

Baker
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Anti-Bribery and Corruption and Economic Crime

6 – 8 September 2022

ANNUAL COMPLIANCE CONFERENCE

Annual Compliance Conference 2022

1 Anti-Bribery and Corruption and Economic Crime

6 – 8 September 2022

2 Customs and Key Compliance Developments

13 – 15 September 2022

3 Export Controls and Sanctions

20 – 22 September 2022

4 Antitrust Compliance

27 – 29 September 2022

5 ESG, Supply Chain and Product Compliance

4 – 6 October 2022

This week: Anti-Bribery and Corruption and Economic Crime

Tuesday 6 September

2.30 - 3.30 pm BST
3.30 - 4.30 pm CEST
9.30 - 10.30 am EDT

Latest Anti-Bribery and
Corruption Developments
in the UK and US

Thursday 8 September

3.45 - 4.45 pm BST
4.45 - 5.45 pm CEST
10.45 - 11.45 am EDT

Bribery and Corruption: Hot
Topics in Investigations

Wednesday 7 September

2.30 - 3.30 pm BST
3.30 - 4.30 pm CEST
9.30 - 10.30 am EDT

The Intersection between
Anti-Bribery Compliance and
the ESG Agenda:
Challenges and
Opportunities

Thursday 8 September

2.00 - 3.00 pm BST
3.00 - 4.00 pm CEST
9.00 - 10.00 am EDT

Bribery and Corruption in a
Turbulent World



Latest Anti-Bribery and Corruption Developments in the UK and US

6 September 2022, 2.30 – 3.30 pm BST

ANNUAL COMPLIANCE CONFERENCE

Speakers



Yindi Gesinde
Partner,
London (Chair)



Marilyn Batonga
Partner,
Washington D.C.



Geoff Martin
Partner,
Washington D.C.



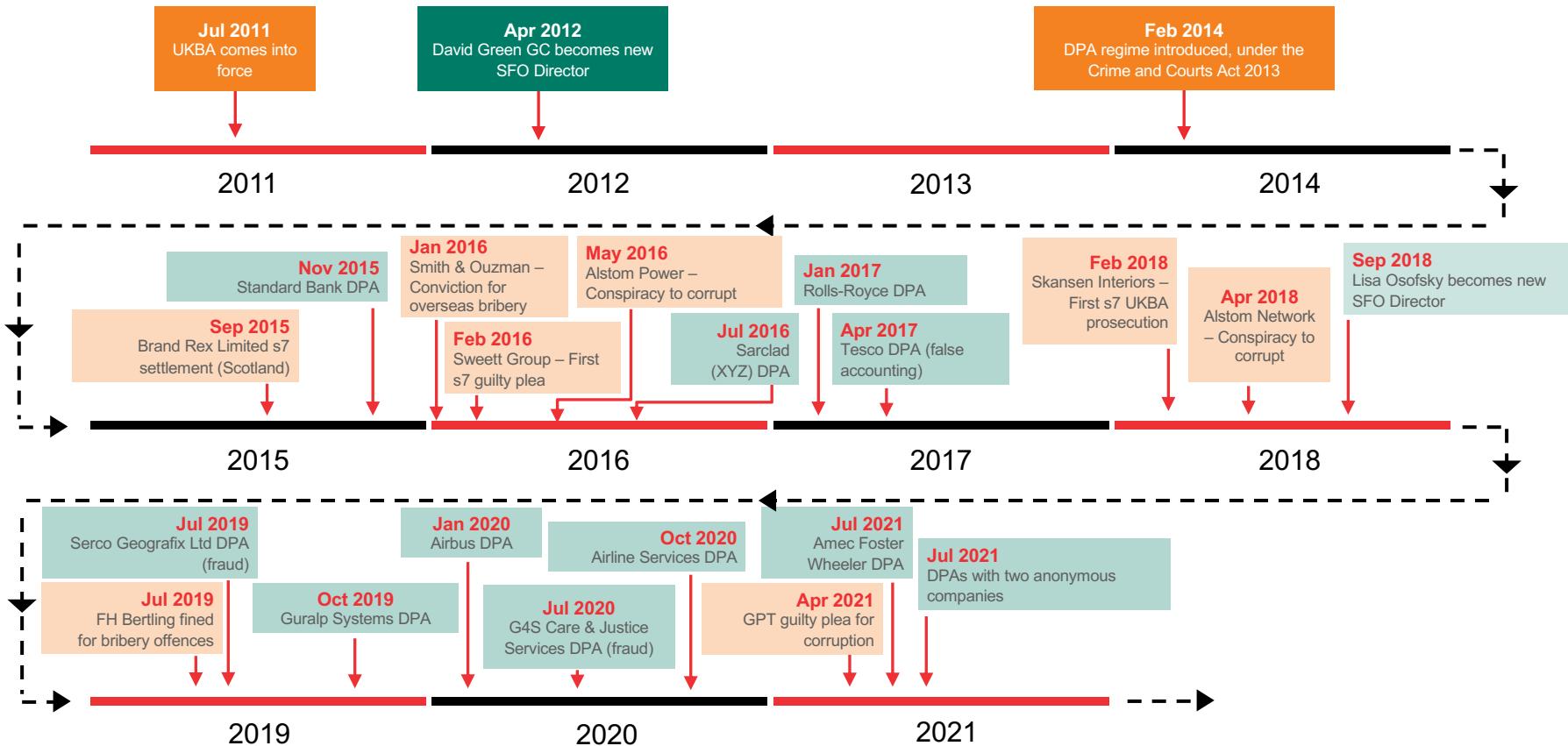
Gavin Hayes
Senior Associate,
London



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UK Developments

UKBA Enforcement: Looking Back



SFO Enforcement: A Move Away from DPAs?



The SFO has not announced any further DPAs since July 2021, instead announcing two significant corporate convictions.

Glencore

- June 2022: Glencore Energy UK Ltd was convicted of seven offences of bribery (five substantive offences of bribery and two offences of failing to prevent bribery) relating to payments by its employees and agents for preferential access in several countries in Africa.
- SFO worked alongside US DOJ and Dutch and Swiss prosecutors.
- Sentencing in November 2022.

Petrofac

- October 2021: successful conviction of Petrofac after it pleaded guilty to seven counts of failing to prevent bribery between 2011 and 2017 to win contracts worth USD 3.66 billion in Iraq, Saudi Arabia and the UAE. Petrofac ordered to pay GBP 77 million.
- Former Head of Sales received a suspended custodial sentence, following an agreement offered by the SFO to reduce a sentence in return for assistance and the entry of a guilty plea.
- This co-operation was considered central to the SFO's case. Will we see the SFO using US-style cooperating witnesses to pursue complex cases in the future?



Is the SFO's focus on DPAs unravelling as corporates are more reluctant to cooperate?



Or is the SFO being more selective around settlements and increasingly willing to **prosecute corporates?**

SFO Prosecution of Individuals: Continued Challenges



The SFO has not transformed any of its corporate settlements into a successful conviction of individuals, with two recent failures resulting in two independent reviews of SFO practices.

Serco - Altman Review

- The prosecution of two former Serco senior executives collapsed in 2021, two years after the SFO reached a settlement with Serco.
- A significant volume of potentially relevant material had not been disclosed to the defendants, and the jury were directed to return verdicts of not guilty.
- Mrs Justice Tipples: "**it seems to me there are... real concerns in relation to the nature of the prosecution case against these defendants.**"
- The SFO appointed Brian Altman QC to conduct an independent review into the disclosure failings.

UnaOil – Calvert-Smith Review

- Three individuals had been found guilty in 2020 and 2021 following an SFO investigation into allegations of bribery.
- These convictions were short-lived, being quashed by the Court of Appeal between December 2021 and July 2022.
- At the core of the Court of Appeal's decision was the SFO's failure to disclose relevant material to the defence, including documents detailing the extent and nature of contact between the SFO and a third party "fixer".
- Attorney General commissioned a further independent review of the SFO's failings, appointing former Director of Public Prosecutions – Sir David Calvert-Smith – to lead the review.

SFO Prosecution of Individuals: Impact of Independent Reviews



Reports following the independent reviews were published in July 2022, with SFO Director Lisa Osofsky describing them as a "sobering read."

- Both reports refer to underlying issues with the disclosure process, such as inadequate supervision of the case team, a lack of resources, and insufficient compliance with SFO policies and procedures.
- The Calvert-Smith review also pointed to a lack of trust between the case team and the SFO's senior management.
- Difficulties may be exacerbated by recent reports that the SFO has been asked to consider ways of reducing headcount by up to as much as 40%.



Potential impact:

- Future of the SFO
- A potential change to the SFO's Roskill model?
- Corporate engagement with the SFO

UK Enforcement by Other Bodies

FCA

- Fines for anti-money laundering in 2021 were £568m, up from £193m in 2020 and £392m in 2019.
- NatWest was fined £265m in December 2021 for failing to monitor suspect activity in the FCA's first criminal conviction.
- As of January 2022, the FCA had 40 active anti-money laundering cases, including two criminal investigations and six "dual-track" cases.

Met Police

- Individuals and corporates were charged by Southwark Crown Court in April 2022 for engaging in a bribery scheme to win contracts with Coca-Cola's UK bottling subsidiary. The Metropolitan Police reported it was the first time one of its investigations led to the CPS bringing charges against a company under section 7 UKBA.

HMRC

- As of May 2022, the HMRC has seven live CCO investigations, with a further 21 live opportunities under review.

Reform of UK Corporate Criminal Liability



Growing calls for reform, particularly from prosecutors such as the SFO and CPS. The Law Commission provided potential options for reform, noting a "**broad consensus that the law must go further.**"



Law Commission rejected the much-discussed "failure to prevent economic crime" offence, instead providing options for an incremental approach by expanding the "failure to prevent" model to fraud and possibly other non-economic crimes.



Other options include:

- The use of publicity orders for corporate offenders;
- Introduction of administratively imposed monetary penalties; and
- A requirement on large corporations to report on anti-fraud procedures.



No deadline has been set for the Government to consider the options.



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US Developments

US Developments

Overview



Relatively quiet year for corporate FCPA resolutions, but several pronouncements made on DOJ approach to corporate FCPA defendants



Number of individual prosecutions remains high, but DOJ has faced challenges asserting FCPA jurisdiction over foreign nationals



Anti-corruption is in focus as part of a broader national security agenda of the Biden Administration, which also includes:

- Anti-Money Laundering
- Anti-Kleptocracy

FCPA Corporate Enforcement Policy

Monaco Memo (Oct. 2021)



Creation of a Corporate Crime Advisory Group



DOJ to consider all prior misconduct



Companies to provide information related to all individuals involved in corporate misconduct in order to qualify for cooperation credit



Revised guidance on the imposition of corporate monitors

FCPA Corporate Settlements

Stericycle (April 2022)



US, Brazil coordinated settlement of \$84 million



Independent compliance monitor for a period of 2 years followed by one-year of self-reporting



2012 and 2016: Company allegedly paid millions in bribes to officials in Brazil, Mexico and Argentina



SEC noted rapid expansion in Latin America and lack of a centralized compliance function

FCPA Corporate Settlements

Glencore (May 2022)

-  UK, US, Brazil Coordinated Settlement
-  \$1.1 billion in fines and disgorgement (\$700m US component)
-  2007 - 2018, Glencore and various subsidiaries, employees, and agents paid over \$100 million in bribes to officials in Nigeria, Cameroon, Ivory Coast, Equatorial Guinea, Brazil, Venezuela, and the DRC, to secure commodities contracts, end government audits and facilitate favorable results in litigation
-  FCPA Anti-Bribery Violations (guilty plea – conspiracy)
-  US jurisdiction established through travel to and conduct in US, as well as use of USD
-  Price manipulation charged by Commodity Futures Trading Commission (CFTC)
-  3 Year Compliance Monitors Imposed (for both FCPA and CFTC)

FCPA Corporate Settlements

Tenaris (June 2022)



SEC Settlement only. No parallel settlement with DOJ or coordinated resolutions with foreign authorities



\$78 million in disgorgement, pre-judgment interest and civil penalties



According to the SEC, agents and employees of the Brazilian subsidiary paid \$10.4 million in bribes to an official at Petrobras



The company also agreed to report to the SEC for a period of two years on its remedial efforts



2011: Tenaris entered into NPA with the DOJ and a DPA with the SEC in connection with conduct in Uzbekistan

US Strategy on Counteracting Corruption

Tackling corruption as a central US national security interest

-  Promotes US domestic, inter-agency cooperation
-  Going beyond the FCPA
-  International Cooperation in Anti-Corruption Enforcement
-  Combatting the US Domestic Market's Role in Facilitating Corruption and its Proceeds
-  US Government Contractors and Recipients of US Funds
-  Tackling the Demand Side of Corruption
-  The (Increasing) Role of Whistleblowers

Anti-Kleptocracy Initiatives



Multi-agency and multijurisdictional efforts to recover assets improperly obtained through foreign government corruption.



Incentives for whistleblowers through the Kleptocracy Asset Recovery Rewards Program.



Current rewards targets:

- Assets linked to Operation Lava Jato / Car Wash Bribery in Brazil
- Assets linked to corruption by the government of the Russian Federation
- Assets linked to corruption involving the Sovereign Wealth Fund of Malaysia

Anti-Kleptocracy Initiatives



Challenges remain regarding the return of stolen assets to the countries harmed by corruption.



Aug. 2022: DOJ announced agreement to repatriate over \$23 million in assets stolen by former Nigerian head of state, General Sani Abacha and his associates

- DOJ received assistance from the UK, Nigeria and France
- Funds are to support critical infrastructure projects
- Agreement includes measures to ensure transparency and accountability.

Individual FCPA Prosecutions

Continue to be a focus



Has been DOJ focus over a number of recent years, confirmed by Monaco



Many cases now follow (or sometimes even precede) corporate resolutions. e.g.
currently driven by:

- Goldman Sachs
- Lava Jato / Odebrecht
- Other substantial Latin American cases and US focus there (e.g. Venezuela, Ecuador)

FCPA Jurisdictional Challenges

Hoskins *et al*



Hoskins

- Derives from conduct in Indonesia in Alstom case (settled 2014); no conduct in US
- Hoskins initially convicted as part of conspiracy with Alstom US entities (overturned on appeal on jurisdictional grounds)
- Retried as agent of same Alstom US entities (acquitted and upheld on appeal)
- Related AML charges prevailed (see next slide)
- Hoskins served 15 months in jail



Other individuals have now successfully defended FCPA charges on **Hoskins** precedent



Corporate resolutions still show liberal use of conspiracy and agency basis of jurisdiction

Growth in Corruption-Related AML Cases

Money Laundering Control Act of 1986, 18 U.S.C. §§ 1956 and 1957.



Marked increase in AML charges brought along-side or as stand-alone in corruption related enforcement actions

Can be used as a tool by prosecutors to tackle:

- FCPA jurisdictional challenges
- Kleptocrats
- Enablers, or those who launder for recipients of bribes
- US domestic corruption
- US financial and property markets' appeal to corrupt actors

Questions



Tomorrow's session

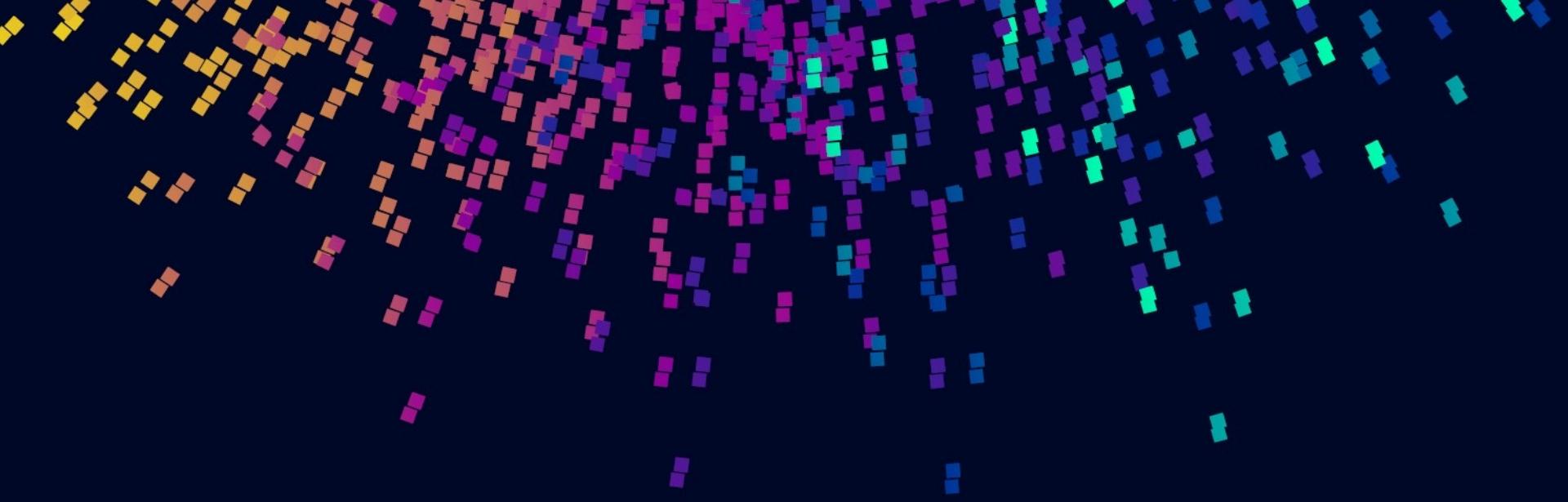
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