

LEGAL UPDATE

SPECIAL SUMMER TAKEAWAY



# ROUNDTABLE

Expert analysis on litigation & DR

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“The Serious Fraud Office has got the legal tools it needs, but will it be given the bodies to get the job done?”

Drew Macaulay

## Enforcement matters

How Bribery Act-compliant is UK Plc? **James Baxter** reports from NLJ's expert roundtable on how & when the enforcement agencies are likely to use their new powers

### Participants

- **Robert Amaee**, Covington & Burling
- **David Greene**, Edwin Coe & NLJ consultant editor (chairman)
- **Richard Lissack QC**, Outer Temple Chambers
- **Paul Lomas**, Freshfields Bruckhaus Deringer
- **Drew Macaulay**, First Advantage Litigation Consulting
- **Mark Sansom**, Freshfields Bruckhaus Deringer

For many UK companies the build up to the twice-delayed implementation of the Bribery Act has been like a nightmarish version of groundhog day. Despite having many years to become compliant, evidence suggests that many businesses are not taking the legislation seriously despite the new regulatory regime handing hard-line powers to enforcement agencies.

A recent European Fraud Survey carried out by Ernst & Young found that one in seven staff polled at large

UK companies was willing to offer cash payments to win business, while just over half were aware of anti-bribery policy at their own organisation.

To mark the Act coming into force last month, NLJ invited a high-profile panel of legal experts to discuss the crucial issues now in play.

The frank exchange of opinions that followed provides a snapshot of the “stay awake” issues currently occupying the minds of lawyers and executives as they prepare for greater statutory intervention into UK boardrooms.

### Dawn raids today. Prosecutions tomorrow?

Discussion began with comparison of the new bribery legislation with the Human Rights Act which came into force a decade ago with a similarly huge amount of publicity. Despite many expecting a wave of litigation as a result—and high-profile barristers chambers such as Matrix opening on the back of it—the legislation did not have the immediate impact many had hoped for.

Richard Lissack QC, Outer Temple Chambers, said: “Unlike the Human Rights Act, this is a penal statute that affects individuals directly and there will be a significant effect. However, it is unlikely to be dawn raids today and prosecutions tomorrow. I think prosecuting authorities will identify a sector and wait for a winning case. No one wants to start here with a loser and I think the enforcement agencies will give some space to companies to try to comply.”

There was wide agreement among the panel that the Serious Fraud Office (SFO) will focus on two main targets:

- small and medium sized enterprises (SMEs), which carry on being non-compliant in the hope they will fall

beneath the regulator’s radar; and

- a non-UK domiciled company, which does business in the UK, to make the point that this is really not about victimising “UK Plc”.

Regulators targeting both types of companies are expected to look for “a slam dunk” case where there is flagrant intentional breach of the law, and where the company appears to have nothing in terms of adequate procedures in place so as to be able to invoke a defence to the corporate offence. According to Mark Sansom, partner at Freshfields Bruckhaus Deringer: “The SFO has been talking tough, certainly around its intention to enforce the legislation aggressively. I think we can expect them to bring some high profile cases, especially if they got, for example, a Serious Organised Crime Agency notification which tips them off to something that looks like an easy target.

“I think in many ways they are better served by having some uncertainty out there as to who they will first target. They will also be better served by waiting for some “slam dunk” cases, rather than taking a contentious point to court and potentially losing on it.”

He added: “I would expect them to take the easy cases and leave some ambiguity over the border-lines of the offences.”

### Future prospects

Discussion over enforcement targets comes as the SFO faces political pressure regarding its own future and is believed to be so over-loaded with work that it may not have the resource to prosecute all the cases it wishes to. The panel made the point that the SFO was investigating more than 100 cases, many of which were in the anti-corruption field, making it unlikely that any quick hits would be instigated under the Bribery Act. However, with the Bribery Act putting the onus on the companies to become compliant, there was a strong feeling among the panel that the SFO could employ a “scatter-gun” approach and ask numerous companies to explain their procedures through self-reporting. This will have the effect of putting the message across that the SFO has the powers to use the Act without necessarily having to find the resource to take it to court and test the judicial remit.

Robert Amaee, of counsel at Covington & Burling and former head of anti-corruption/

## Participant biographies



### Robert Amaee

Of counsel, Covington & Burling

Robert specialises in white collar defence work and the handling of corporate compliance issues, including the provision of advice on the UK Bribery Act. He is the former head of anti-corruption and head of proceeds of crime at the UK Serious Fraud Office.



### Drew Macaulay

Director of business development, First Advantage Litigation Consulting

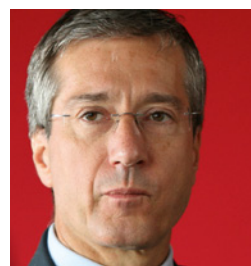
Drew leads First Advantage in its focus on the delivery of computer forensics and electronic disclosure support to corporations and law firms involved in domestic and international litigation, arbitration and regulatory investigation.



### Richard Lissack QC

Head of strategic development, Outer Temple Chambers

Richard specialises in high profile complex litigation, weighted towards commercial and public law work. He undertakes a significant amount of corporate work, in particular international financial services and banking, commercial fraud, corporate killing and regulatory breaches.



### Paul Lomas

Partner, Freshfields Bruckhaus Deringer

Paul specialises in commercial litigation, financial services litigation, cases with a strong economic or regulatory aspect and EU law and competition law. He has acted in a number of major corporate governance crises, including litigation and internal investigations into corporate conduct.



### Mark Sansom

Partner, Freshfields Bruckhaus Deringer

Mark is a partner in the Freshfields’s dispute resolution and antitrust, competition and trade practice groups, and a member of its global investigations practice. He has acted on a wide range of contentious, advisory and transactional competition law cases, as well as bribery and corruption investigations.

proceeds of crime at the SFO said he recalled sitting with numerous general counsel after calling them up to ask for an explanation of issues that were coming up again and again in the press: “Companies have always co-operated when approached and this will continue under the Bribery Act when it comes to questions about the adequacy of their procedures because ultimately the onus will be on the company to explain.”

Summing up the panel view, Paul Lomas, partner at Freshfields Bruckhaus Deringer, added: “There are some difficult issues of jurisdiction around the edges of the Act and I think the SFO would be insane to try and test those boundaries at the early stage. They are going to have to build a momentum of success and that means taking some easy wins.”

#### The multi-agency approach

While the SFO is the lead enforcement agency under the new Act, it is important to remember the role the Financial Services Authority (FSA)—which is already aggressively targeting bribery and corruption under its own remit—will play. The panel agreed that the FSA may proceed more quickly than the SFO in terms of

## Crime & punishment

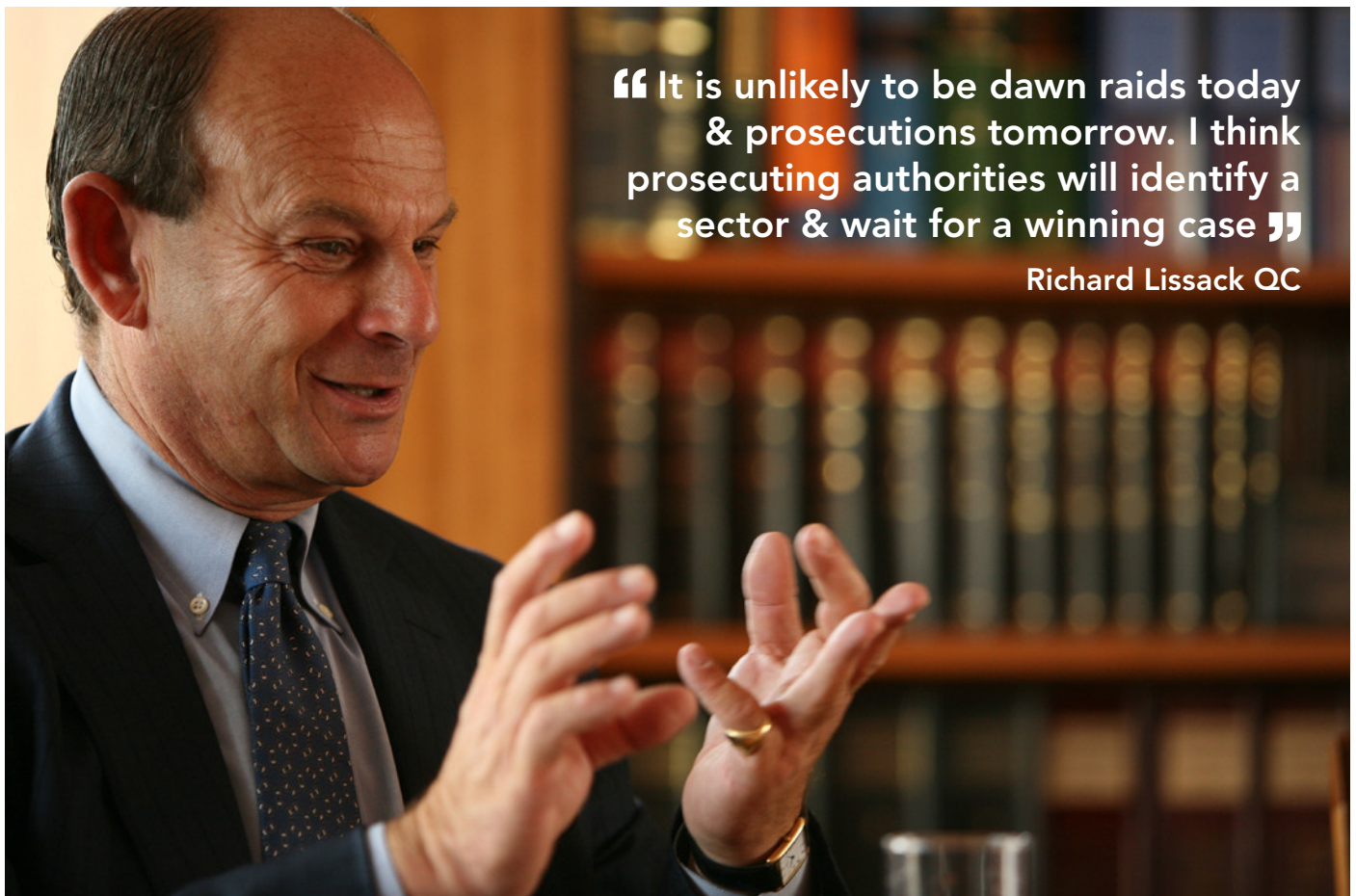
Panelist	Comment
Richard Lissack QC Outer Temple Chambers	“An interesting guide to how penalties may pan out is the recent judgment in the Cotswold Geotechnical Holdings appeal. The appeal against sentence was dismissed on the first prosecution under the Corporate Manslaughter and Homicide Act, where the Lord Chief Justice said that he approved a penalty with a 250% of turnover.”
Robert Amaee Covington & Burling	“I think there is a real recognition at the DoJ and the SFO that in order to send a message out you need to prosecute senior individuals who have played a part in the corrupt practices.”

enforcement by looking at the adequacy of systems and controls within companies. Many will recall that this is exactly what happened in 2009 when the FSA fined Aon for failures in its anti-bribery and corruption systems and controls.

#### Lessons from across the pond

Another agency with a vested interest in seeing a more joined-up approach to global anti-bribery enforcement is the US Department of Justice (DoJ), which

has long prosecuted global companies under the Foreign Corrupt Practices Act (FCPA). The panel was of the view that the first UK conviction may well originate from a DoJ referral. Lawyers have spent a significant amount of time in the build-up to the Bribery Act explaining to clients that it is not enough to be simply FCPA compliant as the Bribery Act extends to commercial bribery too with liability implications for their nexus to potentially thousands of commercial counterparties.



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Richard Lissack QC



## David Greene

Edwin Coe

David specialises in commercial litigation including competition claims and claims on behalf of shareholders. He is also an assessor for the Association of Chartered Certified Accountants. He is also a council member of the Law Society and consultant editor on NLJ.

Drew Macaulay, business development director at First Advantage Litigation Consulting, believes that one of the first cases will be a referral from the DoJ: "If the SFO can take a case that is packaged up already [by the DoJ] then it will get a major benefit in raising the profile of the Bribery Act without having to expend a huge amount of investigative resources."

There was a strong belief among the panel that multi-agency investigations

are not always as cohesive as they might be. One example cited in support of this view was the recent SFO prosecution of Innospec which pleaded guilty to bribing employees of Pertamina (an Indonesian state owned refinery) and other government officials in Indonesia to secure sales of a fuel additive. The investigation was referred to the SFO by the DoJ in 2007, but according to the panel has not been a "happy experience". (The SFO had agreed a plea

agreement with Innospec yet Lord Justice Thomas ruled in March 2010 that the director of the SFO had "no power to enter into the arrangements made and no such arrangements should be made again".)

Despite this setback, there was a strong view among the panel that the SFO will want to create a profile as a strong enforcement agency and that taking a "gift-wrapped" DoJ referral as its first high-profile case could run counter to that aspiration. A more likely scenario could be a tip-off from another agency or a whistleblower situation which allows a strong case to be created from the outset.

According to Robert Amae: "It would certainly have more impact if you're launching your own case rather than piggy-backing off another case, but the reality is that the leads will come to the SFO from all angles. In terms of operation, everyone knows that there is an ongoing dialogue between the SFO, the DoJ and other law enforcement

**“The SFO has been talking tough, around its intention to enforce the legislation aggressively. I think we can expect them to bring some high profile cases especially if they get a Serious Organised Crime Agency notification which tips them off to something that looks like an easy target”**

**Mark Sansom**



authorities. People within teams in one agency speak regularly to their counterparts in other agencies. These days you simply send an e-mail from one prosecutor to another with an attachment showing some pertinent information. You can't use it evidentially—and they have to be very careful about taint—but it progresses the investigation.”

The panel was impressed with how the DoJ has used the powers it derived from the FCPA to change the culture of large corporations. The dominant view was that the agency had been extremely strategic with its powers and that its ability to structure deals and settle cases had encouraged greater compliance. This approach allows more cases to be pursued as it is cheaper, faster and carries more certainty. Deferred prosecution can provide an appropriate carrot for ethical companies to be transparent about any problems they encounter and can avoid prosecution by changing their behaviour.

**Political neutrality?**

The panel, however, did not believe that the new anti-bribery enforcement regime will be characterised by any direct political interference in the process. The point was made that there is no requirement to refer any case to the attorney general and that the Bribery Act in its final form was in many ways a response to the BAE Systems scandal which did involve political intervention.

Mark Sansom emphasised that the original wider-scale UK investigation was dropped in that case due to the threat to intelligence which Saudi Arabia gives the UK on terrorism matters: “I would not expect political interference on that level to be a significant hallmark of the new Bribery Act regime.”

It was agreed though that subtle political encouragement of a certain line being taken in a high-profile case is, nonetheless, likely to happen. A classic scenario could involve the UK public purse being seemingly “ripped off” by an apparent act of bribery and political pressure emerging for the company involved to face harsh penalties in order to send a message to the wider corporate community.

**Joint ventures**

Panel chairman David Greene was keen to debate some of the uncertainties around the edges of the Bribery Act. A key battleground here will be the

Does the Bribery Act mark the beginning of future developments in statutory boardroom intervention?

Panelist	Comment
Robert Amaee Covington & Burling	“The Bribery Act injects momentum into what is already underway. It is the latest chapter in the upsurge of enforcement and obligation now put onto companies to make them behave in an ethical and transparent way.”
Mark Sansom Freshfields Bruckhaus Deringer	“When you talk to corporate counsel you get a sense of their stay-awake issues and certainly in the last three or four years, the extent of worry about corporate crime, anti trust issues, and other forms of worldwide investigation against their companies has risen to the top of the list.”

thorny issue of joint ventures (JVs) and how the new legislation will affect such arrangements. There was general agreement that the guidance does not—and perhaps cannot—cater for the entire spectrum of different sorts of partnerships and alliance agreements that companies enter into.

Mark Sansom said: “Where you have a controlled subsidiary where there is a relatively small minority partner who is not exercising a great deal of influence then the situation is pretty clear. The difficulty comes because the Act aims to move away from concepts of control in deciding who the associated persons are, yet the guidance says you need to put yourself in the mind of the person paying the bribe and think about who they were intending to benefit. Issues such as whether they intended to benefit the JV vehicle alone, or whether they had a specific intention to benefit one or more of the parent companies then become relevant to who gets prosecuted.”

He added: “When approaching that kind of question you come straight back to what sort of influence the parent company has on a day-to-day level in terms of votes, control, and board influence and there are myriad different situations which are very fact specific.”

The extent to which companies will have to drill down into their JV partners in terms of ensuring compliance with the Bribery Act is another grey area. One solution would be to insert a contractual

term into every contract making it necessary for the JV partner to be Bribery Act compliant. Beyond that, however, it would be unworkable for companies to be investigating their own JV partners to protect themselves from a potential breach. It was also mooted among the panel that a “right to audit” clause could be agreed in advance in case a parent company is concerned that a JV partner is involved in conduct it shouldn't be. All agreed that if a JV involved profit sharing and one party thought that it was receiving tainted funds then the company may have a “proceeds of crime problem” that should be self-reported quickly.

Robert Amaee commented that MoJ guidelines make a distinction between an incorporated JV and a contractual one: “According to the guidance, if the JV is set up as a separate legal entity the question is whether it is performing services on behalf of a particular member of the JV and what the intention is behind the payment of any bribe. If the JV is contractual then it depends on all of the circumstances including the actual degree of control exercised by a particular participant. The reality is that prosecutors will have to consider all of these factors before making a decision to charge a member of a JV for the alleged corrupt actions of the JV.”

However, supply chain cases were viewed as a potential minefield by the panel which viewed them as a vulnerable area under the Act. Richard Lissack QC

“It would certainly have more impact if you’re launching your own case rather than piggy-backing off another case, but the reality is that the leads will come to the SFO from all angles. In terms of operation, everyone knows there is an ongoing dialogue between the SFO, the DoJ and other law enforcement authorities”

Robert Amaee



said: “Obviously the further removed the supplier is from the main contractor at the top, the less of a burden on the main contractor. But—without being hysterical—there is a duty on the main contractor to ensure that those with whom it is contracting have got policies in place. I think that is the philosophy of the Act.”

While signing up new JV partners to anti-bribery contracts was viewed as often requiring “compliance training” in advance, the situation with negotiating new contractual clauses with existing JV partners was seen as potentially more difficult. Panelists pointed to particular resistance in the Far East although were optimistic that the creation of a global anti-bribery culture would be hugely facilitated by the UK’s passing of the Bribery Act.

### The future for global anti-bribery enforcement

Looking towards the future, David Greene was keen to elucidate opinion on what impact the Bribery Act will have on a wider global trend towards companies being compelled to act in an ethical and transparent way. Panelists believed that there was a lot of work to be done within companies to become Bribery Act-compliant, particularly those with extensive interests in

emerging markets. However, it was felt that the ability of the Act to allow companies to self-report in a bid to avoid more onerous penalties, would allow regulators and companies to work more closely together to achieve a common end. Question-marks were raised, nonetheless, around the resourcing of the SFO and whether it would have the budget to run as many cases as it would like. The panel agreed that if there is a particularly spectacular case then the SFO could go back to the Treasury and ask for further funds. But, in light of overall budget cuts, it was felt that the organisation would have to find ways to work smarter and that the Bribery Act helps achieve that end because the SFO can ask companies to explain themselves to them. This may

well require a lot less resource as the companies will be doing a lot of the work themselves.

Richard Lissack QC summed up the prevailing panel view of the Bribery Act as being a “very important turning point along the route of international policing of business.” He added that, along with corporate manslaughter legislation, it is the second example of UK statutory intervention in boardroom procedures in four years: “I think they are both similar in philosophy. They cater for the introduction of review by courts of cultures and policies and the holding accountable to criminal courts, which half a generation ago it would have been thought to have been unthinkable. I think that is really where it sits in the continuum.”

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### James Baxter

Freelance journalist & media consultant

James has written about the legal sector and international business markets for the past decade, spending four years as editor of leading monthly magazine *Legal Business*. In addition to writing for the legal press, James has contributed to a number of national, business and consumer titles including *Esquire*, *The Times*, *Associated Newspapers* and *The Guardian*.