

## Client Alert: Brexit and Bribery and Corruption

**Date :** March 16, 2021

*We first produced this note in 2016 but we have updated it with more recent developments including recent statements from the UK Serious Fraud Office.*

### Introduction

Now that Brexit has happened we're updating our earlier guidance on the effects of Brexit on UK bribery law.

### Will the law change?

The heart of the UK's anti-bribery legislation, the Bribery Act 2018, is UK-originated legislation and, as a result, the basics of anti-bribery law in the UK are not be affected by Brexit.

The UK has long been a leader in the fight against corruption – the first specific anti-bribery legislation came in in the UK in 1889. You can find out more about the Bribery Act 2010 in our FAQs here (<http://www.corderycompliance.com/uk-bribery-act-2010-faqs/>).

As a result, there is likely to be little change. The UK Bribery Act 2010 is not part of a body of EU legislation and the UK bribery prosecutors are independent of the EU regime.

### What about enforcement?

The UK Bribery Act 2010 has extra-territorial reach and it is already possible for a non-UK EU national to be prosecuted in the UK and for a UK national to be prosecuted for events which took place in the EU. As we have said, prosecutions under the Bribery Act 2010 are by the UK authorities and not the EU.

However, corruption at an EU level, for example corruption at the European Commission, is currently investigated by an EU body known as OLAF (Office Européen de Lutte Antifraude). OLAF is based in Brussels. OLAF also assists EU Member States in setting their anti-corruption policy. The UK Government has been at odds with OLAF as it disputes its findings in an investigation into the duty on Chinese shoes. Given OLAF's fairly limited role in UK business however this is unlikely to be a major compliance issue for most businesses.

### European Arrest Warrant

One of the main areas of speculation about the impact of Brexit has been the fact that the UK would not be able to participate in the European Arrest Warrant (EAW) scheme. The EAW is an arrest warrant valid throughout all Member States of the EU. Once issued, it requires another Member State to arrest and transfer a criminal suspect or sentenced individual to the issuing state so that the person can be put on trial or complete a detention period. It is important to remember that an EAW can only be used for the purposes of conducting a criminal prosecution (not merely an investigation) or enforcing a custodial sentence – although there is a broadly similar system which can be used in investigations.

It is our view that the loss of the EAW mechanism is perhaps not as profound as some have said. There are a number of reasons for that:

1. The UK tends to rely on bilateral cross-border cooperation for example, in the recent Unaoil prosecution (see here <https://www.corderycompliance.com/sbm-exec-convicted-in-sfo-case/>), the following countries were credited with cooperation: Australia, France, Monaco, The Netherlands, United States of America. Whilst this cooperation does not necessarily extend to the arrest and return of suspects bilateral arrangements do exist and the UK is still part of the Interpol regime. Suspects have been arrested overseas and sent to the UK for trial – one example might be the arrest of former Nigerian politician James Ibori in Dubai.

2. The loss of the EAW mechanism does not impact of the Serious Fraud Office's ability to gather information for example, by use of s.2 Criminal Justice Act 1987 (CJA 1987). Whilst the ability of the SFO to use the s.2 process in some investigations has been limited recently by the Supreme Court in the KBR case (see here <https://www.corderycompliance.com/kbr-sfo-litigation/>), it is still a powerful weapon and as we explained in our KBR alert, there are other similar mechanisms in place for gathering evidence as well.
3. Few know how often the EAW has been used. This information is not publically available and we recently asked the SFO how many times they had used the EAW procedure in the last three years. The SFO said that it held this information but it refused to disclose it. In the year June 2019 to June 2020, according to statistics from the National Crime Agency, only 285 EAWs were issued across all of the UK's law enforcement agencies. Whilst it is regrettable that the SFO are not transparent in their use of the EAW procedure it seems unlikely that the use of the EAW procedure in bribery cases is a regular occurrence.

Our thoughts seem to be matched by the SFO's current Director, Lisa Osofsky. Speaking at a Society Of Corporate Compliance & Ethics (SCCE) event on 15 March 2021 Ms Osofsky said that Brexit "won't stop people taking my calls." She stressed that cooperation between prosecutors was often on a personal not corporate level, that the EAW was a relatively new instrument and that some arrest warrants post-Brexit had been issued through Interpol instead.

### **What about future prosecutions?**

As we have said UK investigations traditionally rely on prosecutors in a number of other countries to help bring bribe payers and bribe receivers to justice. That co-operation is unlikely to be impacted by Brexit. For example, the Swiss authorities have featured in a number of recent cases and Switzerland is not in the EU.

One possible affect could be on an EU that does not include the UK. Some countries in the EU have updated their own anti-bribery laws, including France with the implementation of Sapin II (<http://www.corderycompliance.com/france-adopts-new-sapin2-anti-corruption-law/>), but other EU Member States still have much to do. Often in this context OECD pressure is heavier than EU pressure but one voice arguing for more enforcement has been lost from the EU.

### **What about the conflicts between anti-bribery enforcement and GDPR?**

We have seen potential conflicts in investigations between data protection law and the investigation of bribery offences. We have outlined some of the issues in our Bribery Act 2010 FAQs and in our alert here <https://www.corderycompliance.com/data-transfers-and-investigations/>. Those challenges remain post-Brexit since there is little change in UK data protection law. Our alert here (<http://www.corderycompliance.com/brexit-and-data-protection/>) gives more details.

### **Will bribery increase?**

One side-effect of Brexit could be a rise in bribery. As a general rule the more numerous and complicated customs and border checks are the more scope there is for bribery. The chaos of Brexit has come at the same time as many organisations struggle with heightened bribery risks during the pandemic – see our thoughts on that here <http://www.bit.ly/covbribe>. Brexit may also mean that UK based companies chase business in more risky markets. It is too early to say if Brexit will lead to an increase in bribery but organisations will want to be on their guard.

### **For further information**

Cordery's Brexit Impact Plan helps businesses make sure that they are Brexit-ready. There are more details here <https://www.corderycompliance.com/solutions/brexit-impact-plan/>. You can also find our alerts on other Brexit topics here (<http://www.corderycompliance.com/?s=brexit>). We also have a Brexit Newswire. If you are interested in our Brexit Newswire, please email André Bywater on the address below.

For more information please contact André Bywater or Jonathan Armstrong who are lawyers with Cordery in London where their focus is on compliance issues.

**André Bywater**

Office: +44 (0)207 075 1785

[andre.bywater@corderycompliance.com](mailto:andre.bywater@corderycompliance.com)



[Jonathan Armstrong](#)

Office: +44 (0)207 075 1784

[jonathan.armstrong@corderycompliance.com](mailto:jonathan.armstrong@corderycompliance.com)

