Transparency International Canada

White Paper

Bringing a "Failure to Prevent" Offence to Canada

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EXECUTIVE SUMMARY

This paper provides a recommendation for Canada to adopt a 'failure to prevent' corruption offence as part of its efforts to counter corruption. Failing to prevent corruption means that organizations have the duty to instill policies, processes, and leadership that would actively prevent corruption from taking root. If an organization were later accused of engaging in corruption, it could be held liable for not having done enough to prevent that act from occurring in the first place. Organizations would be forced to take compliance seriously and institute effective procedures to guard against the possibility of corruption, or face being charged with a criminal offence. Guided by international examples, introducing a new 'failure to prevent' corruption offence to Canada's anti-corruption regime could ignite a system that incentivizes compliance with the law and which appropriately punishes offenders for not having taken compliance seriously.

Transparency International Canada aims to draw attention to certain problems in the current Canadian anti-corruption enforcement system and to discuss the merits of shifting to a system that places the burden on entities to develop proper procedures or risk prosecution.

This paper examines the Canadian legal context to establish the suitability of adding a failure to prevent offence into the Canadian legal framework. Drawing on international examples, we explore how similar offences in the UK, EU, Australia and Bermuda were designed and how they function. Our analysis leads to an overview of the problems that exist in the Canadian approach to counter corruption and whether a failure to prevent offence offers an opportunity to improve on Canada's poor enforcement record. We conclude with a list of model features for a Canadian failure to prevent offence as well as an overall recommendation in favour of the introduction of such an offence to the Canadian legal system.

Overall, the creation of a failure to prevent offence and its inclusion in Canada's legislative framework for anti-corruption could positively incentivize companies to create effective and context-specific anti-corruption programmes. It would enable law enforcement authorities to engage with the private sector more proactively with the goal of developing a preventative rather than reactive culture towards countering corruption.

1. DESCRIPTION AND PURPOSE OF THE PROJECT

It has been almost 25 years since Canada signed and ratified the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (the "OECD Convention"),[1] and 20 years since the *United Nations Convention Against Corruption* ("UNCAC"). The cornerstone of Canada's implementation of the OECD Convention is the *Corruption of Foreign Public Officials Act* (the "CFPOA"), which criminalizes "giving, offering or agreeing to give or offer any benefit, directly or indirectly, to a foreign public official for the purpose of obtaining or retaining an advantage in the course of business."[2] Similar provisions exist in the *Criminal Code* outlawing corruption of domestic officials.[3]

Though some aspects of the CFPOA have been amended in response to OECD peer evaluations, most significantly in 2013,[4] treating foreign corruption and bribery as a criminal offence sends a strong message about the reprehensible nature of the conduct being sanctioned. However, the level of enforcement activity under the CFPOA has remained extremely low both in relation to Canada's economic size and compared to its economic peers.

There is no single explanation for the low level of enforcement under the CFPOA, though OECD evaluations and reports by non-governmental agencies such as Transparency International point to several factors, including the failure to direct adequate resources towards corruption investigations, the capacity of expert teams of police and prosecutors devoted to corruption matters, poor coordination between federal and provincial agencies, a challenging legal framework, and the absence or futility of complementary enforcement measures, such as civil sanctions and

1 *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (21 November 1997), online (Organisation for Economic Cooperation and Development):* http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf *[OECD Convention].*

2 *Public Prosecution Service of Canada Deskbook, Chapter 5.8 "Corruption of Foreign Public Officials" (1 March 2014), online:* https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p5/ch08.html*.*

3 Criminal Code *R.S.C. , 1985, c. C-46 [Criminal Code] at ss.119-125 and Part X relating to Fraud.*

4 *Fighting Foreign Corruption Act, SC 2013, c 26. The amendments addressed several long-standing concerns about the Act identified in the first three phase reports on Canada's implementation of the Convention, issued in 1999, 2004 (follow up in 2006) and 2011 (follow up in 2013) respectively: online (OECD)* https://www.oecd.org/canada/canada-oecdanti-briberyconvention.htm. *For a short summary of the amendments, see PPSC Deskbook.*

corporate governance obligations and general policy incoherence in our approach.

Another factor that may contribute to low enforcement levels may be that Canada currently relies exclusively on a criminal law approach that prohibits corrupts acts via a subjective *mens rea* offence. Doing so ties anti-corruption enforcement to the exacting standards of criminal law increasing the enforcement challenges in several ways:

1. Proof of a subjective state of mind of at least recklessness is a high standard to meet, particularly in corruption cases where plausible business motives for conduct may raise a reasonable doubt.
2. Many cases of foreign corruption involve the conduct of individuals acting on behalf of a business or other organization. Bringing charges of corruption against organizations complicates the task of proving the elements of the offence because there are special rules that govern which individuals' conduct and intent can be imputed to an organization.[5]
3. Where alleged corruption occurs in countries with which Canada has no mutual legal assistance treaties, gathering evidence may be next to impossible absent voluntary disclosure.
4. The time required to investigate and prosecute corruption cases makes them particularly vulnerable to applications for stays of proceedings for unreasonable delay.[6]
5. While the 2018 addition of a Remediation Agreements (RA) regime,[7] a form of a non-trial settlement mechanism, was intended to encourage organizations to come forward where they uncovered possible corruption within their ranks, the ability of organizations and their counsel to assess whether the regime might apply to them appears to have been hampered by a lack of detailed guidance on the process to be followed and uncertainty as to what treatment

5 *Criminal Code, s. 22.2. This section governs how the elements of subjective mens rea offences are established against an organization.*

6 *A Jordan application is an application for a stay of proceedings that is brought because of an alleged violation of the right to a trial within a reasonable time, as protected by paragraph 11b) of the Canadian Charter of Rights and Freedoms. It is named after the case in which the Supreme Court of Canada established presumptive ceilings beyond which delays were presumed to be unreasonable, with little allowance for exceptions: R v. Jordan, 2016 SCC 27, [2016] 1 SCR 631. Jordan applications were successfully brought in at least 3 cases involving individuals charged with corruption related offences: R v Kyres 2018 QCCS 4671, **R. c. Bebawi**, 2019 QCCS 5902, R v Roy (2017).*

7 *Criminal Code, Part XXII.1 – Remediation Agreements.*

organizations who come forward can expect from authorities.[8] While there remains some uncertainty on the process and what steps organizations should follow, it is helpful that we can now draw some conclusions from the first two RAs that have been recently approved.[9]

Against this backdrop, it is time to examine whether Canada should develop other anti-corruption enforcement mechanisms that, without undermining the central criminal prohibition against acts of corruption and bribery, could expand the reach of current enforcement.

One example can be found under section 7 of the United Kingdom's *Bribery Act 2010* (the "UKBA") which sanctions commercial organizations that fail to prevent corruption undertaken on their behalf.[10] Instead of targeting the bribes paid or other acts of corruption directly, a failure to prevent offence looks at what features of the organizational environment allowed corruption to manifest itself. Looking at the organizational environment provides a standard against which the preventive measures taken by the organization can be assessed.

A well-designed "failure to prevent" offence encourages organizations to manage corruption risks proactively because it allows an accused organization to defend itself against a charge if it can show its risk management was prudent and diligent. To do this, the organization has to prove, on a balance of probabilities, it has taken all reasonable measures in the circumstances to prevent the corrupt conduct.

This paper examines the merits of creating an analogous offence in Canada to determine whether it would complement existing enforcement by creating a feasible means of increasing voluntary disclosure and cooperation and encourage the implementation preventive measures to counter corruption.

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8 Transparency International Canada (2020), "Overview of Remediations Agreements in Canada".

9 R. c. SNC-Lavalin inc., 2022 QCCS 1967, R. v. Ultra Electronics Forensic Technology Inc, 2023 QCCS 1063.

10 Bribery Act 2010 (UK), s 7 [UKBA].

2. THE CANADIAN CONTEXT

2.1. Legal Principles: Liability

In Canadian criminal law, there are both subjective and objective *mens rea* offences. Subjective *mens rea* concerns what occurred in the mind of the accused at the time of the offending conduct. There are four kinds of subjective *mens rea*:

- Recklessness: the accused is aware that their conduct could lead to harmful consequences yet does it anyway.
- Knowledge: the accused is aware of a given circumstance or fact.
- Willful blindness: an alternate means of proving knowledge, where the accused purposely avoids becoming informed of facts or circumstances of which they are aware; and
- Intent: the accused desires a specific outcome or result.

Objective *mens rea*, on the other hand, examines what the accused ought to have known at the time of the offending conduct, with an eye to the circumstances surrounding the accused. This type of *mens rea* is used in negligence offences where the accused's conduct deviates from the reasonable person standard. The amount of deviation required to prove guilt depends on whether the offence is criminal or regulatory.

2.2. Organizational Liability under the Criminal Code

Under Canadian law, liability for truly criminal offences, such as those in the Criminal Code or the CFPOA, must be direct liability. Since organizations are intangible entities, criminal liability has developed imputation rules that determine when and under what conditions the conduct and intentions of human beings can be used as evidence of the organization's direct participation in a criminal offence. When the conditions for the imputation rules are met, the criminal law will treat the organization as directly liable for the offence. In other words, the illegal conduct and intentions are considered those of the organization.

The imputation rules for criminal liability of organizations are based on the intentions of broad groups of "senior officers" that includes all those employees, agents or contractors who play "an important role in the establishment of an organization's

policies" or who have responsibility "for managing an important aspect of the organization's activities".[11] Judicial decisions that have since interpreted the expression "senior officer" have confirmed the new definition permits the use of the fault of middle managers to establish the required evidence of *mens rea* to convict the organization.[12]

The Criminal Code regime has two sets of imputation rules for the purposes of proving organizational criminal liability. One applies to offences that require proof of objective *mens rea* (penal negligence) and the other applies to offences that require proof of a subjective state of mind of recklessness, wilful blindness, knowledge or intention.

The imputation rules that apply to penal negligence allow proof of the illegal conduct (the actus reus) to be drawn from the conduct of one or more representatives or senior officers.

Under the imputation rules for subjective *mens rea* offences (s. 22.2 CrC), there are three ways to prove the elements of the offence:

(1) a senior officer committed the offence,
(2) a senior officer, with the intention to commit the offence, ordered or directed a representative to engage in the illegal conduct,
(3) the senior officer becomes aware of the fact that one or more representatives has or is about to commit the offence and the senior officer does not take reasonable measures to prevent or stop the offence.

In all three cases, the senior officer must be acting within the scope of their authority and with the intention to benefit, at least in part, the organization.

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11 Criminal Code, s. 2 *as amended by Bill C-45,* s. 1.

12 *The expression "senior officer" has been directly interpreted in two decisions: R. v. Pétroles Global, 2012 QCCQ 5749 (Chapdelaine, J.), par 69-84; and R. v. Pétroles Global, 2013 QCCS 4262 (Tôth, J.), par 30—52. The recent Quebec Court of Appeal decision in CFG Construction inc. c. R. 2023 QCCA 1032, a criminal negligence case in which the status of "senior officer" was conceded by the defence, appears to implicitly endorse the conclusions reached in Pétroles Global though it does not cite these cases. The QCA refers, at paragraph 64 to the same influential article that examined the definition of senior officer in detail on which Justices Chapedelaine and Tôth relied in their interpretations: T. Archibald, K. Jull et K. Roach « Critical Developments in Corporate Criminal Liability: Senior Officers, Wilful Blindness, and Agents in Foreign Jurisdictions » (2013), 60 C.L.Q.* **93;** https://canlii.ca/t/jzms1

Sentencing

The Criminal Code outlines the principles that should guide sentencing for convictions. Section 718.1 states that sentences should be "proportionate to the gravity of the offence and the degree of responsibility of the offender."[13]

Section 718.21 provides a non-exhaustive list of potential mitigating or aggravating factors, specifically adapted to organizations. Section 732.1(3.1) sets out a number of conditions that a judge can impose on an organization through a probation order.

One factor in s. 718.21 that is particularly relevant to a discussion of the merits of creating a failure to prevent offence is whether the organization has attempted to reduce the likelihood of the offending conduct recurring in the future.[14] In the same vein, s. 732.1(3.1)b) expressly provides for the possibility of imposing compliance conditions on the offending organization, such as the "development of policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence."

Remediation agreements

Part XXII.1 of the Criminal Code creates a non-trial settlement mechanism, called a remediation agreement, which allows for an organization to resolve criminal charges for crimes like corruption without a trial and without a conviction while nevertheless being subject to financial and other consequences that are similar to criminal penalties. Remediation Agreements were adopted in part to encourage more enforcement of corruption and similar offences.

Section 715.32(1) of the Criminal Code establishes 4 mandatory conditions that must be met before a prosecutor can invite an organization to negotiate an RA:

- There must be a reasonable prospect of conviction for the offence alleged.
- The underlying conduct does not involve bodily harm or death, does not injure national security or national defense, and has not been done by or for the benefit of terrorist or criminal organization.
- It must be in the public interest to do so. Paragraph 715.32(2) provides eight specific factors (s. 715.32(2)(a) to (h)) that prosecutors are expected to take into

13 *Criminal Code, s. 718.1.*

14 *Ibid, s 718.21.*

account, but they are also free to consider other relevant non-enumerated factors (s. 715.32(2)(i)).

- The consent of the Attorney General (or their lawful deputy, such as a director of public prosecutions) of the jurisdiction (federal or provincial) responsible for the prosecution.

RAs are only available to organizations that are private entities, whether for profit or not.[15] Part XXII.1 contains a schedule that lists the only offences that are eligible for an RA, including corruption.[16]

If the eligibility conditions are met, prosecutors can then issue an invitation to an organization to negotiate an RA. This invitation sets out the terms and conditions under which the negotiation will occur and the cooperation expected from the organization.[17] If the negotiations are successful, the prosecutor applies to the court for approval of the agreement. The court's role is to ensure the agreement complies with the mandatory requirements set out in the law, is in the public interest and that the terms are fair, reasonable and proportionate to the gravity of the offence.[18] The court has a specific duty to consider how the interests of victims have been taken into account.[19] Once a judge approves the terms of the RA, the charges will be put on hold and, upon completion of the agreement, there will be no criminal conviction.[20] However, if the terms of the RA are breached by the defendant, then prosecutors can resume the prosecution of the charges. [21]

Since the enactment of the regime in June 2018, there have been three judicial decisions that have interpretated some of the provisions in Part XXII.1. The first decision confirmed that prosecutors have complete discretion in deciding whether it would be in the public interest and appropriate to invite an organization to

15 *Definition "organization", s. 715.3(1) CrC. This definition is narrower than the general definition of organization in s. 2 CrC.*

16 *Part XXII.1 CrC, Schedule 1.*

17 *Ss. 715.33(1) CrC*

18 *S. 715.37(6)b) and c) CrC*

19 *Ss. 715.37(3) CrC*

20 *Department of Justice Canada, "Remediation Agreements and Orders to Address Corporate Crime" (11 September 2018), online:* https://www.canada.ca/en/department-justice/news/2018/03/remediation-agreements-to-address-corporate-crime.html.

21 *A plain language briefing of the regime is available through TI Canada's "*Overview of Remediation Agreements in Canada".

negotiate an RA.[22]

The other two are court approvals of remediation agreements, one negotiated between the Quebec prosecution service (*Direction des poursuites criminelles et pénales*, DPCP) and SNC-Lavalin[23], and the other between the Public Prosecution Service of Canada (PPSC) and Ultra Electronics Forensics Technology Inc (UEFTI).[24] These judicial decisions have provided valuable interpretations of certain provisions in the regime, though there are still several aspects of the regime that have not been interpreted or fleshed out.

Corruption Offences

In Canada, domestic corruption offences are set out in the Criminal Code and prosecuted by provincial prosecutors. They include:[25]:

- Bribery of judges or members of Parliament or provincial legislative assemblies;
- Bribery of police officers or other law enforcement officers;
- Bribery/corruption of government officials, i.e., influence peddling;
- Fraud or breach of trust by a public official;
- Municipal corruption;
- Selling or purchasing a public office;
- Influencing or negotiating appointments to public offices; and
- Giving or receiving secret commissions.

All of the above are subjective *mens rea* offences, subject to the imputation rules set out in s. 22.2 of the *Criminal Code*.[26]

Meanwhile, the CFPOA deals with the corruption of foreign public officials, and it applies to both natural and legal persons.[27] The CFPOA was designed to support the Canadian ratification of the OECD Convention, and it codifies Canada's commitment

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22 *SNC_Lavalin Group Inc v Canada (Public Prosecution Service), 2019 FC 282 (Canlii), [2019] 3 FCR 327*

23 *R. c. SNC-Lavalin inc., 2022 QCCS 1967 (CanLII)*

24 *R. v. Ultra Electronics Forensic technology Inc (UEFTI), 2023 QCCS 1063.*

25 *Criminal Code, ss. 119–125 and 426.*

26 *Criminal Code, s. 22.2.*

27 *Corruption of Foreign Public Officials Act, SC 1998, c 34, s. 2 [CFPOA].*

under the UNCAC.[28] Under the CFPOA, bribery of a foreign public official to obtain or retain an advantage in the course of business is an indictable offence.[29] Additionally, the possession of property, or the proceeds thereof, obtained via foreign bribery, and the laundering of this property or proceeds, are offences under the CFPOA.[30]

The CFPOA provides for *mens rea* offences, such that conviction requires intention. Therefore, as in the case of domestic corruption offences, for an organization to be convicted under the CFPOA, s. 22.2 of the Code must be satisfied. The Crown must prove that a senior officer acting within their authority committed an offence (through one of the three imputations methods in par. 22.2(a), (b) or (c)), intending at least in part to benefit the organization. The senior officer(s) must know or ought to know that the bribe recipient is a foreign public official.[31]

The *mens rea* test for CFPOA offense requires the prosecution to meet a very high threshold. The court stated in the *Arapakota case*[32] that the Crown was required to prove more than the accused deliberately engaging the material acts that make up the actus reus. The decision ultimately requires that the Crown show:

(1) an accused intentionally offered a benefit,
(2) to a person they know is a foreign public official,
(3) with the intention that the benefit serve as consideration for things done by the public official and
(4) that the accused acted for the purpose of obtaining a business advantage.[33]

The combination of these elements requires evidence of intention that may be difficult to obtain in practice.

There are severe maximum punishments for convictions under the CFPOA,

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28 *United Nations Convention Against Corruption, 9 December 2003 (14 December 2005).*

29 *Joanna Harrington, "Addressing the Corruption of Foreign Public Officials: Developments and Challenges within the Canadian Landscape" (2018) 56 Canadian Yearbook of International Law, at 109 [Addressing the Corruption of Foreign Public Officials].*

30 *Ibid.*

31 *R v Barra and Govindia, 2018 ONSC 57.*

32 *R. v. Arapokota, 2023 ONSC 1567.*

33 *Transparency International Canada:* Submission to the OECD Working Group on Bribery Phase 4 Monitoring of the Implementation of the OECD Anti-Bribery Convention *in Canada March 31, 2023.*

including 14 years imprisonment for individuals and unlimited fines for individuals and organizations, subject to the discretion of the court. Both convictions and charges under the CFPOA can lead to the application of the Integrity Regime[34], which debars organizations that have connections to corruption-related offences from contracting with the federal government.[35] For convictions, the punishment is a mandatory debarment period of ten years with a possible reduction to 5 years, and, for charges, the maximum debarment is eighteen months.[36]

Enforcement

Since the CFPOA was enacted, there have only been six convictions or guilty pleas and two remediation agreements. Cases that resulted in convictions or guilty pleas are: *Hydro Kleen Group* (2005), *Niko Resources* (2011), *Griffiths Energy* (2013), *Karigar* (2013, Appeal in 2017), *Bebawi* (2019, Appeal in 2023), *SNC-Lavalin – Libya* (2019).[37] In one case, a first instance conviction was reversed on appeal and a new trial ordered: *Barra and Govindia* (2019, Appeal in 2021). Two cases resulted in no sanctions either because charges were laid but stayed one year later (*Kushniruk* 2017), or because there was an acquittal (*Arapakota* 2023). Two cases have been settled by way of a remediation agreement (SNC-Lavalin – *Montreal Bridge* (2022); *Ultra Electronics* (2023).[38]

The scant number of judicial decisions, as a body of jurisprudence, provides little guidance and certainty about how existing statutory provisions will be interpreted and applied. This is further aggravated by the fact that some of these cases are now being analyzed by appeal courts, and previous interpretations have been unsettled in such appeals.

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34 *Government of Canada's Integrity Regime,* Ineligibility and Suspension Policy.

35 *Mark Morrison and Michael Dixon, "The Anti-Bribery and Anti-Corruption Review: Canada" (10 December 2021), online: The Law Reviews* https:///thelawreviews.co.uk/title/the-anti-bribery-and-anti-corruption-review/Canada.

36 *Ibid.*

37 *R. v. Watts, [2005] AJ No. 568 (AB QB); R. v. Niko Resources, [2011] AJ No. 1586; R. v. Griffiths Energy International, [2013] AJ No. 412 (AB QB); R. v. Karigar, 2013 ONSC 5199 (CanLII); R. v. Karigar, 2017 ONCA 576 (CanLII); R. c. Bebawi, 2020 QCCS 22 (CanLII); Bebawi c. R., 2023 QCCA 212 (CanLII); R. c. SNC-Lavalin Construction inc. (Socodec inc.), 2019 QCCQ 18961 (CanLII).*

38 *For a full discussion of the various cases, see Jennifer A. Quaid, « The Limits of Legislation as a Tool of Reform: A Study of the Westray Reform to Organizational Sentencing" (2020) 54 RJTUM 511.*

In addition, CFPOA offences can be brought by either the federal Public Prosecution Service of Canada or by a provincial prosecution service. The exclusive investigative body of foreign corruption cases is the RCMP. Resourcing has often been pointed out as being problematic to obtain convictions in Canada, as has the lack of deep specialized knowledge in the field of anti-corruption. Unfortunately, the remediation agreement regime which was meant to help Canada improve its enforcement efforts, has yet to yield many positive results. As it stands, the incentive for organizations to be fully compliant and self-report any wrongdoing is not obvious. Shifting the burden and the threat of non-compliance may thus be an avenue worth exploring.

3. OVERVIEW OF THE UK OFFENCE

3.1. Introduction

Section 7 of the UKBA, enacted in 2010, contains the offence for the failure to prevent bribery. The UK provides an excellent example of how the failure to prevent bribery offence has been implemented and tested in a commonwealth jurisdiction, but in order to understand how it works, we must begin with corporate liability in the UK.

Under United Kingdom law, corporate criminal liability may:

- arise vicariously for the acts of company agents/employees;
- arise non-vicariously from the identification principle, which provides that "the acts and state of mind" of those who represent the "directing mind and will" of a company can be imputed to the company itself[39]; or
- be created through legislation.

For offences that require *mens rea*, the identification principle is used to identify which corporate officers can be treated in law as the embodiment of the company, and, therefore, their acts and states of mind are deemed to be those of the company as "controlling officers" of the company.[40]

The evidentiary challenges that arise in the context of prosecuting identification principle offences led to the enactment in the UK of laws that specifically create corporate criminal liability, such as the UKBA and others.

39 *Tesco Supermarkets Ltd v Nattrass [1972] AC 153 at paras 191–199 [Tesco].*

40 *R v St Regis Paper Co Ltd [2012] PTSR 871 at para 6.*

3.2. Failure to Prevent Bribery (s.7 of the UKBA)

Section 7 puts the onus on commercial organizations to ensure that they have adequate policies and procedures in place to have a full defence in the circumstances where an employee commits a bribery offence. Thus, a commercial organization commits the offence in Section 7 of failing to prevent bribery when a person associated with it commits the offences in Sections 1 (active bribery) and 6 (bribery of foreign officials) of the UKBA on behalf of the organization (i.e., the associated person commits bribery with the intention of obtaining or retaining business or an advantage in the conduct of business for that organization). This offence only applies to the organization itself and not the associated individual(s). However, the organization has a full defence if it can show that, on a balance of probabilities, at the time of the offence, it had adequate procedures in place to prevent persons associated with it from committing bribery. Section 7, therefore, articulates a strict liability offence.

Section 7's Extraterritorial Jurisdiction

Section 7 applies to a commercial organization if it is incorporated in the UK or anywhere in the world, provided that it "carries on a business, or part of a business, in any part of the United Kingdom."[41] The UK Ministry of Justice has published guidance on the implementation of anti-bribery measures for commercial organizations, which suggests a common sense approach in identifying whether an organization falls within the jurisdictional scope of section 7 (the "UKBA Guidance"):

> "Applying a common sense approach would mean that organizations that do not have a demonstrable business presence in the [UK] would not be caught[.] … [H]aving a UK subsidiary will not, in itself, mean that a parent company is carrying on a business in the UK, since a subsidiary may act independently of its parent or other group companies."[42]

41 *UKBA, s. 7(5)(b).*

42 *UK Ministry of Justice, Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (2011) at 15 [para 36] [UKBA Guidance].*

Person Associated with the Commercial Organization

Section 8 defines a person "associated with the commercial organization" as "a person who performs services for or on behalf of" the commercial organization.[43] The UKBA Guidance clarifies that a "person" can be an individual or an incorporated or unincorporated entity.[44] The capacity in which the person performs services for or on behalf of the commercial organization is immaterial, and the performance of services is determined considering all circumstances relevant to the relationship between the person and the commercial organization. For example, the associated person could be the organization's employee, agent, contractor, or subsidiary. Moreover, the UKBA creates a presumption that an employee of the organization is a person who performs services on its behalf, unless shown otherwise. Overall, the UKBA Guidance clarifies that the term's scope was intended to be construed as broadly as possible.

The Adequate Procedures Defence

Section 7 creates a full defence for commercial organizations with adequate procedures to prevent associated persons from committing the offences in Sections 1 and 6 of the UKBA (i.e., developing and implementing an anti-bribery compliance program). Furthermore, the UKBA Guidance sets forth six principles that should guide commercial organizations in developing and implementing adequate procedures under Section 7. The UKBA Guidance also provides extensive commentary and case studies to contextualize the meaning of each non-prescriptive principle, because each principle is intended to be flexible, and outcome focused. These principles are[45]:

1. *Proportionate procedures*: The commercial organization's procedures to prevent bribery should reflect the bribery risks that the organization faces, and the "nature, scale, and complexity of its activities." They should be "clear, practical, accessible, and effectively implemented and enforced."[46]

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43 UKBA, s. 8(1)

44 UKBA Guidance, at 16 [para 37].

45 Ibid at 21–31.

46 Ibid at 21.

2. *Top-level commitment*: Management should be committed to preventing bribery and fostering an ethical business culture where bribery is not tolerated.[47]
3. *Risk assessment*: The commercial organization should periodically assess and document the nature and extent of its exposure to potential external and internal bribery risks.[48]
4. *Due diligence*: The commercial organization should implement risk-based due diligence procedures to mitigate identified bribery risks.[49]
5. *Communication and training*: The commercial organization should aim to embed its bribery prevention policies and procedures throughout the organization, and it should seek to ensure that they are understood through internal and external, proportional, and risk-based communication and training.[50]
6. *Monitoring and review:* The commercial organization should periodically monitor and review its anti-bribery policies and procedures and improve them where necessary.[51]

Section 7 in Practice

The UK Serious Fraud Office (SFO) is responsible for enforcing the UKBA. It conducts investigations, lays charges, and prosecutes cases before the UK criminal courts, as well as negotiating Deferred Prosecutions Agreements (DPAs) with defendants, which are subject to judicial approval.

In 2020, the SFO issued guidance on compliance programs,[52] wherein they specified that the review of a commercial organization's compliance program will inform the SFO's decision to prosecute, to invite the commercial organization to negotiate a DPA, and to seek a given sentence. In particular, the SFO considers whether a commercial organization can mount an

47 *UKBA Guidance, at 23.*

48 *Ibid at 25.*

49 *Ibid at 27.*

50 *Ibid at 29.*

51 *Ibid at 31.*

52 *Serious Fraud Office, "Evaluating a Compliance Programme" (2020), online:* https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/evaluating-a-compliance-programme/.

effective "adequate procedures" defence when deciding to prosecute.[53] At the sentencing stage, a compliance program that could not support the "adequate procedures" defence could still be considered a mitigating factor. Relatedly, the SFO's 2013 DPA Code of Practice[54] stipulates that the state of a commercial organization's compliance program would influence the decision to impose a compliance monitor on an organization that sought to settle and signaled that a genuine and proactive compliance program should not typically lead to the imposition of a compliance monitor.[55]

Potential Future Developments

In 2017, the UK enacted the *Criminal Finances Act 2017*, which created a new offence for failure to prevent facilitation of tax evasion.[56]

In 2020, the UK government requested a report on possible future reforms to corporate liability law from the Law Commission, a UK independent body that conducts research and consultations to make systematic recommendations about revising the legal framework to the government. The Commission's 2021 Options Paper proposed four general principles for the creation of future 'failure to prevent' offences:[57]

1. Liability should only attach to corporations if the unlawful conduct was undertaken by the employee or agent in order to benefit the organization.
2. Organizations should have a defence if they can prove that they had prevention procedures in place that were reasonable in the circumstances. They should also have a defence if they can prove it was not reasonable for such procedures to be in place.
3. The government should be required to publish guidance on adequate

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53 *Ibid.*

54 *Serious Fraud Office, "Deferred Prosecution Agreements" (2013), online:* https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements/.

55 *See the Annex for the convictions and DPAs that the SFO has brought under Section 7 since 2010.*

56 *Criminal Finances Act 2017 (UK), ss 45–46.*

57 *Law Commission, "Corporate Criminal Liability: Summary of the options paper" (2021) at 7 [Law Commission Summary].*

procedures for the defence; additionally, the government could create or approve sector-based guidance.

4. There should not be any presumption of extraterritoriality, i.e., there should not be a presumption that conduct overseas is covered; rather, the decision to make the offence extraterritorial should be made within the specific offence's context.

4. OTHER INTERNATIONAL "FAILURE TO PREVENT" OFFENCES

4.1. European Commission Anti-Corruption Directive

In May 2023, the European Commission released their proposed directive on combatting corruption in the European Union (EU).[58] Included in the directive is a failure to prevent style offence. Article 16 describes the liability of legal persons under the directive. Crucially, article 16.2[59] states legal persons (corporations) can be held liable where there was a lack of supervision or control of a corruption offence. In other words, lack of effective due diligence, training, oversight, policies, or otherwise can be considered a failure to properly supervise the corporation and accounts for a failure to prevent corruption.

EU member states are required to transpose EC directives into national law, meaning this directive may result in several EU member states soon introducing their own failure to prevent corruption offence.

4.2. Australia's New Section 70.5A

Currently, Australia's anti-corruption provisions resemble Canada's with a few differences. There must be a relevant connection to Australia to trigger jurisdiction of the offence of bribing a foreign public official as per section 70.5 of the Code.[60]

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58 COM/2023/234 final, *Proposal for a Directive of the European Parliament and of the Council on combatting corruption.*

59 *Article 16.2 states "Member States shall take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission, including by any of the persons under his authority, of any of the criminal offences referred to in Articles 7 to 14 for the benefit of that legal person."*

60 *Criminal Code Act 1995 (Austl), s 70.5 [AUS Criminal Code].*

Australia's corporate criminal law attributes fault to the commercial organization where a culture existed that "directed, encouraged, tolerated or led to non-compliance" with the anti-bribery provisions, or where the corporation failed to "create and maintain a corporate culture that required compliance" with the anti-bribery provisions.[61] Australia has introduced an amending bill before Parliament to introduce a failure to prevent bribery offence similar to that which exists under the UKBA.

The *Crimes Legislation Amendment (Combatting Corporate Crime) Bill, 2019*, would be added as section 70.5A of the Criminal Code, and it proposes several amendments to Australia's anti-bribery provisions, including[62]:

- Amending the offence of bribery of a foreign public official to extend the definition of foreign public official to include a candidate for office.
- Removing the requirement that the foreign official must be influenced in the exercise of their duties.
- Replacing the requirement that a benefit and business advantage must be "not legitimately due" with the concept of "improperly influencing" a foreign public official.
- Extending the offence to cover bribery to obtain a personal advantage.
- Creating a new offence of failure of a body corporate to prevent foreign bribery by an associate.

Extraterritorial Jurisdiction

A commercial organization is in scope if it is (i) a constitutional corporation; (ii) incorporated in a Territory of Australia; or (iii) taken to be registered in a Territory under section 119A of the *Corporations Act 2001*.[63] An associate of the organization is guilty of the offence if it engaged in conduct outside Australia that would constitute an offence if that conduct had been engaged in Australia.

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61 *Ibid, s 12.3(2)(c) and (d).*

62 *Note that while the legislation made its way through parliament, it has yet to enacted. Crimes Legislation Amendment (Combatting Corporate Crime) Bill, 2019 (Austl) [Australia Failure to Prevent Amendment]. Available online:* https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=LEGISLATION;id=legislation%2Fbills%2Fr7055_first-reps%2F0001;query=Id%3A%22legislation%2Fbills%2Fr7055_first-reps%2F0000%22;rec=0.

63 *Ibid, section 8.*

The failure to prevent bribery offence is extraterritorial and requires a similar nationality threshold to the CFPOA. Additionally, Australia's failure to prevent offence is an absolute liability offence. Under Australian law "absolute liability and strict liability are alike in the absence of any requirement that the prosecution prove intention, knowledge, recklessness, negligence or any other variety of fault. The sole difference between these modes of criminal responsibility is that absolute liability does not even permit a defence of reasonable mistake of fact."[64] The organization may be convicted of an offence because of the commission of an offence by an associate even if that associate has not been convicted of the offence.[65] An associate is an individual connected to the organization, whether through employment, management, holding shares, or otherwise. Associates can be used to hold the organization accountable even without prosecuting the associate themselves.

Adequate Procedures Defence

The Australian government published draft guidance on the types of measures an organization could implement to prevent an associate from bribing a foreign public official.[66] The offence of failing to prevent bribery would not apply if the corporation had adequate procedures in place designed to prevent its associates from committing foreign bribery. There are several principles in the draft guidance that illuminate the vision that the government had for corporations' implementation of anti-bribery policies and procedures.

- Proportionality:
    - The policies and procedures a corporation implements to prevent foreign bribery and corruption should be proportionate to its circumstances.[67]
- Effectiveness:
    - There are five main components of an effectively implemented compliance program: 1) a strong ethical culture of integrity in the organization; 2) conduct that demonstrates senior management and directors' commitment to compliance; 3) "a strong anti-bribery

64 *Australia Attorney General's Office, "Commonwealth Criminal Code: Guide for practitioners".*

65 *Ibid.*

66 *Attorney-General's Department, Combatting Corporate Crime Bill 2019: Guidance on adequate procedures to prevent the commission of foreign bribery (2019) [Australia Draft Guidance].*

67 *Ibid at para 75.*

compliance function"; 4) "effective risk assessment and due diligence procedures"; and 5) "careful and proper use of third parties."[68]

- Elements of Bribery Prevention Policies:
    - An organization's anti-bribery policies should be easily understood by all its associates. The policies should articulate the organization's corruption risks, the systems it has designed to mitigate these risks, and the procedures and measures established to prevent the organization's associates from committing bribery.[69] Corporations should adopt a policy of requiring entities over which they have control to implement adequate anti-bribery measures. This could be implemented as a condition of engagement.[70]

While the Bill has passed all levels of Parliament, it still awaits Royal Assent. Nonetheless, the background work that Australia has put into a failure to prevent offence further demonstrates its potential utility in shifting the anti-corruption conversation to one about prevention rather than prosecution.

4.3. Bermuda

The Bribery Act 2016[71] is Bermuda's main anti-corruption legislation, and it is largely based on the UKBA. It casts a wide net, as the Bribery Act applies to all Bermudians, Bermuda residents, and entities incorporated or registered in Bermuda.

Section 9 of the Bribery Act is the failure to prevent bribery offence. It contains an adequate procedures defence like the UK and the proposed Australian amendment. Under Section 9, a relevant commercial organization is liable to prosecution if a person associated with it bribes another person with the intention to obtain or retain a business advantage for that organization.

The Act establishes a territoriality connection with Bermuda, but it is not necessary that the act of bribery have a substantial nexus with Bermuda for a Bermudian company to be liable. Section 9 does not require the associated person to be connected to Bermuda, nor does it require an act to have taken place in Bermuda.

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68 Ibid at para 82.

69 Ibid at para 85.

70 Ibid at para 90.

71 Bermuda, Bribery Act, 2016 [Bermuda Bribery Act].

For example, a non-Bermuda company that does business in Bermuda, and that does not have adequate procedures in place, could face prosecution in Bermuda for conduct that occurred wholly outside Bermuda by an individual without any connection to Bermuda.[72]

Adequate Procedures Defence

A key feature of a failure to prevent offence is the availability of an adequate procedures defence. The commercial organization has a full defence if it can show that, despite a particular case of bribery, it had adequate procedures in place to prevent persons associated with it from committing bribery. The standard of proof is the balance of probabilities.

4.4. Comparison with Canada

Bermuda and Australia's failure to prevent offences, and their associated adequate procedures defences, have much in common with Section 7 of the UKBA. As Canada considers the implementation of a similar offence, it would likely mirror those of these commonwealth jurisdictions where it has a similar legal structure and corporate criminal law tradition.

5. THE ROAD AHEAD FOR CANADA

5.1. Introduction

The main purpose and objective of the failure to prevent offence is to shift part of the burden of enforcement of anti-bribery and anti-corruption laws onto corporations themselves. That is, the offence incentivizes corporations to proactively implement strong and robust anti-corruption programmes internally. The purpose of the UKBA offence is "'to influence behaviour and encourage bribery prevention as part of corporate good governance.'"[73] This incentivization and influence is crucial for

72 *Ben Adamson, "Unveiling Bermuda's new Bribery Act" (17 January 2018), online:* https://www.cdr-news.com/categories/expert-views/7883-unveiling-bermuda-s-new-bribery-act.

73 *Liz Campbell, "Corporate liability and the criminalisation of failure" (2018) 12:2 Law and Financial Markets Review 57 at 59. Quoting from Mike Penning's Foreword to the UK Government's publication, Insight into awareness and impact of the Bribery Act (2010): Among small and medium sized enterprises (SMEs) (2015) at 3.*

establishing a *de rigueur* corporate culture of compliance, which could effectively isolate bad actors within a commercial organization and create a higher standard of ethical practice in Canada's corporate community.

A secondary purpose, which may prove to have more practical enforcement importance, is that, if Canada adopted a failure to prevent offence as a strict liability offence, the Crown's enforcement challenges could be greatly reduced. This is because of two key distinctions between existing subjective mens rea corruption offences and a strict liability failure to prevent offence:

1) The nature of the fault that must be established (subjective mens rea of knowledge for acts of corruption vs simple negligence for failure to prevent).
2) Who bears the burden of proof. For corruption offences, the Crown must prove knowledge beyond a reasonable doubt. For a failure to prevent strict liability offence, once the Crown proves beyond a reasonable doubt that an act of corruption occurred, the accused is **presumed negligent** and can be convicted unless they can establish they were diligent on a balance of probabilities.

Though the creation of a strict liability failure to prevent offence would be new to Canadian criminal law, the concept of sanctioning poor risk management is not. There is arguably a generic failure to prevent element imbedded in organizational liability in Canada through the third basis of imputing the subjective intent of a senior officer to the organization. Section 22.2(*c*) of the Criminal Code states: "knowing that a representative of the organization is or is about to be a party to the offence, does not take *all reasonable measures* to stop them from being a party to the offence" (emphasis added)[74]

More broadly, the use of strict liability offences in federal and provincial regulatory regimes is widespread. The combination of a negligence fault standard that places the legal onus on the defendant to show that it took all reasonable precautions and exercised due diligence has long been accepted as a constitutionally sound[75] means

74 *Profiting from Risk Management and Compliance by Todd L. Archibald and Kenneth E. Jull Chapter 10. The Changing Face of Corporate and Organizational Criminal Liability IV. The New Law of Expanded Organizational Criminal Liability § 10:25. Levels Below that of Senior Officer—Taking of All Reasonable Measures as a Potential Defence*

75 *R. v. Wholesale Travel Group Inc*

to encourage the adoption and maintenance of robust policies and prevention measures that reduce foreseeable risks of noncompliance with rules and standards designed to protect the public interest. [76]

For a corporation to take advantage of the Adequate Procedures defence, the burden would shift onto the corporation to show that they had procedures in place that would allow them to have a full defence under the law. The Crown would need to evaluate the rigour and application of an organization's anti-corruption policies and could seek charges for failing to prevent corruption if they were deemed inadequate.

Historically, Canada has struggled to meet its anti-corruption commitments to effectively enforce and prosecute foreign bribery and corruption among its corporations required by the OECD Convention and the UNCAC.[77] Very few charges—and fewer convictions—have been brought since the enactment of the CFPOA. The expansion of the definition of "senior officers" whose conduct can trigger liability for the corporation has been helpful, but it has not been enough to turn the tide on Canada's enforcement record. A failure to prevent offence, if paired with greater resourcing and better enforcement strategies, would likely be helpful to shore up the issues in Canada's anti-corruption legal system.

5.2. The Structure of a Potential Canadian Failure to Prevent Offence

Just as the UK's failure to prevent offence is triggered by conduct contrary to sections 1 and 6 of the UKBA, a failure to prevent offence in Canda would be triggered by associated person(s)' conduct contrary to sections 3 and 4 of the CFPOA.

Additionally, taking the UK's and Australia's examples, Canada could structure the failure to prevent offence in such a way that it is triggered by a wider range of persons associated with the organization, which would further reduce the investigatory and enforcement burdens on the Crown.

The UKBA guidance on effective compliance programs, and the Australian draft guidance may prove quite useful and instructive for the possible implementation

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76 R. v. Wholesale Travel Group Inc., [1991] 3 S.C.R. 154, 84 D.L.R. (4th) 161.

77 *See OECD (2023),* Implementing the OECD Anti-Bribery Convention in Canada: Phase 4 Report.

of a failure to prevent offence in Canada. The principles for effective compliance procedures that a corporation could implement could help both legislators and corporations, who would likely be consulted on any potential amendment to the CFPOA, craft a tailored legislative amendment. It is important to note that the Australian draft guidance's 'proportionality' principle emphasizes the role that circumstance and context play in a given corporation's ability to implement policies and procedures.[78] In other words, anti-corruption programmes aimed at preventing corruption should be tailored to the realities, size, reach, industry sector and overall profile of the organization.

6. RECOMMENDATIONS AND CONCLUSION

Though TI Canada has been hesitant to solve anti-corruption enforcement issues by calling for new laws, adding a failure to prevent offence to Canada's anti-corruption arsenal could prove very effective. Enforcement requires proper resourcing, expertise, investigative prowess, and prosecutorial strength. While there is much to do on enhancing enforcement efforts with Canada's current suite of anti-corruption laws, the failure to prevent offence has several advantages:

- It puts prevention first. The threat of prosecution stems from organizations ignoring their requirements to address corruption risks. The burden on the prosecution is therefore reduced.
- Proving a failure to prevent offence requires a lower threshold than other CFPOA offences.
- Failure to prevent provides the background for authorities to engage thoughtfully with the private sector by helping them draft policies to address their corruption risks.
- It puts corruption top of mind and provides authorities with an offence that has a realistic prospect of conviction.
- Provides private sector first movers with an opportunity to demonstrate their bona fides in the area of anti-corruption and be examples for their peers.

Overall, the creation of a failure to prevent offence and its inclusion in Canada's legislative framework for anti-corruption could prove quite effective for positively incentivizing companies to create effective and context-specific anti-corruption

78 Australia Draft Guidance, at para 75.

programmes. Additionally, it could ease the enforcement and investigative burdens on the Crown. Transparency International Canada recommends the addition of a failure to prevent offence to the Canadian anti-corruption legislative framework.

The current legislative framework for combating foreign corruption and bribery face many challenges including appropriate resourcing, diffuse and uncoordinated enforcement efforts, and a lack of guidance—both formally and from jurisprudence. The creation of a new, failure to prevent offence could have a benefit for the Canadian anti-corruption regime that is more than the sum of its parts. Both the UKBA's and Australia's draft failure to prevent offences provide much needed guidance for Canadian legislators and policymakers, and it is our hope that this whitepaper can be a strong starting point for the crucial research, analysis, and discussions that must occur between the various stakeholders on this matter.

Below, we provide a list of model features for a failure to prevent offence in the Canadian context, as well as a list of pros and cons for adopting such an offence in Canada. The listed cons of adopting the offence deal with the problems that creating such an offence does not solve, rather than direct drawbacks of adopting such an offence.

6.1 List of model features

- Strict liability offence based on commission by associated person of offence under ss 3 or 4 of CFPOA.
- Expanded definition of 'associated person.'
- Adequate procedures defence with robust and complete guidance from the prosecution to assist organizations in meeting the requirements.
- Proportionality, which is important for SMBs (could be as part of guidelines or written into law itself), for examination of procedures in place for full defence.
- Extraterritorial jurisdiction.
- Requirement for government to provide regularly updated guidance both for enforcement entities and corporations.
- Potentially standalone office like the SFO.

6.2. Pros and cons of adopting offence in Canada

Pros

- Puts prevention first.
- Lower evidentiary threshold than other CFPOA offences.
- Provides authorities with background to engage thoughtfully with private sector.
- Puts corruption top of mind for corporate boards and organizations.
- Provides authorities with an offence with a realistic prospect of conviction.
- Allows private sector to take initiative to demonstrate their anti-corruption bona fides and set an example for their peers.
- Reduces enforcement burden.
- Sets in motion the creation of a culture of compliance in the private sector.
- Aligns Canada with some of its key international peers with similar legal systems (US, UK, Australia, EU)

Cons

- Does not address the lack of enforcement resources.
- Does not necessarily solve the issue of the byzantine system of enforcement and investigation, which is spread throughout different government bodies.
- Does not address the lack of enforcement statistics.
- A failure to prevent offence targets different conduct (related to a failure to implement appropriate governance and compliance measures) than the underlying conduct (the acts of corruption or bribery themselves in addition to conduct that tries to conceal any illegal gains) which may not be immediately understood by the public. This could lead to confusion and a perception that corruption is not being treated as serious morally reprehensible conduct.

ANNEX - S.7 FAILURE TO PREVENT CASES IN THE UK

Since 2010, the SFO has brought three convictions and seven DPAs under Section 7:

1. Convictions:
    a. In 2016, Sweett Group plc, a UK-listed infrastructure and building management company, was convicted for a Section 7 offence due to the conduct of a wholly owned foreign subsidiary. The UK company admitted that it had not put in place "adequate procedures" and would not present a Section 7 defence.[79]
    b. In 2018, Skansen Interiors, a small UK-based refurbishment company, was convicted for a Section 7 offence because of bribes paid by its senior management. At trial, the company argued that its small headcount (approximately 30 employees) and its geographically limited operations meant that a detailed and sophisticated anti-bribery policy was not required because not paying bribes is considered common sense. At the same time, the company had been implementing certain internal financial controls and incorporated anti-bribery language in its contracts. For these reasons, the company argued that its procedures were "adequate" under the circumstances. However, the jury did not find the procedures "adequate" and convicted the company.[80]
    c. In October 2021, Petrofac Limited, an oil-field service provider, pleaded guilty to seven counts of failure to prevent bribery. No adequate procedures defence was raised in this case.[81]
2. DPAs:
    a. In 2015, the UK-based Standard Bank settled with the SFO a

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79 *Serious Fraud Office, "Sweett Group PLC sentenced and ordered to pay £2.25 million after Bribery Act conviction" (2016), online:* https://www.sfo.gov.uk/2016/02/19/sweett-group-plc-sentenced-and-ordered-to-pay-2-3-million-after-bribery-act-conviction/.

80 *Joanna Ludlam et al., "UK: 'Adequate procedures' and self reporting under the spotlight as jury rejects Section 7 defence" (2018) Global Compliance News, online:* https://www.globalcompliancenews.com/2018/03/14/adequate-procedures-rejects-defence-20180313/.

81 *Serious Fraud Office, "Serious Fraud Office secures third set of Petrofac bribery convictions" (2021), online:* https://www.sfo.gov.uk/2021/10/04/serious-fraud-office-secures-third-set-of-petrofac-bribery-convictions/.

Section 7 charge, according to which one of its foreign affiliates paid foreign government officials to induce them to favour the bank's proposal for a US$600 million project.[82]

b. In 2016, Sarclad Ltd, a UK-based steel supplier, settled various bribery-related charges, including a Section 7 offence. Between 2004 and 2012, three company employees systematically bribed foreign officials through agents to secure contracts.[83]
c. In 2017, Rolls-Royce plc, a UK-based aerospace company, settled multiple counts of bribery-related offences, including two Section 7 offences for misconduct in at least five jurisdictions, involving inadequate anti-bribery controls over its employees and business partners.[84]
d. In January 2020, Airbus SE settled five counts of the Section 7 offence in at least five jurisdictions. The company failed to establish adequate policies and procedures to control the conduct of its employees and business partners, who indirectly made illicit payments to various airline executives to obtain business, via their relatives or by sponsoring a sports team owned by such executives.[85]
e. In October 2020, Airline Services Limited, a service provider for the airline industry, settled three counts of the Section 7 offence arising from the use of an agent to obtain three plane refurbishment contracts for an airline where he had worked as a project manager and had access to commercially sensitive information. Moreover, despite the company significantly relying on its agents' strong connections with individual airlines

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82 *Serious Fraud Office, "SFO agrees first UK DPA with Standard Bank" (2015), online:* https://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank/.

83 *Serious Fraud Office, "Three individuals acquitted as SFO confirms DPA with Sarclad" (2019), online:* https://www.sfo.gov.uk/2019/07/16/three-individuals-acquitted-as-sfo-confirms-dpa-with-sarclad/.

84 *Serious Fraud Office, "SFO completes £497.25m Deferred Prosecution Agreement with Rolls-Royce PLC" (2017) online:* https://www.sfo.gov.uk/2017/01/17/sfo-completes-497-25m-deferred-prosecution-agreement-rolls-royce-plc/.

85 *Serious Fraud Office, "SFO enters into €991m Deferred Prosecution Agreement with Airbus as part of a €3.6bn global resolution" (2020), online:* https://www.sfo.gov.uk/2020/01/31/sfo-enters-into-e991m-deferred-prosecution-agreement-with-airbus-as-part-of-a-e3-6bn-global-resolution/.

to obtain new business, the company had failed to educate its personnel and establish policies and procedures to detect and remediate bribery. To the contrary, the agents' compensation was primarily incentive-based.[86]

f. In June 2021, Amec Foster Wheeler Energy Limited entered into a DPA relating to the use of corrupt agents in the oil and gas sector. Among other things, the company settled one count of the Section 7 offence according to which the company failed to prevent its associated persons from bribing employees or agents of Petróleo Brasileiro S.A, intending to obtain the award and/or retention of a contract to design a gas-to-chemicals complex in Brazil.[87]

g. In July 2021, two UK-based companies, Bluu Solutions Limited [BSL] and Tetris Projects Limited [TPL], both of which are subsidiaries of Jones Lang LaSalle, a real estate company, entered into two separate DPAs. BSL accepted responsibility for four offences of bribery and one offence of failure to prevent bribery, while TPL has accepted responsibility for one offence of failure to prevent bribery. The offences dealt with office refurbishment contracts.[88]

86 *Serious Fraud Office, "SFO enters into Deferred Prosecution Agreement with Airline Services Limited" (2020), online:* https://www.sfo.gov.uk/2020/10/30/sfo-enters-into-deferred-prosecution-agreement-with-airline-services-limited/.

87 *Serious Fraud Office, "SFO enters into £103m DPA with Amec Foster Wheeler Energy Limited" (2021), online:* https://www.sfo.gov.uk/2021/07/02/sfo-enters-into-103m-dpa-with-amec-foster-wheeler-energy-limited-as-part-of-global-resolution-with-us-and-brazilian-authorities/.

88 *Serious Fraud Office, "R v Bluu Solutions Limited and Tetris Projects Limited" (2023), online:* https://www.sfo.gov.uk/cases/r-v-bluu-solutions-limited-and-tetris-projects-limited/.

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