payment will start to become anxious that attention is being drawn to the impasse, while other more promising opportunities are being missed.
36. Other techniques include:
- Relax, and try to share a joke. In response to the question “*do you have a present for me?*” start by offering “*Yes, here’s a smile*”, moving on if necessary to an item of little or no value, such as a cheap biro, or photo.
  - Ignore the indirect hints, taking them at face value, and appearing confused. Few officials are likely to be specific about asking for a bribe, as this would constitute a criminal offence in which they would be implicated.
  - Ask if you can see the official’s boss to discuss what exactly the problem is. This can have the effect of raising the stakes, but if done in a non-threatening manner normally has an immediate effect in resolving the problem – few officials wish to get their boss directly involved in this way.
  - Explain why you are not able to pay the bribe, suggesting that the matter is out of your hands. “*I have promised my boss not to pay any bribes*”; “*My company policy does not allow it*” etc.

- Ask for an official receipt.
  - Pretend not to understand English.
37. Very occasionally all these techniques may fail, and/or you sense that the situation may be getting out of hand. In such situations, in order to ensure consistency with previous statements (inconsistencies can themselves lead to new risks), it may be necessary to suggest arrangements that you both know will not be respected, such as *"please post a receipt to my local office at this address"*.
38. The circumstances of any significant demand for a facilitation payment should be reported to management. If a payment is made, full details should be provided in order if necessary to defend the action taken.

### **Should facilitation payments be criminal offences?**

39. The term "facilitation payment" is often misused.
40. A true facilitation payment is a payment made to induce a person to perform a duty which that person is already obliged to perform (e.g. issue a permit or visa).
41. Any payment, however small, to obtain preferential treatment is a bribe (i.e. a payment for a licence when the criteria for granting it are unsatisfied, or a payment for clearing goods through customs more quickly than others).
42. Difficult in practice to distinguish true facilitation payments from bribes.
43. Facilitation payments are sometimes large, (e.g. payment to issue a completion certificate, when the completion certificate is legally due).
44. Facilitation payments are damaging, but appear to be a fact of life in some jurisdictions.
45. The difficulty with criminalising true facilitation payments is that the payer is generally less culpable than the recipient, and indeed the payer is often a victim of extortion.
46. In its written submission to the Law Commission's Consultation Paper on Bribery, the UK Anti-Corruption Forum was unable to reach a consensus on the criminalisation of facilitation payments made overseas (although there was consensus that facilitation payments in the UK should be illegal).
47. Options in relation to making facilitation payments overseas:
- Criminalise payments, and prosecute.
  - Criminalise payments, but make policy decision not to prosecute.
  - Criminalise payments, subject to defences such as (a) duress, (b) no prosecution if payments reported and accounted for and (c) excluding liability for payments under a specified sum.
48. Anti-corruption prosecutors/investigators in Africa are keen for facilitation payments to be outlawed and prosecuted as facilitation payments by foreign companies (i) help to perpetuate a culture of corruption; (ii) blur distinction between proper & improper payments and (iii) are exploited as a mechanism for making corrupt payments.
49. If facilitation payments are criminalised, the penalties should reflect relative culpability, in particular debarment is unlikely to be an appropriate outcome.
50. Demands should be resisted for per diem payments to Government officials in excess of those which have been contractually agreed, and/or those which are defensible as a reasonable estimate of expenses. Such additional payments could be interpreted as bribes.
51. Facilitation payments are illegal in many countries where they are routinely sought. Payment therefore creates commercial risks:
- an increasing risk of prosecution;
  - the risk of breaching contracts, or even having contracts terminated;
  - the risk of falsifying records in violation of own laws (by wrongly recording the payments as a legitimate expense) or of recording payments accurately and therefore documenting a violation of domestic and foreign laws.

## Due Diligence

### Session Topic:

#### **Due Diligence**

- Why is due diligence necessary to prevent corruption?
- What due diligence should be undertaken before:
  - Working in a new country
  - Working with a new client
  - Working with a new business partner (consortium or joint venture partner, contractor, consultant, sub-contractor, agent)
  - Taking on a new employee

### Session Panel:

**Panel chair:** Bob McKittrick  
Former Director Scott Wilson Group; Past President - IStructE

#### **Panel:**

Kevin Stovell  
Group Development Director - Mott MacDonald Group

Gordon Masterton  
Vice President - Jacobs; Past President ICE

Adrian Davidson  
Director - EMCIIIS

Neill Stansbury  
Director - Global Infrastructure Anti-Corruption Centre

\*\*\*\*\*

### Summary of content of session

**Note:** This summary contains a selection of comments made by the panellists and by participants during floor discussion. It does not attempt to be a full transcript, or a complete record of all comments made. Nor does it attempt to provide comprehensive and complete advice on the issues in question. As the workshop was held under the Chatham House Rule, the person making each point has not been identified. The comments made do not necessarily represent the views of all members of the UK Anti-Corruption Forum.

#### Why is due diligence necessary to prevent corruption?

52. There are many reasons why a company should want to avoid corruption:
- It faces criminal liability if it is involved in corruption, or if one of its business partners or employees acts corruptly in a manner which makes the company responsible.
  - It faces financial loss if it is involved in corruption. It may have to pay fines, and be debarred from future contracts. Contracts signed as a result of a corrupt act may be terminated, leaving the company exposed to damages claims. Even if it is not involved in corruption, it may suffer loss as result of corruption in its supply chain (e.g. if a sub-contractor bribes the company's procurement manger to award it a contract at an inflated price).

- It faces reputational damage if it is connected with a corrupt project or partner, or if it is prosecuted or debarred.
53. It is therefore imperative that a company undertakes due diligence before getting involved in a new country or new project, or with a new business partner (e.g. joint venture partner, agent, client or sub-contractor). As a company makes its decisions through its employees, it is also imperative to ensure as far as possible that your employees are honest.
  54. Due diligence cannot be perfect. You can never find out all risks. You can only make reasonable enquiries and take reasonable steps to satisfy yourself that the risk of corruption is limited appropriately.
  55. Companies that do not take steps to assess and manage corruption risk stand a greater chance of being caught in the anti-corruption net.
  56. It is the rare CEO who sees the mounting global tally of corporations hit with multi-million-dollar penalties for corruption and does not wonder, could this happen to my company?
  57. Think UK as well as international. Corruption also exists in the UK.

### **What due diligence should be undertaken before working in a new country?**

58. There is a sliding scale of countries:
  - In some countries it is virtually impossible to do business without becoming involved in corruption.
  - In some countries, you can work with certain clients, or in certain sectors, without too great a risk of corruption, but other clients and sectors should be avoided.
  - In some countries, it is possible to work in all sectors without any major risk of corruption.
59. You need to find out what types of corruption you may face in a country:
  - Is corruption common in the bid process (which means that, if a competitor pays a bribe, you are unlikely to win the contract, and will waste your tender expenses)?
  - Are you likely to face extortion during project execution? This could include demands to pay bribes to obtain:
    - customs clearance for your equipment
    - visas for your staff
    - building approvals
    - completion certificates
    - payment certificates
    - payments
    - unhindered transit through a police roadblock.

Therefore, even if you are able to win the contract without paying a bribe, you may be unable to work on the project successfully without paying bribes.

60. You need to find out what the legal environment is in a country:
  - To what extent are gifts, hospitality and facilitation payments illegal?
  - Is there an effective enforcement system (prosecution, fines, jail, debarment etc.)?
  - Is there an effective complaints mechanism (e.g. if you face extortion, or suspect corruption in the bid process)?
  - Do you have a legal obligation to report corruption (in some countries it is a crime not to report a crime).
  - Is extortion, or the threat of death or personal injury, a defence to corruption?

- Does the law carry the death penalty for bribery (in which case, if you report, someone may be executed)?
61. A company should have clear internal procedures which govern whether or not it enters into business in a new country.
  62. Language issues can materially increase the risk in some countries. How do you know that you are communicating effectively, and are picking up warning signs?
  63. The following due diligence steps can be taken to review country corruption risk:
    - You can check appropriate web-sites which offer advice on country risk (e.g. Transparency International, World Bank, and the Business Anti-Corruption Portal).
    - You can do web-searches on a country, by using the country name and then “corruption” in the search phrase.
    - You can ask the UK Embassy in the relevant country about the level of corruption in that country, and its likely manifestations.
    - You can review the local press. Some countries where there is a lot of corruption have a free press where the corruption is widely reported.
    - You can talk to the UK or local business associations or alliances.
    - You can join the UK Anti-Corruption Forum, and exchange views and advice on corruption prevention with other members.
  64. In addition to corruption, you should conduct a thorough security and political risk analysis. The countries which are the least secure and have the highest political risk often also have high levels of corruption.

**What due diligence should be undertaken before working with a new client?**

65. There is always a choice as to whether or not to enter into a relationship with a new client. If there are serious doubts about the integrity of a client, it is safer not to enter into a project with that client.
66. A company should have clear internal procedures which govern whether or not it enters into a relationship with a new client. The decision as to whether to work with a new client must be taken at an appropriately senior level.
67. There should be no leeway which allows regional managers to by-pass the company’s controls on new clients.
68. A company can take steps to assess the ethical values and reputation of a client by looking at its web-site, and by doing a web search on the client to see whether it has any reports of corruption against it in the press. You can also undertake checks on the new client using the methods suggested in paragraph 63.
69. The client can be asked to sign a statement or contract clause committing to ethical business, but this can be impractical to ask for and very difficult to achieve owing to the imbalance of the client/contractor/consultant relationship. In any event, an anti-corruption statement or policy from the client can be window dressing, and cannot be relied upon as proof of implementation by the client of such a policy.
70. The best policy is to work with clients with which you have a satisfactory long-term relationship, and where you know from experience that the client has an effective ethical policy. However, any expanding business will always need new clients.
71. It can be beneficial to work with old clients in new countries. If you have a good and honest relationship with a client, you can benefit from this by working with the old client in the new country. However, in some cases, the old client may not be aware of the corruption risks in the new country, and can as a result suffer adverse consequences which can impact also on the company.
72. Having both a new country and a new client materially increases the risk.
73. Keep monitoring and updating intelligence on existing clients, as circumstances can change.

74. You can, in extremis, pull out of a project. The company's reputational risk may be better protected by pulling out of a corrupt project while it is on-going rather than stay in and risk becoming involved more deeply.

**What due diligence should be undertaken before working with a new business partner (consortium or joint venture partner, contractor, consultant, sub-contractor, agent)?**

75. A company should have clear internal procedures which govern whether or not it enters into a relationship with a new business partner.
76. Need leadership from the top of the organisation, so that the policies are properly implemented.
77. Need good training for staff, so that they are aware of good practice in selecting partners, and the risk if the partners prove corrupt.
78. Joint venture partners, sub-contractors and agents can impose serious corruption risks on a company. If they pay a bribe in connection with a contract awarded to the company, and the bribe is discovered, the client can terminate the contract. This will have adverse financial impact on the company. Although in theory, it may be able to claim recompense from the defaulting party, in practice this may be difficult.
79. Keep monitoring and updating intelligence on existing business partners, as circumstances can change.
80. Check that the business partner's ethical policy is at least as good as that of your own company. Where the business partner is a small business, and does not have a published ethical policy, take steps to ensure that the business partner agrees to comply with your company's published policy.
81. It can sometimes be difficult or embarrassing to raise these issues with a new business partner. You can do this by explaining that the new regulatory environment requires your company to go through these procedures.
82. Some clients require you to work with local partners, or you may need local partners to provide local skills. There can be very good reasons to use local partners, e.g. technology transfer, provision of local services and knowledge etc. However, there can also be corrupt reasons. Use of local partners can increase the corruption risk. In some cases, you are required to work with a partner specified by the client. This can be suspicious, as there could be a corrupt relationship between a representative of the client and the local partner. In other cases, you can choose your own partner.
83. Wilful blindness is a big risk with business partners. If you suspect that they may be corrupt, and do not take adequate preventive measures, then you can in some circumstances be liable for their corrupt actions.
84. Agents are traditionally viewed as the highest risk business partners. Some agents exist only for the purposes of paying a bribe. However, many agents run genuine businesses, and perform a very valuable and legitimate business service. It is important to take care to distinguish between the two types when appointing them.
85. Joint venture partners and sub-contractors can also be a high risk area. While most will be legitimate, some may be linked to the client, and may be appointed on a project primarily for corrupt purposes.
86. When appointing a business partner, take all reasonable steps to ensure that the payment they are receiving is reasonable payment for legitimate services (i.e. that the payment is unlikely to conceal a bribe).
87. You need to do careful checks on business partners as far as possible: who owns them, who manages them; do they have a proper and legitimate business, or are they just a shell company; are they seeking payment in foreign currency off-shore; are you appoint them just for their political connections, or because they can perform a valuable service (e.g. office support, translation, local engineering services etc.)?
88. You may be able to obtain references from other companies who have used them.
89. You can undertake checks on the new business partner using the methods suggested in paragraph 63.
90. Keep a written record of your due diligence checks on a business partner. If that partner does get implicated in corruption, the fact that you have undertaken reasonable checks may help you avoid criminal liability.

### **What due diligence should be undertaken before taking on a new employee?**

91. A company should have clear internal procedures which govern taking on new employees.
92. An inside threat is as great as an outside threat. An employee can cause just as much damage to an organisation through a corrupt act as can another organisation.
93. Middle management is possibly the greatest risk.
94. Employees who are particularly at risk are those who:
  - control the procurement of sub-contractors and suppliers
  - obtain new business
  - certify work done
  - control payments
  - work in IT.
95. Temps and agency staff are also a risk. Agencies should do appropriate back-ground checks on their staff before they provide them to you. Check that any agency you use does this.
96. Level of vetting you should undertake depends on the role of the person. The more risk they pose, the greater the level of checks that should be undertaken.
97. CV is a marketing tool, and can be inflated and written in a manner which favours the employee. It is therefore better to get employees to fill in an application form which contains all relevant data.
98. Get new employees to sign their agreement with the company's ethical policies.
99. Get new employees to sign an agreement allowing you to check information which is protected under the Data Protection Act.
100. Should check whether the employee has a criminal record (this can be done with their signed consent).
101. Can check bankruptcy and County Court judgements.
102. Can check with the university whether the employee's degree was actually obtained.
103. Can do a web-search of the employee, to see whether any mention is made of criminal activity, and whether the web-reports are consistent with the employee's claimed previous employment (this will probably only be effective with senior employees).
104. Re-check long-standing employees; police are re-checked every three years.
105. Do not confuse information about a person with their character (they can have a strong CV and a weak character).
106. Ensure that you take up the employee's references from previous employees.
107. In some countries, it is very difficult to obtain background information on employees.

## Internal Monitoring and Whistle-blowing

### Session Topic:

#### **Internal monitoring**

- What monitoring systems should you put in place in your company to prevent/uncover corruption?

#### **Whistle-blowing**

- What reporting systems should a company put in place?
- How does a company deal with reports?

### Session Panel:

**Panel chair:** Nelson Ogunshakin  
Chief Executive - Association for Consultancy and Engineering)

**Panel:**  
Peter Welch  
Group Commercial Director - WSP Group

Tom Osorio  
Auditor - BP International

Jermyn Brooks  
Director of Private Sector Programmes - Transparency International; ex-Global Managing Partner - PWC

\*\*\*\*\*

### Summary of content of session

**Note:** This summary contains a selection of comments made by the panellists and by participants during floor discussion. It does not attempt to be a full transcript, or a complete record of all comments made. Nor does it attempt to provide comprehensive and complete advice on the issues in question. As the workshop was held under the Chatham House Rule, the person making each point has not been identified. The comments made do not necessarily represent the views of all members of the UK Anti-Corruption Forum.

#### Internal Monitoring:

108. An effective internal monitoring system need to be implemented to ensure as far as possible that the company's anti-corruption systems are operating effectively and that the company is not participating, deliberately or accidentally, in any corrupt transactions.
109. Internal monitoring does not need to be set up specifically for corruption. It can form part of the company's general internal monitoring, but should have an anti-corruption component.
110. Leadership from the top is essential if internal monitoring is to be effective.
111. Internal monitoring can include management supervision and internal audit.
112. Need to have clear written procedures which govern the company's key decisions. The procedures should be workable, and therefore need to be written by people who have the correct level of knowledge of the area. Monitoring can check that these procedures have been complied with.
113. There needs to be effective training of the employees who are carrying out monitoring activities.
114. Naivety and thoughtlessness are as big, if not a bigger issue to guard against as deliberate intent.

115. Internal monitors need to be carefully chosen. They need to understand the business, and have attention for detail. If the wrong people are chosen as monitors, then the monitoring will be a failure.
116. A good monitor will have an instinct for something which is wrong. Wrongdoing can be well hidden, so you need to know what to look for.
117. A company can establish a set of red-flags = warning signs for monitors to look for.
118. Monitoring can be helped by looking at trends in figures and data. If financial performance is routinely reported, and compiled into a data base, strange results will stand out. Possible unusual trends could include:
  - A sub-contractor winning an unusual number of contracts
  - A supply contract placed for an unusually long period.
119. Monitors can be internally unpopular. They can be regarded as “snoopers”.
120. Whistle-blowers are a vital internal monitoring resource.
121. It is useful to distinguish three levels of monitoring:
  - Monitoring by management systems e.g. via communications programmes, training efforts and whistleblowing structures
  - Separate actions, such as employee surveys to judge their understanding of policies, management letters from high risk executives in the organisation setting out issues and how they were dealt with, and internal audit routine and one-off reviews
  - Feedback to top management, leading to review of system's effectiveness and corrected procedures in future (continuous improvement). There should be feedback to Audit Committee or Board at least once a year.

### **Whistleblowing**

122. Companies should put into effect a reporting system under which employees can report corruption suspicions to senior management.
123. Employees should be entitled to report anonymously if they wish.
124. All reasonable steps should be taken to ensure the confidentiality of employees who report.
125. Employees who report in good faith should not be victimised at work, or suffer any adverse consequences from the fact that they reported. Whistleblower protection should be taken very seriously as statistics show that most organisations fail to achieve this. Many whistleblowers are victimised (e.g. by being side-lined for promotion, or being shunned at work). In the worst cases, whistle-blowers have been killed.
126. A Helpline is just as important as a Whistleblowing function. Advice given via helplines can avoid the need to blow the whistle.
127. It is important that staff can report in their own language to ensure that they can accurately pass on their concerns.
128. Reports must be investigated at once and be passed to the appropriate department. Effective action must be taken. If whistleblowers are aware that nothing will be done as a result of their report, they will not use the system.
129. Statistics show that two thirds of reported incidents relate to HR matters.
130. It is important that the system requires feedback to be provided to the person who reported (unless the person reported anonymously).
131. Feedback should be on both the progress and result of the investigation into the incident.

132. There should be a company policy on communicating fraud and other crimes to law enforcement agencies.
133. Some third party organisations provide relatively cheap and effective reporting systems. They often have a multi-lingual capability.
134. Metrics may be helpful; to show the system is being used and to detect any parts of the organisation which are not using the system.
135. Corruption reporting and whistleblowing is often best included as part of broader communications on ethics, discrimination and other business principals. The approach taken will be most effective if it is consistent with the company culture, and is championed by recognised business leaders rather than by a special team with staff that are not well known or respected.
136. Anonymity can help reports, but experience suggests that most people will provide their name in a healthy organisation, and this helps investigation and providing feedback.
137. Reports are likely to cover both internal and external problems.
138. Real examples should be used to encourage reporting and demonstrate that follow up by management will occur.
139. Whistleblowing can still be regarded negatively i.e. as a betrayal of your colleagues. In some countries, it reminds people of periods of dictatorship when people spied on and reported each other, often with fatal consequences. Therefore, it needs to be handled sensitively.
140. There are many publicised cases of whistleblowers who have in fact been victimised after blowing the whistle. Therefore, it is imperative that a company ensures that this does not happen, and that staff know that it will not happen.
141. Some systems reward whistleblowers (e.g. the first to blow the whistle in a cartel gets immunity, and people in the USA who blow the whistle on fraud against a public body receive a share in the proceeds).

## Crisis Management

### Session Topic:

#### **Crisis management**

What do you do if you discover corruption:

- Perpetrated by a member of your organisation
- Perpetrated against your organisation
- On a project you are involved in, but where the corruption does not affect you?

### Session Panel:

**Panel chair:** Jean Venables OBE

Chairman - Crane Environmental; President elect - ICE

#### **Panel**

Chris Vaughan

General Counsel - Balfour Beatty

Neil Holt

Group Board Director - Halcrow Group

Gavin English

Managing Director - WSP International Management Consulting

\*\*\*\*\*

### Summary of content of session

**Note:** This summary contains a selection of comments made by the panellists and by participants during floor discussion. It does not attempt to be a full transcript, or a complete record of all comments made. Nor does it attempt to provide comprehensive and complete advice on the issues in question. As the workshop was held under the Chatham House Rule, the person making each point has not been identified. The comments made do not necessarily represent the views of all members of the UK Anti-Corruption Forum.

#### What do you do if you discover corruption perpetrated by a member of your organisation?

142. If it becomes apparent that corruption may have been perpetrated by a member of your organisation, then immediately refer the matter to the very top of the organisation.
143. Appoint an appropriate member of staff to investigate the matter urgently. On a larger matter, you may need to appoint a team.
144. Ensure that all documents and computer records are secure, and are not destroyed or tampered with.
145. Appoint external counsel to advise on the legal aspects. If more than one jurisdiction is involved, you may need counsel in both jurisdictions. In particular, you may need advice on what offences may have been committed, on whether there is a legal obligation to report, and on money laundering aspects, risk of a "tipping off" offence being committed etc.
146. You also need to consider related obligations (e.g. accounting, tax, stock exchange etc.)
147. Ensure as far as possible that you have the correct facts before taking a decision on the appropriate action.
148. It is possible that, in addition to the original offence, the company may commit a further offence by taking action, or by not taking action. This is particularly the case with money laundering, accounting offences, tipping off etc. The later offences may implicate board members, even if the original offence did not.
149. Once the facts have been assembled, the decision as to what to do should be taken at the highest level.

150. If the decision is made to hand the matter over to the authorities, then you need to be prepared for significant time and disruption while the authorities are investigating. It can also be very stressful for staff, particularly if some are implicated, and may be interviewed by the police under caution or may be arrested. You may need to provide counselling for some staff, and independent legal representation.
151. The decision as to what to do depends on the facts of the case, and the applicable jurisdictions. The advantages of self-reporting to the authorities can be that the matter will be dealt with more leniently than if the authorities find out independently. Some matters have a clear and defined benefit of self-reporting (e.g. cartels, which offer immunity). However, with bribery and fraud, under the current UK law, it is uncertain what the consequences of self-reporting will be.
152. Appropriate disciplinary action may need to be taken against the relevant staff.
153. Consider whether to report the issue to the media. If the media find out by themselves, they could speculate on the facts, which could be more damaging than if you report the correct facts to the media.
154. Staff should be kept informed as far as permitted and possible. Speculation among staff can be dangerous and unsettling.
155. At the same time as you are dealing with the crisis, you should examine what failures in your management structure lead to the incident, and how it could be improved to avoid a repetition.
156. There is no crisis management system which can be put in a manual and which can cover all situations. Every situation is different and depends primarily on common sense, prompt action and good judgement.
157. Once the problem has been resolved, the company will need to prove to the authorities, its clients, its business partners, supply chain and staff that the issue has been put behind the company, that lessons have been learned, and that the company has come out stronger and better prepared.
158. It would be much easier to be able to make effective decisions if the authorities published clear guidance on the principles of how these issues would be dealt with (e.g. what likely benefit there is if you self-report, co-operate fully with the authorities etc). At the moment, it is uncertain, and, in theory, a company could self-report, get convicted, and be debarred permanently from EU public sector work. This is not a satisfactory situation.

### **What do you do if you discover corruption perpetrated against your organisation?**

159. There are several possible ways in which corruption could be perpetrated against your organisation. For example:
  - A company could lose a bid to a competitor, where the company knows, or strongly suspects that there has been corrupt practice by the prospective client and/or competitor.
  - A company discovers that a joint venture partner or sub-consultant has invoiced for goods/services that have not been supplied.
  - The company's employees or sub-contractors are found to have been exposed to demands for payments or services in return for "personal security".
160. In a situation where you suspect corruption in a bid process by a competitor, do not go straight to the relevant complaint process, whether that is directly with the client or funder, or through a third party such as the embassy. Instead, use the procurement process to maximum effect to ensure due processes have all been properly and transparently followed:
  - Ensure you fully understand the relevant procurement process and ensure it has been followed to the letter.
  - Ensure your bid was fully compliant with the law, the published RFP and the client's (and funders) procurement guidelines and regulations.

- If concerns exist regarding the procurement or evaluation processes employed, ask questions politely, within the locally applicable rules, and respecting local cultural considerations (seeking local support/advice from the embassy or other suitable sources).
- In pursuing any line of query, always seek to leave the client with an honourable exit route in the event that there has been a genuine mistake or poor judgement exercised by the client or members of his organisation.
- Don't expect the decision just to be overturned - expect instead stiff resistance and the real likelihood that regardless of the outcome of the objection, the contract will not be awarded to your company.

Before deciding to pursue any complaint, consider first the potential impact of that complaint on:

- your company's reputation (locally and with the funding organisation); and
- your future operations locally (with this or related clients).

Consider also any other means by which you may expose and address the corruption without jeopardising either reputation or future operations.

**What do you do if you discover corruption on a project you are involved in, but where the corruption does not affect you?**

161. Some examples of positions you may be in where this could happen:

- Part of a programme management team managing the procurement and delivery of works through contractors, consultants and suppliers.
- Part of the construction supervision staff – RE, ARE, etc.
- Part of a Technical Assistance team advising a procurement department involved in tender evaluations.

162. Some examples of the types of corruption you may uncover:

- Collusion and price fixing between bidders and/or suppliers.
- Contractors cutting corners with sub-standard materials, poor construction quality and constructing less than it is claiming for. Reduced road thickness, reduced quality and quantity of material, the construction process - compaction, etc.
- Fabrication and approval of claims and amendments.
- Theft of materials from projects.

163. Real life situations and actions taken and the consequences of these actions:

**Example 1 – Security and Safety:** A UK Engineer in charge of a major project implementation in Africa inadvertently finds evidence of a scheme to steal cement and materials from the project. He raises the issue through formal channels, and immediately faces thinly veiled death threats from a local contact. He decides to ignore these and ends up giving evidence in court against the Culprit. The result was the Culprit was jailed and there were no further problems for the UK Engineer.

In this case it worked out fine but this is not always the case.

An engineer with the National Highway Authority of India (NHAI) uncovered corruption in the implementation of India's Golden Quadrilateral project. He initially raised his concerns with NHAI but these were ignored so he wrote to the Prime Minister of India. Despite his requests to keep his identity a secret, his letters were leaked and the engineer was killed shortly afterwards in suspicious circumstances. There is an ongoing campaign for a full investigation.

**Example 2 – Financial Risk:** A UK Consultant was bidding for a large multi-lateral funded Road Maintenance and Development Project in Asia. The consultant spent approximately £25k on bid preparation costs including visiting the country. After submitting the bid the Consultant received good

information that there had been collusion between the local consultants included in all of the bids to fix local fee rates. This collusion included the Consultant's local consultant who had previously signed an agreement confirming they would comply with the Consultant's Ethics Policy in every respect. The actions of the local consultants did not impact directly on the Consultant, but he decided it compromised his Code of Ethics and withdrew his bid. The reasons the consultant withdrew his bid were made clear to the client and the donor. The evaluation process continued and the project was awarded. Later discussions took place between the donor's local office and the Ministry responsible for the project with a proposal being made to bar the consultant from bidding for donor funded projects in the country for between 2 and 5 years! Eventually after a series of further discussions, common sense prevailed and no formal action was taken against the Consultant. However, this was two years ago and despite submitting a number of bids since the event the Consultant has not won any work in the country!

**Example 3 – Reputational Risk:** A UK Engineer leading team on rural infrastructure project in Asia uncovers suspicious practices on site for which he is nominally responsible. He raises the issues and commissions a thorough investigation into alleged malpractices. He follows correct procedure in suspending project activities, and informing the donor. He reports "off the record" to local donor office, which files a report to their Anti-Corruption Unit. The ACU launches an investigation, but after consulting with the affected government department they switch their focus to investigate allegations against the international consultant. The consultant eventually clears its name. But no action has been taken in connection with the original report.

**Example 4 – Reporting Risk:** A UK Engineer advising on a tender evaluation in Africa identifies major discrepancies in the bidder's unit rates. He includes reference to this in his evaluation report, and is immediately (subtly but clearly) threatened. The Minister of Finance hears informally and intervenes personally, quickly arranging for the report to be issued in the name of the Chief Engineer. Two senior government engineers were subsequently investigated and arrested.

#### 164. **Actions which can be taken:**

- If you are going to report allegations of corruption, these allegations must be well founded, and documented. There are enormous risks in making false allegations.
- The company senior management should be immediately informed, and they must quickly decide on how to respond to the situation. A senior director should be made responsible for dealing with the situation.
- Quickly investigate and review the evidence available to establish the facts.
- A risk assessment should be quickly undertaken to identify the risks to staff and family as a result of the allegations coming to light, risk of discrimination against the company, risks of the allegations not being substantiated, risks of financial loss, etc.
- Action must be identified and taken to mitigate the risks before the allegations are reported. Actions to protect staff and family members – remove them, police protection, etc; actions to protect the interests of the company or organisation.
- Decide on the action to be taken. If the decision is taken to report the irregularities, then the correct procedures and channels must be followed.
- If no action is taken, or if the response is inadequate, then report to other authorities if necessary.