Transparency International Anti-Corruption Helpdesk Answer

Consideration of victims in the enforcement of the FCPA and the UKBA

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Foreign bribery not only fosters a culture of corruption in business but it has a devastating effect on the countries where the bribes are paid (Kaplan 2020; Transparency International 2020a). While there is no dearth of anti-bribery legislation at the international and national levels, there is no consensus on victims' remedies or rights (Transparency International 2019). The jurisdictions of two of the most recognised foreign bribery laws (FCPA and UKBA) allow for restitution and compensation for victims; however, they differ in their approach.

Could you provide details on the consideration of victims (states or individuals) in the enforcement of the FCPA and the UKBA (in DPAs, NPAs or in entering judgment)?

Query

Contents

Main points

- FCPA and UKBA remain the most recognised state legislations dealing with foreign bribery that seek to prevent corruption globally with their extra-territorial reach.
- Consensus on the definition, rights and compensation of victims of foreign bribery in the cases of FCPA, UKBA, other state legislations and international conventions is still lacking.
- Consequences for perpetrators ought not to stop at "supply side" countries.
- Enforcement agencies should aid investigations in countries where bribes are paid (the 'demand side') and provide them with a share of the penalties.

Background

Bribery is widespread in international business, raising serious moral and political concerns, undermining good governance and economic development, and distorting international competitive conditions. Thus, all countries share a responsibility to combat bribery in international business transactions (OECD 2009).

International conventions, such as the Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention and the United Nations Convention against Corruption (UNCAC), have played a major role in triggering and guiding domestic reforms by requiring signatory-countries to criminalise foreign bribery and cooperate with other countries during investigations (Martini 2012).

In fact, even countries such as China and Russia, regarded as having corrupt business milieus, have approved anti-bribery legislation to comply with the requirements of such conventions (Martini 2012).

The most recognised state legislation dealing with bribery is the United States Foreign Corrupt Practices Act (FCPA) and the United Kingdom Bribery Act (UKBA), which seek to prevent and punish corruption globally with their extra-territorial reach (Kelly 2020). The US Congress, driven by the erosion of public trust during the

Watergate Scandals[1], approved in 1977 the FCPA, criminalising bribery of foreign public officials (Kelly 2020). With the enactment of certain amendments in 1998, the anti-bribery provisions of the FCPA now also apply to international firms and persons acting directly or through agents (US Department of Justice 2017).

While there is no private right of action under the FCPA, the Senate had initially included a provision for it. The provision, however, did not make it to the final passing of the law (Lauterpatcht and Greenwood 1993). The Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) jointly enforce the FCPA. In recent years, they have brought an increasing number of FCPA enforcement actions to charge violators with both civil and criminal offences (Kelly 2020).

UKBA, on the other hand, was introduced to update and enhance UK law on bribery, including foreign bribery. It requires strict liability for companies and partnerships failing to prevent bribery, placing the burden of proof on companies to show that they have adequate bribery prevention procedures in place. The act also provides for strict penalties for active and passive bribery by individuals as well as companies (TI-UK 2019). The Serious Fraud Office (SFO) is a multidisciplinary enforcement agency for the UKBA, combining forensic investigators, accountants, lawyers, computer specialists, and counsel working together from the start of a case, right through investigation and prosecution (Alford 2014).

While both laws have guidance manuals (in 2017 and updated in 2019, the DOJ came up with a FCPA manual on compliance for companies, and the Ministry of Justice drew one up for the UKBA in 2010), there are some differences in their approach (Tate 2019). For example, when it comes to assessing whether a programme is well implemented, the DOJ ought to look at both senior and mid-level management and whether the company creates and fosters "a culture of ethics and compliance". The UK guidance also provides examples of some of the activities which can set an appropriate tone from the top. However, it does not highlight middle-management requirements or go into the same detail about the day-to-day oversight of a compliance programme.

The differences between the FCPA and the UKBA are outlines in annex 1.

Since 2004, the DOJ has brought a third option to FCPA enforcement (the two options earlier included to charge or not to charge) non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs)[2], both of which are

[1] Five men carrying bugging devices and photographic equipment, with links to the top people at the Republican Party were arrested while breaking into the Democratic Party's Watergate headquarters in Washington in 1972. An investigation resulted in President Nixon being forced to hand over tape recordings made at the White House. The House Judiciary Committee accused Nixon of a cover-up and of misusing the FBI and the CIA, among other government agencies. Nixon was the first American president to resign, therefore avoiding impeachment (The Guardian 2011).

[2] A deferred prosecution agreement (DPA) generally is an arrangement reached between a prosecutor and a company to resolve a matter that could otherwise be prosecuted. The agreement allows a prosecution to be suspended for a defined period, provided the organisation meets certain specified conditions. A DPA is made with the approval or under the supervision of a judge (Marsh 2018). It requires the defendant to agree to pay a fine, waive the statute of limitations, cooperate with the government, admit the relevant facts, enter into compliance and remediation commitments, potentially including a corporate compliance monitor (Thomson Reuters 2020). In the US and UK, DPAs apply to organisations; however, in the US they can also apply to individuals (Marsh 2018).

alternative resolution measures, and have become the predominant means to settle FCPA enforcement action against companies. While the UK also uses DPAs, there are key differences in its approach, as highlighted in annex 2.

Victims of corruption in foreign bribery

International standards regarding victims' remedies include the 1985 UN General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which provides some guidance on general principles covering the topics of access to justice and fair treatment, restitution[3], compensation, assistance and victims of abuse of power (Transparency International 2019).

While the UNCAC does not provide a definition of "victim of corruption", the interpretative note on article 35 in the *travaux préparatoires* of the convention explains that the possibility of seeking compensation should be available to states as well as legal and natural persons (UNODC 2019). It has the following provisions for victims of corruption (in accordance with the fundamental principles of states' domestic laws):

- Article 32(5) (Protection of witnesses, experts and victims): the views and concerns of victims are to be presented and considered at appropriate stages of criminal proceedings against offenders.
- Article 34 (Consequences of acts of corruption): states to take measures to address the consequences of corruption, considering it a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession, or take any other remedial action.
- Article 57 (Return and disposal of assets):
    1. Property confiscated by state parties is to be disposed of, including by return to its prior legitimate owners.
    2. Each state party is to adopt legislative and other measures as may be necessary to enable its competent authorities to return confiscated property. Rights of bona fide third parties are also to be considered when acting on a request by other state parties.
    3. (a) In the case of embezzlement of public funds or of laundering of

[3] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the UN General Assembly in 2005 highlight the concepts of:*
Restitution – intended to re-establish the situation which would have existed had the wrongful act not occurred. This may include restoration of liberty, family life, citizenship, return to one's place of residence, and restoration of employment or property.
Compensation – should be provided for any economically assessable damage which results from the act (physical or mental harm, pain, suffering, lost opportunities, loss of earnings, medical and other expenses of rehabilitation, legal fees, etc.).
Rehabilitation – to include medical, psychological and other care and services, as well as measures to restore dignity and reputation.
Satisfaction and guarantees of non-repetition – including verification of facts and full public disclosure of the truth; a declaratory judgment (as to the illegality of the act); apology; judicial or administrative sanctions against the perpetrator(s); commemorations; prevention of recurrence (through legal and administrative measures including prosecution).

Reparation is due only after a breach of justice has occurred. While the grounds of reparation are indeed in the past, those of compensation may be in the past as well as in the present. Both aim for a just rectification, correction or amelioration of the condition of those who have suffered certain kinds of injury or loss (Khatchadourian 2006).

embezzled public funds, confiscated property could be returned to the requesting state party if (b) the requesting state party reasonably establishes its prior ownership of such confiscated property to the requested state party or when the requested state party recognises damage to the requesting state party as a basis for returning the confiscated property; (c) In all other cases, giving priority consideration to returning confiscated property to the requesting state party, returning such property to its prior legitimate owners or compensating the victims of the crime.

4. Where appropriate, the requested state party may deduct reasonable expenses incurred in investigations, prosecutions or judicial proceedings leading to the return or disposition of confiscated property.
5. States parties may also give special consideration to concluding agreements or mutually acceptable arrangements on a case-by-case basis for the final disposal of confiscated property.

However, only a few states explicitly address the right to seek compensation for corruption, either by providing a definition of who is a victim of corruption or by regulating compensation mechanisms available in corruption cases (UNODC 2019). Most states do not explicitly address the right of foreign states to stand before courts and receive compensation in their general compensation provisions; however, in several cases, foreign states fall under the general definition of legal persons and thus, at least in theory, are able to seek compensation (UNODC 2019). The negative effects of corruption extend beyond victimised entities to often affect society as a whole. Thus, the concept of social damage does exist in some jurisdictions, allowing for compensation for damages to the public interest (UNODC 2019).

There is increasing international recognition of the link between corruption and human rights violations and of the need for states and multinational companies to remedy adverse impacts on human rights (Transparency International 2019). The revised OECD Guidelines for Multinational Enterprises (2011) include a new human rights chapter in line with the UN Guiding Principles on Business and Human Rights. It states that multinational enterprises should "provide for or cooperate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts" (Transparency International 2019). A requirement to address actual impacts through remediation is also in the OECD Guidelines Commentary on General Policies for due diligence (applicable to both human rights and bribery) (Transparency International 2019). With foreign bribery, it is up to the states to ensure that their process allows for remediation in the sense of making good the adverse impact (Transparency International 2019).

Collective reparation and restitution in cases of foreign bribery are necessary for several reasons (Simone and Zagaris 2014; Garcia 2020):

- It goes hand in hand with deterrence, signalling that corruption is not a victimless crime and that those involved in it do not get to keep the proceeds of their crime.

- It communicates the importance of public good.
- It completes the administration of justice.
- The funds made available through reparation can be transformative for affected communities, as well as support anti-corruption activities in that region.
- Reparation generates trust between citizens and their institutions.

Restitution in foreign bribery, however, has also faced controversy and criticism. A common argument against paying restitution to developing countries in which public officials were bribed is that, because these countries were complicit and not victims in the crime, any funds returned may end up being lost to corruption again (Simone and Zagaris 2014). This argument has various flaws. First, it assumes that all public officials at all levels in a country are corrupt; second, it does not consider possible regime changes and the role of international pressure; and lastly, it does not consider that there are ways to prevent the money from being stolen again (Simone and Zagaris 2014).

Under the French Criminal Procedure Code, victims who have been harmed, including states, may apply to be a *partie civile* and be a full party to the criminal proceedings (Transparency International 2019). In the US and the UK, compensation and restitution[4] have been awarded to states affected by foreign bribery in a very limited number of cases. (Transparency International 2019). Consensus on the definition, rights and compensation of victims of foreign bribery in the cases of FCPA, UKBA and other national legislation and international conventions is still lacking.

The study published by Stolen Asset Recovery (StAR) Initiative in 2014 found that, out of 395 corruption settlements worldwide between 1999 and 2012, US$6.9 billion in monetary sanctions were imposed. However, only US$197 million – just 3.3 per cent – was ordered returned to the country whose official was involved (Oduor et al. 2014). Thus, in reality, despite the presence of legal infrastructure, interest and drive, reparation rarely happens, nationally or internationally (Garcia 2020).

United States

The Crime Victims' Rights Act (CVRA) provides crime victims with a list of rights, including the right to the timely notice of any proceeding involving the accused, the right not to be excluded from these proceedings, the right to be reasonably heard at sentencing, and the right "to full and timely restitution as provided in law" (US Department of Justice 2016). A "crime victim" is understood via the act as "a person directly and proximately harmed as a result of the commission of a federal offense" (US Department of Justice 2016). The Mandatory Victim Restitution Act and the Victims and Witness Protection Act also provide rights for victims, including restitution (GPO 1982).

Also, in the US, a foreign government that is a victim of an FCPA violation can assert the full protection of rights given to crime victims during an FCPA criminal enforcement action (Messick 2016). The most significant right for foreign governments

[4] *Compensation and reparation are two parts or forms of compensatory or corrective justice. Act of restoring; restoration of anything to its rightful owner; the act of making good or giving equivalent for any loss, damage or injury; and indemnification*

as crime victims, however, is the right to compensation for losses the offence caused. If a bribe payer is found guilty of, or pleads guilty to, conspiring to violate the FCPA, then under both the Victims and Witness Protection Act and the Mandatory Victim Restitution Act a foreign government "directly harmed" by the conspiracy has a claim for damages (Messick 2016).

Examples of FCPA cases where a foreign government received restitution or compensation (Messick 2016) are:

- United States v. Kenny International Corp., No. Cr. 79-372 (DDC 1979) (plea agreement): US$337,000 paid to the government of the Cook Islands, the amount of financial assistance provided to a political party in return for a promise it would continue a government contract with the defendant if it won election.
- United States v. Napco International, Inc., No. Cr. 3-89-47(1) (D. Minn. 1989) (plea agreement): US$140,000 paid to US Defense Department to be credited to Niger's foreign military sales account as compensation for a bribery scheme involving Nigerian officials.
- United States v. F.G. Mason Engineering, Inc., No. B-90-29 (D. Conn. 1990) (plea agreement): US$160,000 payment plus discounts on future sales to compensate the German government for bribing one of its military intelligence service officers.
- United States v. Diaz, No. 20346-CR-JEM (S.D. Fla. 2009) (plea agreement): defendant ordered to pay US$73,824 to the government of Haiti, its fee for serving as intermediary in a bribery scheme between government officials and the US firm.
- United States v. Green, No. CR 08-00059(B)-GW (C.D. Cal. 2010) (conviction): DOJ sought compensation of US$1.8 million, total bribes paid to Thai officials; court reduced to US$250,000 without explanation).

Citing the use of the word restitution in the aforementioned laws for victims, compensation ideally ought to be measured by what the victim lost rather than what the defendant gained (Lollar 2014). However, in none of the cases was there an explanation of why the DOJ conditioned the plea bargain on payment of restitution or compensation nor the rationale for the amount (Transparency International 2019).

The MVRA provides an exception to compensation where determining the amount would be so complex that it would unduly delay resolution of the criminal case. Such a clause may potentially lead to the rejection of victimhood. For example, the petition submitted by Costa Rica's state-owned Instituto Costarricense de Electridad (ICE) in United States v. Alcatel–Lucent France, the company was viewed not as a victim but as a co-conspirator since many ICE employees had been involved in the bribery scheme. However, had the government of Costa Rica claimed compensation, many argue that the results could have been different (Oduor et al. 2014).

United Kingdom

Compensation to victim countries in foreign bribery cases has been given priority at the policy level in the UK (Transparency International 2019). The Crown Prosecution Service (CPS), the National Crime Agency (NCA) and the Serious Fraud Office (SFO) have come up with a general framework of principles, published in 2018, to identify cases

where compensation is appropriate and to act swiftly in those cases to return funds to the affected countries, companies or people (SFO 2018). The general principles are as follows:

- The SFO, CPS and NCA consider the question of compensation in all relevant cases. They are also collectively referred to as the Departments.
- If the question of compensation is relevant, then the Departments will use available legal mechanisms to secure it. These include:
    1. In cases resolved by prosecution, the CPS and the SFO obtain remedies available under the Proceeds of Crime Act 2002 for confiscation and the Powers of Criminal Courts (Sentencing) Act 2000 for compensation.
    2. In cases resulting in a DPA, the SFO and the CPS seek compensation as part of the terms.
    3. In cases disposed of civilly, the Departments return funds to victims where appropriate.
- The Departments are supposed to work together with the Department for International Department (DFID), Foreign and Commonwealth Office (FCO), Home Office (HO) and HM Treasury (HMT) in relevant cases to:
    1. Identify who should be regarded as potential victims overseas. This may also be in the form of an affected state.
    2. Assess the case for compensation.
    3. Obtain evidence which may include statements in support of compensation claims.
    4. Ensure the process for the payment of compensation is transparent, accountable and fair.
    5. Identify a suitable means by which compensation can be paid to avoid the risk of further corruption.
- Guidance on the implementation of these general principles to be made available on the Department's websites.
- Departments, where possible, should engage proactively with the relevant law enforcement or government officials in affected states.
- Information on concluded cases to be published by the Departments.

The SFO website also has guidance information for victims, clarifying that compensation relates to the loss suffered as a result of the crime and is not related to the process of being a witness. It also states that the amount of any compensation is a matter for the court (SFO 2020).

Cases of compensation in the United Kingdom since 2014 include:

- Following the conviction of Ao Man Long, former Secretary of Transport and Public Works in the Macao Special Administrative Region, for corruption offences, the CPS ensured that Mr Ao's UK-based assets (totalling £28.7 million or approximately US$35 million), part of the US$100m hidden in offshore companies and over 100 bank accounts, were successfully returned to the region's authorities (SFO 2018).
- The government of Kenya was paid £349,000 (approximately US$430,000) after the prosecution of senior executives at printing firm Smith & Ouzman. The funds

paid for 11 new ambulances to service hospitals across the country (SFO 2018).

- The government of Tanzania was included as part of the terms of the SFO's first Deferred Prosecution Agreement, with Standard Bank, and paid £4.9 million (US$7 million) compensation (SFO 2018).
- The SFO recovered £4.4 million (approximately US$5 million) from corrupt oil deals in Chad, which has now been transferred to DIFD to identify key projects for investment to benefit the poorest in that country (SFO 2018).

Cases of compensation for victims of foreign bribery before the UKBA include:

- Under a 2009 plea agreement between the UK construction firm Mabey & Johnson and the SFO, the company agreed to pay reparations (totalling £1,415,000 or approximately US$1,750,000) to Iraq, Ghana and Kenya after being charged with inflating contract prices to fund kickbacks to Iraqi officials involved in a major contract to build bridges in Iraq, as well as paying bribes to officials in Ghana and Jamaica (Oduor et al. 2014).
- In 2010, BAE Systems agreed to pay Tanzania ex gratia a reparations payment of almost £30 million (approximately US$37 million) in settling a case of alleged bribery in the sale to Tanzania of an outdated and redundant military air traffic control system costing about £26 million (approximately uS$32 million) (Oduor et al. 2014).

Victims from the 'supply' and 'demand' side of bribery: the Airbus case

Airbus, Europe's largest aerospace multinational, is set to pay a record £3 billion (approximately US$3.7 billion) in penalties after admitting it had paid huge bribes on an "endemic" basis to land contracts in 20 countries (Pegg and Evans 2020). The company had used a network of secret agents to pay large-scale bribes to officials in foreign countries to land high-value contracts, increasing its profits by US$ 1 billion (Hollinger, Beioley and Shubber 2020).

The decision on Airbus' fines made by the French, UK and US authorities, however, does not cite any penalty payment for the countries where the company was paying bribes, including Colombia, Ghana, Indonesia and Sri Lanka, the so-called demand side of the bribery equation (Transparency International 2020a).

Foreign bribery, especially on this scale, has a devastating effect on the countries where the bribes are paid. Governments spend more on lower quality or incomplete goods and services and, at times, waste millions on unnecessary procurement, eventually affecting services like education and healthcare. The impact, especially in poorer countries, can be immense (Transparency International 2019; Transparency International 2020a). Hence, the consequences for Airbus ought not to stop at "supply side" countries, like France, the UK and the US. Authorities there ought to aid investigations in countries where bribes are paid, and provide them with a share of the penalties,

including disgorged profits[5] (Transparency International 2020a).

Currently, the government of Sri Lanka is examining ways of recovering damages, including claiming compensation from Airbus SE (Kotoky 2020).

What can victims do?

Oftentimes, even in jurisdictions allowing for reparations, authorities may not know how to provide for compensation to victims of corruption. For example, how can eroded trust in the government be quantified? Even in the case of material public goods, questions surrounding reparations being related to the public good affected by corruption may arise (Garcia 2020b).

Some experts opine that reparation is one area available for collaboration with civil society to generate ideas that provide for sufficient (and contextually relevant) accountability to ensure reparation reaches those it is intended to. Asking victims what "reparation" should look like also helps shed light on the matter (Garcia 2020b).

The UK and US legal systems provide tools that would allow for compensation and restitution in cases of foreign bribery to victims in some circumstances. Nevertheless, these tools have yet to be widely applied in practice due to the presence of persistent obstacles, possibly related to the reluctance to return any funds to countries that may be perceived to be complicit in the case and to developing countries' lack of capacity to claim victim status in foreign courts (Simone and Zagaris 2014).

When it comes to restitution or compensation of victims, the first step is claiming victim status or otherwise participating formally in the prosecution of foreign bribery cases in foreign countries (Simone and Zagaris 2014). Here, information on proceedings provided by investigative and enforcement agencies becomes crucial, especially in the cases of out-of-court settlements such as DPAs and NPAs (Oduor et al. 2014; Simone and Zagaris 2014)

Under US jurisdiction[6], the absence of a private right of action under the FCPA has caused victims' attorneys to pursue indirect legal theories – often in the form of securities class actions, derivative actions, or books and records cases – in an effort to craft a recoverable private claim for corporate bribery (Stratton et al. 2019).

Victims may be able to provide securities claims based on alleged criminal wrongdoing if they can sufficiently plead that the failure to disclose such conduct made the company's other disclosures "materially misleading" (Simone and Zagaris 2014).

Plaintiffs can pursue an FCPA follow-on civil action even in the absence of a private right of action if the allegations in the follow-on action are "sufficiently distinct" to avoid any "potential concern" that the plaintiffs are merely seeking to

[5] A remedy requiring a party who profits from illegal or wrongful acts to give up any profits they made as a result of their illegal or wrongful conduct. The purpose of this remedy is to prevent unjust enrichment (Cornell Law School 2020).

[6] It ought to be noted that the MVRA addresses restitution for Title 18 offences, the FCPA is codified under Title 15 of the US Code, therefore the MVRA does not require restitution for FCPA violations directly (Fowler 2014b).

enforce the FCPA. In the VEON[7] case, Southern District of New York Judge Andrew L. Carter, Jr. held that the alleged misrepresentations on which the plaintiff sought to rely were "sufficiently distinct to avoid any potential concern that plaintiffs are seeking to enforce the FCPA by [their] securities fraud action" (LaCroix 2017).

It ought to be noted that in the US, a state claimant must waive sovereign immunity to bring a civil action. Such a waiver could expose it to the risk of counter suits, and the requirement of producing material about its internal deliberations during the pre-trial investigation could be embarrassing, deterring some states from presenting claims (Transparency International 2019).

The aforementioned Compensation Principles, adopted by the UK government in 2018, requiring law enforcement agencies, including the SFO, to identify overseas victims in all applicable corruption cases and to seek compensation for them using whatever legal mechanisms are available, may be viewed as a positive development for victims of foreign bribery.

Earlier in 2020, a group[8] of 16 residents from the Democratic Republic of Congo stepped forward as potential victims in the SFO's corruption investigation into Kazakh multinational mining company, Eurasian Natural Resources Corporation (ENRC) (RAID 2020).

Here, donor agencies and CSOs may also have a role to play. By providing technical assistance in the restitution process, facilitating the flow of information, building political will, and monitoring and managing returned funds, they can support victims of foreign bribery (Simone and Zagaris 2014).

Road ahead

When it comes to foreign bribery, international conventions have had an impact on national legislation. However, neither the OECD Anti-Bribery Convention nor 2009 Revised Recommendation reference the victims of foreign bribery. This may foster the notion that foreign bribery is a victimless crime (Transparency International 2019). On the one hand, through training, companies should directly address this issue by showing that violations of anti-corruption compliance laws are not victimless (Kaplan 2020). On the other hand, enforcement agencies should involve demand side countries in settlements of foreign bribery cases. They could (Transparency International 2019; Transparency International 2020a):

[7] In February 2016, VEON, a multinational telecommunications company, entered a deferred prosecution agreement with the DOJ in which the company pled guilty to violations of the FCPA and agreed to pay more than US$460 million in penalties. In the criminal information accompanying the DPA, the company admitted that, between 2005 and 2012, the company paid bribes totalling tens of millions of dollars to Gulnara Karimova, the daughter of Uzbekistan's president, to gain favourable treatment in the country. Executives at the company disguised the payments in the company's books and records as legitimate transactions (LaCroix 2017).

[8] The group, which includes local chiefs, community representatives and former workers at the Kingamyambo Musonoi Tailings (KMT) mine, said that for nearly a decade following the stripping of the mining licence from KMT's original owners, and the sudden closure of the mine in 2009, their communities were deprived of clean drinking water, plagued with ongoing air and water pollution, sickness and a lack of education opportunities. Former workers who lost their jobs said they were not only deprived of their livelihoods but also lost valuable free healthcare for themselves and their families (RAID 2020). In April 2013, the SFO, launched a criminal investigation into ENRC for alleged fraud, bribery and corruption. At the time, ENRC was a UK-registered company listed on the London Stock Exchange (LSE). To date, no charges have been filed, and the investigation is ongoing. ENRC denies any wrongdoing and, in 2019, launched legal action against the SFO over its investigation (RAID 2020).

- develop principles or guidelines concerning granting compensation to victims in foreign bribery cases (including DPA and NPA cases)
- notify authorities in demand side countries while the settlement is being negotiated
- provide notification, if possible, to other potentially affected parties, such as competitors, shareholders, consumers and others who may have been harmed as a result of foreign bribery
- allow the authorities in victim states to submit claims for reparations or compensation, including social and collective damages, and to present victim impact statements; also allow claims and impact statements from other victims
- share information and assist other countries in their investigations, including financial resources
- publish all relevant documents and details to facilitate a culture of openness
- show how fines are calculated, including details of which components are criminal fines and which are from disgorgement of profits
- follow the Global Forum on Asset Recovery (GFAR) principles in cases of the return of funds to affected states or into the hands of representatives of a class of victims (as the injured population is often denied recourse at home due to corruption in state institutions)
- recently, the Trump administration, based on complaints from companies, hinted that it may reform FCPA legislation, potentially watering it down (Transparency International 2020b). The FCPA has served as the landmark anti-corruption law that criminalises bribery of foreign officials. Instead of backing down, the government should expand the existing law to not only cover businesses who give bribes but also the foreign officials who request them. In fact, a bill before the US Congress called the Foreign Extortion Prevention Act would go on to do just that (Transparency International 2020a).
- governments across the world ought to step up their coordination to secure justice for the victims of corruption and see that they are compensated, and that the perpetrators face the consequences (Transparency International 2020a)

Comparison of UKBA and FCPA (Annex 1)

Provisions	UKBA	FCPA
Bribery of foreign public officials (FPO)	Yes (section 6).	Yes, the FCPA applies only to bribery of foreign officials: 15 U.S.C. §§78dd-1(a) and (f)(1).
Private to private bribery	Yes, the main provisions of the act apply to the private sector as well as the public sector except for the FPO offence.	No.
Receipt of a bribe	Yes (section 2).	No.
Intent	Mixed. Intention is required for some cases of section 1 and 2 offences. No corrupt or improper intent is required in the FPO offence, section 7.	In alleging violations of the bribery provisions of the FCPA, the government must show that the defendant had the requisite state of mind with respect to his actions i.e., negligence, recklessness, intent: 15 U.S.C. § 78dd-1(f)(2).
Facilitation payments	The act does not permit an exception for facilitation payments.	Permitted under very limited circumstances when paid to foreign officials to expedite or secure the performance of a "routine governmental action". This excludes a decision by a foreign official to award new business or to continue business with a particular party e.g., to obtain a licence or be granted a concession (15 U.S.C. §78dd-1(b) and §78dd-1(f)(3)).
Promotional expenses	The act makes no specific provision for promotional expenses.	Yes, affirmative defence if they are reasonable and bona fide business expenses that are directly related to the promotion, demonstration or explanation of products or services (e.g., demonstration or tour of a pharmaceutical plant) or in connection with the execution of a particular contract with a foreign government.
Extra-territorial application	Yes, persons are liable for sections 1, 2 or 6 offences committed outside the UK if they have a close connection with the UK.	Yes, the FCPA applies to violative acts by US issuers, domestic concerns and their agents and employees that occur wholly outside US territory, and to acts by US citizens or residents, wherever they occur.

Provisions	UKBA	FCPA
Third parties	Yes, liability for acts of associated persons who perform services for or on behalf of the company.	Yes, the FCPA prohibits corrupt payments through intermediaries. It is unlawful to make a payment to a third party, while knowing that all or a portion of the payment will go directly or indirectly to a foreign official. The term "knowing" includes conscious disregard and deliberate ignorance. Intermediaries may include joint venture partners or agents.
Failure to keep accurate books and records	Covered by other legislation.	Yes.
Criminal penalties	Individuals: up to 10 years sentence and unlimited fines; companies: unlimited fines.	Corporations and other business entities are subject to a fine of up to US$2 million per violation. Officers, directors, stockholders, employees and agents are subject to a fine of up to US$250,000 per violation and imprisonment for up to five years. Under the Alternative Fines Act, the actual fine may be up to twice the benefit that the defendant sought to obtain by making the corrupt payment. Fines imposed on individuals may not be paid by their employer or principal.

Source: TI-UK (2010). Adequate Procedures: Guidance to UK Bribery Act.

Key differences in the treatment of DPAs by the UK and the US (Annex 2)

	UK	US
Judicial involvement	Judicial approval is required to initiate negotiations, enter into a DPA and modify its terms. The declaration of a DPA and the court's reasoning, in addition to an agreed-upon statement of facts, is made public.	DPAs are negotiated by prosecutors with little judicial involvement. Generally, the US judiciary approves the terms without significant amendment before they are made public.
Designated prosecutors	Only "designated prosecutors", including the SFO and Director of Public Prosecutions (in England and Wales), have the power to enter into a DPA.	Federal, state and county prosecutors and others authorised to enforce federal and state regulations have the power to enter into a DPA. Individual prosecutors may have significant autonomy.
Offences	DPAs are only available concerning "scheduled offences", which include certain violations under the Bribery Act, Proceeds of Crime Act and Companies Act.	The scope of offences where a DPA may apply is broad and authorities are given comparatively wide discretion. (Notable exceptions are cases involving national security, foreign affairs and violations of public trust by government officials.)
Non-prosecution agreements (NPAs)	NPAs are not available.	NPAs may be used in exceptional circumstances.
Underlying legal framework	In the absence of a strict liability corporate defence, the so-called identification principle is used to determine whether the offender was a "directing mind and will" of the company and is a significant evidential hurdle to establishing corporate liability.	In addition to potential direct statutory liability for the organisation, the concept of *respondeat superior* (an employer has responsibility for the acts of its employees and agents) makes corporate criminal liability a realistic prospect in situations where employees of a corporation are involved in criminal activities.
Conduct of internal investigations	Authorities have a more developed methodology for organisations engaging outside counsel to perform investigations. These investigations and their results are routinely recognised by prosecutors and scrutinised by prosecutors for the purposes of appropriately resolving cases.	Authorities are less likely to rely on a private sector investigation as a matter of course and may indicate that they do not wish initial interviews to be conducted by third parties, such as the organisation's lawyers.

Source: Marsh 2018. Deferred Prosecution Agreements: Key Differences Between The US And UK.

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