HOUSE OF LORDS

# Bribery Act 2010 Committee

## Corrected oral evidence: Bribery Act 2010

Tuesday 27 November 2018

10.35 am

Watch the meeting

Members present: Lord Hodgson of Astley Abbotts (Chairman); Lord Empey; Baroness Fookes; Lord Grabiner; Lord Haskel; Lord Hutton of Furness; Lord Plant of Highfield; Baroness Primarolo; Lord Thomas of Gresford.

Evidence Session No. 20 Heard in Public Questions 177 - 183

## Witnesses

I. Roger A Burlingame, Partner, Dechert LLP; Dr Branislav Hock, Lecturer in Counter Fraud Studies, University of Portsmouth.

USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

# Examination of witnesses

Roger A Burlingame and Dr Branislav Hock.

Q177 **The Chairman:** Good morning and thank you for coming along. Unfortunately, Lord Saville, who normally chairs this Committee, cannot be here, so I have taken over the chair for this session.

A list of Members' interests relevant to the inquiry has been sent to you and is available. I remind you that the session is open to the public, is broadcast live and is subsequently accessible via the parliamentary website. A verbatim transcript will be taken of the evidence and put on the parliamentary website.

A few days after the session you will be sent a copy of the transcript to check for accuracy. It will be most helpful if you can advise us of any corrections you wish to make as quickly as possible.

Finally, if, after this evidence session, you wish to clarify or amplify any points made during your evidence, or have additional points you wish to make, you are most welcome to submit supplementary evidence to us at that time, but quickly please.

We have all read the brief on you. Please introduce yourselves briefly for the purposes of the transcript. The acoustics in this room are pretty bad, so turn the volume up if you can.

***Dr Branislav Hock:*** I am a lecturer in counter-fraud studies at the University of Portsmouth. I have been researching the effectiveness of foreign anti-corruption law for six years. I have written several articles and I have a forthcoming book that focuses on extraterritorial enforcement of anti-bribery law. I was a researcher in the Netherlands at the Tilburg Law and Economics Center, and I am originally from the Czech Republic where I graduated in law.

***Roger A Burlingame:*** Good morning. I am a partner at Dechert LLP. I am an American living in London. I represent British and European companies and individuals who are facing enforcement actions by the DOJ, the SEC or the CFTC in the United States. I was a federal prosecutor in New York City for 10 years, where I ended as the chief of the public corruption section. One of the core areas in which I represent entities and people now is in respect of FCPA prosecutions and investigations.

Q178 **The Chairman:** Thank you very much. I will pose the first question. What effect do you think the Bribery Act has had on business practices in the UK and with international companies? How prevalent do you think bribery by UK companies is, and how are the UK's efforts to tackle bribery perceived by other countries?

***Dr Branislav Hock:*** There are three questions there, so I will divide my response. When we speak about the effects of the Bribery Act, it is important to take into account the effect that it has had on large multinational corporations and the effect on small and medium-sized enterprises. There is a huge difference. Originally, the Bribery Act was

meant to regulate large multinationals as a result of certain problems and enforcement issues, such as the BAE Systems enforcement action.

Most large multinationals already had to comply with US law before the Bribery Act was adopted, so it is nothing too new for large multinationals. What is new, however, is that the Bribery Act and its enforcement is an exemplification of more multilateral enforcement regimes. It is not only the US that is enforcing law on anti-corruption; many more countries, including the Netherlands, the United Kingdom and Brazil for instance, are now enforcing it.

These large multinationals, as with Rolls Royce for example, often face multiple overlapping enforcement actions. That is the main effect of the Bribery Act: large multinationals need to take into account that, if they engage in bribery, they are likely to face multiple enforcement actions coming from many countries.

When it comes to small and medium-sized enterprises, this is very new. There are all these issues relating to adequate procedures, failure to prevent bribery, the necessity to implement effective compliance programmes. If the Bribery Act is enforced against small and medium-sized enterprises, the impact is potentially huge.

***Roger A Burlingame:*** I agree that the Bribery Act increases the size of the footprint which the US started to create in this space in the late 1990s, picking up steam in the 2000s, with the FCPA.

Having another regulator out there with similarly large, if not larger, jurisdiction and willing to create meaningful penalties for companies—while there are differences between the laws, the same conduct will violate both—creates a bigger law enforcement footprint. It has spread the message deeper into the business community that companies have to work hard to make sure that they are policing their employees and making sure that they are not engaging in such conduct.

**The Chairman:** I do not think that either of you has answered the second part of the question, which was how prevalent you think bribery by UK companies is, and your assessment of the prevalence.

***Roger A Burlingame:*** It is very difficult to tell, because you do not really know until someone is caught; in my job, I am on the receiving end. Either you are aware that you are acting proactively to prevent yourself from having an FCPA or Bribery Act problem by educating your workforce on what the problems are, or you have already had a problem and are trying to remediate or deal with the fact that the enforcement authorities are coming after you.

Given the rewards out there for self-reporting and the penalties if you are caught not self-reporting, it is fairly rare for someone to turn to someone like me and say, "We have a problem and we're not going to do anything about it".

It is clearly out there. Obviously the net is not catching 100% of the bribery that is going on. You would need somebody with a different field of expertise to give you a good answer to that question.

***Dr Branislav Hock:*** My personal opinion is that it is a serious problem. There is still a lot of bribery, but it is very difficult to obtain data. I have been thinking about how to prove that there is a lot of bribery and I have three arguments, briefly.

First, there is the perception. We can look into the perception of corruption and bribery from the point of view of how the UK as a country is perceived, for example with regard to the Transparency International perceptions index. There should not be so much bribery. However, the problem is that if UK businesses, or other businesses from developed countries, bribe in developing countries, they usually bribe in countries that are the lowest-ranked on the perceptions index. So there might be a problem with these perception indexes, because bribery has a supply and demand side.

Secondly, we can find out whether there is a lot of bribery by looking into cases. The problem there is whether, when we see more cases, it means that the criminal justice system is just working more effectively, or that bribery is increasing. It is very difficult.

It is useful to think about the third point: if you look into anti-trust enforcement you are looking into more developed enforcement regimes. Cartels might be linked very much with bribery. In the Petrobras case, for instance, a large state-owned energy corporation was procuring many goods and services, and suppliers—private companies—were competing for the procurements. These companies were bribing the state-owned corporation because they were bidding for contracts, so contracts were concluded that were not necessary or that were too expensive, for instance. So we can assume there is a link between cartels and bribery.

Let us look at anti-trust enforcement. We should note that not all anti-trust cases are related to bribery, but let us look at more developed regimes. The European Union has been enforcing anti-trust law since the late 1960s, so for 50 years. In 2017, it imposed sanctions of €2 billion to corporations for engaging in cartel cases. In 2016, there were €3.6 billion of sanctions. The anti-trust regime is way more developed than the anti-corruption enforcement regime, because we have a system involving the European Commission and the European Court of Justice, and states are co-operating. We are still seeing these cases after 50 years, which is evidence that there must be a lot of bribery out there.

**Lord Grabiner:** That last answer assumes that in cartel action there is probably a bribery element. Is that what you are suggesting?

***Dr Branislav Hock:*** There might be. Some criminal schemes might include more elements. Bribery is usually associated with other offences such as money laundering, export law violations, books and records

violations—you do not want to say in your accounts that this was bribery, so you call it something else—as well as anti-trusts and cartels.

**Lord Grabiner:** So aside from anti-trust enforcement, competition law and so on, do you have any sense that, rather than use the Bribery Act, some other charge has been made—for example, under English law, misfeasance in public office which is a distinct criminal offence? Do you have any sense that the paucity of cases that have been brought so far under the Bribery Act may be, at least in part, due to the fact that some other charge is being deployed?

***Dr Branislav Hock:*** Yes, I think so. The technique of accumulating alternative charges is very much used by United States enforcement authorities. They do not always use anti-bribery charges and books and records charges, which are provisions of the FCPA. They use export laws, RICO, which is an anti-mafia statute, and the Travel Act with some kinds of commerce.

So my answer is that we need to ask: is it functionally equivalent? Would it provide equivalent sanctions? Would it put equivalent pressure on companies? Sometimes in the United Kingdom only civil recovery orders were used, for instance, which were not considered by the OECD, the Organisation for Economic Co-operation and Development, to be equivalent to criminal charges.

For sure, there is this opportunity—we have seen it in other countries such as the United States—but we should make sure that it does not lower the standard of enforcement.

Q179 **Lord Thomas of Gresford:** How does the Bribery Act compare with equivalent legislation in other countries? Are there other approaches, regarding either legislation or enforcement, from which the United Kingdom could learn?

***Roger A Burlingame:*** This follows on from what Dr Hock just said. There is a big distinction between the way the US uses the Bribery Act and the way the rest of the world is looking at it. There is a growing trend, and, soon, more and more countries will join the ranks of the US and the UK in enforcing these sorts of laws. In that way, England is a leader.

As far as the US perspective goes, the Bribery Act and UK corporate enforcement is in its adolescence compared to a more mature system in the US. There are two differences between the two systems that jump out at me which make the US more effective, or at least make the DOJ more effective.

First, the regime offers more certainty. It does that at a certain cost, which is taking power away from judges and giving it to prosecutors. What companies want in resolving these issues is certainty. When you are dealing with DOJ prosecutors, they can give you the deal and that will be the deal. You can often spend years hammering out what the deal is going to be and then, when you reach that deal, you know what will

happen. There is more incentive for a company that is under investigation to start in on this process knowing that there can be a more certain resolution at the end of it.

The other area where there is a sharp distinction is the willingness of UK versus US law enforcement to leverage the resources of private law firms. When I was a prosecutor and graduated from prosecuting drugs, gangs and bloody things to white collar, in one of my first cases the same firm that I had started my career at, a Slaughter & May-equivalent firm in New York City, was representing the company that I was prosecuting. I knew very well what that law firm could do and what it could do in comparison to me and the two FBI agents who were part of my team. I sent them a subpoena with Herculean tasks set out for them, such as getting global email searches back within an incredibly short amount of time. The partner called me up to complain and said, "This is outrageous. How can you possibly expect us to get all this for you?" I said, "I remember what you can do. This is going to be a big billing opportunity for the firm and I'm sure you're going to be able to meet these demands".

As a result, six weeks later you get binders, perfectly tabbed, with a preliminary slice of the evidence, or at least the law firm's best effort at "Here's what we've found". It is incredibly helpful. As the prosecutor you do not then say, "Great. Let me take these binders and march into the Grand Jury", and, "This is my entire case". It is your starting point, but it gives you leverage and a resource to investigate that you are otherwise incapable of.

Using that technique allows DOJ prosecutors to do so much more work than their British counterparts, who are much less willing to trust the work of the equivalent UK firms in this area. I have sat on panels with members of the FCA and the SFO defending their position, and I find ridiculous the idea that a senior partner at Slaughter & May who is making X million per year is going to put their and their family's livelihood at risk to deep-six a document to try to save the company that they are representing some monetary liability.

It could happen theoretically; it is easy to imagine. But the incentives for companies to co-operate in a straightforward and compliant way are so strong and the penalties so enormous that the partner in effect is presented with the option of, "Either I can go to jail for obstruction of justice if I am found to have got rid of this document, or I can reach a successful resolution for my client by providing helpful co-operation to the Government and reaching that resolution", which is all the client really cares about in the long run: putting an end to the misery. That is an area where the differences in development between the two systems really jump out.

**Lord Thomas of Gresford:** You will appreciate that you are suggesting plea bargaining, and that the criminal law of this country has always set its face against plea bargaining. That is why the deferred prosecution agreements are so tightly drawn and require the consent of the judge.

***Roger A Burlingame:*** Yes.

**Lord Thomas of Gresford:** But you obviously think that plea bargaining would be a good thing.

***Roger A Burlingame:*** There is a downside. The white collar enforcement area in the United States is now a gigantic industry, and it is growing and becoming much bigger here. There are incentives to young prosecutors to put big cases together, because they can then say, "I'm the guy who did that big case", and the law firm is interested in hiring as their newest partner the person who just did the big case.

There are cases that I have been involved in where you would welcome judicial oversight to prevent prosecutors from overreaching, because if you give them that power of certainty you are also relying a lot on the good faith of the prosecutors not to get overly enthusiastic and to appropriately seek justice rather than to win, which is their job but can be a problem when you have ambitious and hardworking people who are struggling to get to the bottom of a situation.

I am not saying that it is always about career advancement and malign motives. It is not that there is a right answer to that question but that the benefit of the way it has evolved in the United States, with judges essentially excluded from the process, is that it allows the machine to run more efficiently and to produce an outcome that is more attractive to a company weighing up whether or not it wants to turn itself in and engage in the nightmare process of investigating itself and coming to a resolution.

**Lord Thomas of Gresford:** But you recognise that it has its dangers.

***Roger A Burlingame:*** Yes.

**Lord Thomas of Gresford:** The second aspect that you talked about was employing large firms that are defending their clients almost as if they were agents of the prosecutor by demanding things from them instead of the prosecutor doing the investigation. Do I understand you correctly?

***Roger A Burlingame:*** I am the prosecutor, and you are using the firm as a tool for your investigation, which is how it works in every case in the United States. You realise that the firm—

**Lord Thomas of Gresford:** This is the defence firm.

***Roger A Burlingame:*** Correct. When you are investigating company A and asking its lawyers to collect emails, you agree on the search terms and you put constraints around the investigation that they are doing on your behalf to make sure that they are conducting the investigation or carrying out your orders in a way that you are happy with.

**Lord Thomas of Gresford:** Is there not a conflict of interest with the firm representing the defendant in such circumstances?

***Roger A Burlingame:*** Ultimately, no. The way it works out is that in the end there is an agreed upon set of facts. As I said, it is rare that a reputable law firm, which is not in the business of doing just this one investigation—there are practices doing this over and over again—will say that up is down or black is white, or hide evidence or obstruct the investigation. In these investigations you tend to get an agreed upon set of facts, and the advocacy comes in where there are differing interpretations as to what the penalties should be for those facts, how the facts are appropriately characterised under the law, and whether there was a violation or not.

As for just using the law firms as a tool for fact gathering, the law firm's job is not to behave in the public interest; it is to represent their client. But it is a disaster for their client if they do anything other than behave in a transparent manner with the prosecutors and conduct the investigation in good faith, especially when what is being produced is emails and sets of employees who have been interviewed to determine the scope of their responsibilities. Anyone or any email that looks interesting you follow up, and do the investigation yourself from that point forward.

My take, on discussing this question with British law enforcement folks, is that it tends to be looked at in a very black and white way; either law enforcement is ceding its authority and farming out its investigative responsibilities to private practice, which is outrageous, or it has to do everything itself. When I was a prosecutor, I was not overly trusting of the companies that were conducting these investigations at my direction, but I could do 10 times as much work if I gave them a lot of work to do. I then thoroughly tested the evidence that they were giving back to me to decide whether it was trustworthy and I believed it.

If you want to see what the client company's ultimate objectives are, in one instance in my career I thought that the lawyers were being overzealous and getting in the way of me getting to what I wanted to find. I wrote a letter saying, "I'm troubled that it does not appear that the company is interested in proceeding in a co-operative posture". The lawyers were fired the next day and a new firm came in.

**Lord Haskel:** The process that you describe sounds very expensive.

***Roger A Burlingame:*** No. It is much cheaper for the Government; it is very expensive for the client.

**Lord Haskel:** Exactly. Does that not put a small firm at a big disadvantage?

***Roger A Burlingame:*** Do you mean if a smaller company is under investigation?

**Lord Haskel:** That is right.

***Roger A Burlingame:*** It does, but the scope of the investigation also varies with the size of the company. Where a massive multinational is involved, collecting the relevant individuals' emails can be a three-month

process, often requiring sifting through millions of emails, but if you are a 30-person entity, that job can be done in a couple of weeks. It is still no fun paying lawyers to do this work for you, but it is a lot less work.

**Lord Hutton of Furness:** Roger, you have given us a clear insight into how the system works in the United States, but you have described a very different system, with plea bargaining and whole range of differential characteristics. Given where we are in the UK, with no plea bargaining and a deferred prosecution agreement structure, do you think it likely that the framework in the UK will be as effective in tackling some of these problems as the framework in the US? You described our system as relatively immature.

***Roger A Burlingame:*** I meant no disrespect.

**Lord Hutton of Furness:** I am sure that none of us took it that way. Can it become as effective a tool?

***Roger A Burlingame:*** I think it will inevitably end up in the exact same place. The overwhelming majority of cases that I have described in the US end up with a deferred prosecution agreement, with its close cousin the non-prosecution agreement, or with some corporate plea, which is effectively the same thing: that is, a way to resolve the situation that prevents a company being indicted and potentially going out of business.

The main difference between how cases are resolved in the UK and in the US at the moment is that greater judicial oversight makes for a more cumbersome procedure, but I think that the more cases there are the clearer the ground rules will become. Once there is a real sense of, "Here's the terrain I'm facing. Here's what the result will be", it becomes much more attractive for corporates to opt in and wipe this liability off their books rather than live with the tell-tale heart beating somewhere within their company.

As you get more corporate self-reporting, either the SFO's budget has to go way, way up or you have to rely more on law firms to leverage the manpower of the SFO in the way that I am describing. As the SFO goes through this procedure more and more, I think it will realise that the firms that it is dealing with are honest brokers in this arrangement and in a way all shooting for the same thing, which is coming to a quick and fair resolution. The different parties might have a different idea as to what "fair" means, and there can be robust debate on that, but I do not think it requires a different route to get there.

**Baroness Primarolo:** In the UK system, if a company wants a DPA, it has fully to co-operate: that is, its representatives have to disclose to the SFO what is required in the investigation. Does that not produce a similar result within the constraints of UK legislation to the one that you are describing? If it does, I do not quite see why you would want to leverage any more from the defence lawyers.

***Roger A Burlingame:*** I think it does. The incentives to co-operate are the same in both the US and the UK, but my understanding of the way the SFO is handling that is not to dole out as much work to law firms and to keep more of it for itself, meaning that it can prosecute far fewer cases because more of its time is being handled with its own people doing that work. Some of that work is scut work, which can be handed off without engaging a lot of the issues that we are discussing. I am sure it is already happening.

**Baroness Primarolo:** Essentially, your point is that, as the system matures and confidence in the mechanisms builds, we might see more of the type of leverage that we are talking about.

***Roger A Burlingame:*** Yes. The revolving door is always raised as a horrifying thing, but you can see it starting to grow [here]. I have been in the UK for six years, and just in that time I have seen more people coming out of the SFO and going into law firms. They understand how things work inside the SFO. More people are heading into the SFO with the idea that they may come out later. You get more trust between the private legal community and the enforcement authorities, which also leads to that mechanism.

Q180 **Baroness Fookes:** We have been given evidence about the opinion procedure in the United States, where a company can seek advice from a government authority on whether what it is proposing to do is likely to fall foul of bribery legislation. How effective do you think this is in the United States? Do you suggest that the UK follow that example?

***Roger A Burlingame:*** It is helpful. It is not used quite as frequently as one might think. It tends to be used in the corporate acquisition context, because, if you buy a company, you buy its historical liability. Some companies discover the hard way that it is not pleasant to buy a gigantic amount of FCPA liability.

In a number of those opinions, company A will say, "We're thinking of buying company B. Here's what we've discovered in looking at company B. Are we going to have an FCPA problem?" So they can get reassurance in that context, which is helpful for the acquiring company. The more transparency there is in how the law is going to be applied, the more helpful it is for the business community in figuring out how they should train their employees to comply with the law, how they will be treated, whether they have a problem and whether they should self-report. To the extent that it increases transparency, it is helpful

**Baroness Fookes:** We do not have such a system in the UK. Would you advise that we consider it?

***Roger A Burlingame:*** I do not think there is any harm in it. In the way the DOJ has structured it, whereby you do not submit hypothetical examples—I could see that becoming a nightmare for the division tasked with answering such questions—if a company is willing to say, "Here's a

real-life problem. I swear to the facts that I am putting in front of you", and in that way put its own skin in the game, it is helpful for everyone.

**Baroness Fookes:** Dr Hock, do you agree?

***Dr Branislav Hock:***. I would not recommend the opinion procedure. We have more important problems. I think the Department of Justice last issued an opinion in 2014, which is four years ago. Since the 1980s, when it was introduced, there have been some 60 questions. There is the worry that if I ask the Department of Justice, I can direct prosecution and am more likely to be asked to self-report.

It is also not very timely; sometimes, eight months are given for a response. It might be useful in some ways, but it has just not been working for many years in the United States. In the United Kingdom there are other issues to consider at this point. That is my opinion.

**Baroness Fookes:** Presumably it could make it more expensive for the prosecuting authority if they have to give opinions.

***Dr Branislav Hock:*** I agree.

**Lord Grabiner:** For what it is worth, we have had evidence from the Serious Fraud Office and others; they are very uninterested in setting up an opinion department because they think that it would distract their attention from the things they should be focused upon. I suspect there is also a money issue; I do not know.

I do not know what you think about the reality of this proposition in the English, or UK, context as opposed to the American one. The impression I have from both your answers is that they have not been doing much of this in the United States for some time now. In this country, it looks as though the relevant authorities are not particularly interested in engaging in that direction.

***Roger A Burlingame:*** I think it is harmless, and if anything only beneficial, but it also often boils down to a "will you or will you not self-report" question, as you were pointing out. It often becomes irrelevant, because if you have discovered a liability you just engage in starting on the co-operation dance as opposed to seeking the opinion.

***Dr Branislav Hock:*** There were questions that were unclear four or five years ago, such as in mergers and acquisitions: "Am I liable for bribes of a company that I am acquiring?"—these kinds of questions. Most of these issues were solved because often, if you see a problem, you just self-report it. That is an answer.

Q181 **Lord Haskel:** How effective do you think the OECD's anti-bribery convention is? Is there any reason to believe, as some have suggested, that bribery from OECD countries is decreasing and that there has been an increase in bribery from non-OECD countries? Do you think we can do anything about this?

***Dr Branislav Hock:*** In speaking about the effectiveness of international treaties, we should first think about what we mean by effectiveness. What is the treaty about? What is it supposed to achieve? The OECD anti-bribery convention is about market regulation. Its objective is to create a level playing field between corporations. It is a very specific instrument that focuses on bribery in international business transactions. I think it has been the most effective anti-corruption treaty in history; it has achieved the most out of all these treaties.

We should understand the convention in its historical context. The United States adopted the FCPA in 1977 because of internal American problems related to the Watergate scandal. Surprisingly, US businesses then started lobbying for more international action against corruption, because they felt that corruption could give them a competitive disadvantage against their European competitors. So in fact it was the US business lobby that facilitated the process. It led 20 years later, at the end of 1997, to the adoption of the OECD Anti-Bribery Convention.

What does this convention do? It says that foreign bribery should be criminalised and it operates on the principle of functional equivalence. For its members, that means that you do not really need to implement the provisions exactly as they are written in the convention, but they should be functionally equivalent. You can see that in Germany, for example, where you do not have the criminal liability of corporations. You do in many other countries, but it is still considered to be functionally equivalent.

That was the key thing that the OECD Anti-Bribery Convention did. Before the adoption of the convention, and even before 2007, there was perhaps not so much enforcement as could be expected. It is only in the last 10 years that we have seen these huge enforcement actions. It was one thing that enabled the United States to enforce these large cases, because other countries had to co-operate with them; they provided them with evidence and became co-operative. After Siemens received sanctions of some €1.4 billion in 2007 or 2008, also involving the German authorities, we started to see these large enforcement actions.

The United States had waited 30 years to achieve really large enforcements. The United Kingdom had had its problems with BAE Systems, when for political reasons the enforcement was closed, but the United States authorities then came and took the enforcement over and sanctioned the company instead of the UK. The OECD, based on its monitoring peer-review system, harshly criticised the United Kingdom, since part of the reason for the wider Bribery Act that it had adopted was in order to change ineffective laws.

**Lord Haskel:** When you say that the OECD rules are helping regulation, what other aspects of trade are they helping?

***Dr Branislav Hock:*** The question of competitive disadvantage is still important. The other part of your question was about what to do if we assume that you take risks as a company if you are in a market where

there is bribery. You might not want to invest in that market. What might happen instead is that black knights come into these markets that do not have to comply with the OECD Anti-Bribery Convention.

Already in 2007 there was empirical evidence that companies with headquarters in countries with relatively low levels of corruption tend to invest more in countries with relatively low levels of corruption. On the other hand, companies based in countries with relatively high levels of corruption tend to invest more in countries with relatively high levels of corruption. In other words, corruption invites corruption.

It is all based on perceptions. Still, we see that despite the fact that some companies need to comply with strong clauses and other companies do not, the less corrupt companies are still investing in these problem markets. So on the one hand the obligation to comply is only one element of a much larger regulatory package; you might need to have higher-quality products or comply with environmental obligations but it is only one part.

On the other hand, the key thing that I see in my research is that the competitive disadvantage is not so huge, because many non-OECD companies with headquarters in non-OECD countries need to comply with the US Foreign Corrupt Practices Act. The difference between the US Foreign Corrupt Practices Act and the Bribery Act is that the Bribery Act has not been enforced by non-UK corporations. In my research, I see that the majority of corporations sanctioned by the United States authorities were non-US corporations. Between 2008 and 2015, $4.4 billion in sanctions were awarded to non-US corporations, or corporations that had stronger ties to countries other than the United States, while only $1.4 billion was imposed on corporations that are US-based.

I do not say that this is protectionism, but it might be, because, as was mentioned, having a strong compliance programme is a huge business in the United States. Maybe French companies 10 years ago did not have a compliance programme at the level expected by the Department of Justice, but it is just a fact. I do not think that the fact that some non-OECD country is not enforcing its laws against its corporations is necessarily such a huge problem.

One small remark: I see a number of non-US corporations being prosecuted in the United States, and sometimes the basis for the jurisdiction is doctrinal or for science fiction reasons—it might be because of wire transfer and it might be that strong conspiracy laws are being used. In other words, if my business partner bribes, I am part of the conspiracy and the US Department of Justice or the Securities and Exchange Commission has jurisdiction. There is no explanation of why Chinese or Russian companies, for example, are not prosecuted in the United States.

I assume that some of these corporations bribe. Japanese corporations are sanctioned in the United States, based sometimes on these science fiction jurisdiction reasons, but Chinese or other companies are not.

Maybe those companies would not be willing to pay the sanctions, because they do not have such strong ties to the United States, or maybe there is a problem with the contracts. What would happen if Chinese prosecutors started to enforce their foreign anti-corruption laws against UK or American corporations? That could be part of some trade war, if you consider enforcement as an economic sanction, as some scholars wrote five years ago.

**The Chairman:** Mr Burlingame, do you have anything to add on this?

***Roger A Burlingame:*** No.

Q182 **Lord Empey:** Some countries, such as France, have started to make anti-bribery policies compulsory for companies, backed up by a regime of inspections and fines for those that do not comply. Is this an example that the UK should consider following?

***Roger A Burlingame:*** The professor probably has a more studied response, but my shooting-from-the-hip response is that your money would be better spent on prosecutions. If you can increase the number of companies that feel that they are at risk of facing draconian penalties for engaging in this behaviour, they will figure out how to avoid those problems. That has already happened with global companies, multinational companies and large domestic companies, so what you are talking about is diving deeper down into the pool of smaller companies.

My sense is that creating this regime and putting these regulations in place would be a fairly expensive and resource-consuming thing to do, whereas taking that same money and prosecuting half a dozen companies that are caught violating the law will cause them all to behave much better. The professor can probably back this up with more reasoned analysis.

***Dr Branislav Hock:*** It could be a good idea, but we need to ask why we would want to do that, perhaps from a deterrence point of view. First, it could be useful in some form if we are speaking about large multinational corporations. In France, this applies to companies with more than 500 employees or with a turnover of €100 million, I think.

**Lord Empey:** Yes.

***Dr Branislav Hock:*** It could make sense then. It would not make sense for small and medium-sized enterprises at this point, but it would for large corporations. We need to ask why. There are four reasons. From a deterrence point of view, I agree with my colleague. These large multinationals already need to have these compliance programmes. If they do not, they do not get compliance credit and they are in big trouble anyway. What do prosecutors want to do with the information? Why would they want to go into companies and ex ante say, "With yourcompliance programme, why did you make this decision? We don't think it's good and you're going to get sanctioned"? That may add a bit of deterrence, but it would not be significant.

But there are three perspectives on why this should be done. First, you may want to do it to get some information from corporations. It would be part of the reporting obligations. If the corporation is socially responsible, it should report and share with others how it prevents corruption, supports human rights and deals with the fundamental rights of its employees in developing countries, for instance.

That regime already exists. There is a new European Union directive on non-financial reporting for exactly the same type of businesses as affected by Sapin II. These large corporations already need to start reporting, but it is information to investors and consumers. This is a kind of marketing; there is no information about what to do with that information. So corporations already have some obligation to report, but not in the same way as banks do when it comes to money laundering.

Thirdly—this is getting interesting—we get, from the other angle, to the privatisation of enforcement tasks. In the United States, companies bring in files and self-report. There is an internal investigation, which makes it easier for prosecutors. What I mean is that, if a prosecutor comes into a company, there might be some chance of establishing a public-private partnership. We might be interested in certain types of information. Again, anti-bribery and anti-corruption become part of some self-regulating mechanism similar to the ones that banks have—large multinational corporations might be able to see bribery within a supply chain, for example, or bribery of one of their business partners. All that can be caught by the compliance programme. If, as a matter of prevention, the enforcement authority comes and says, "You should report something", it might be useful in this way.

Fourthly, we have discussed the compliance industry—it is a huge business. If I am supposed to conduct a financial audit, I should not at the same time be an adviser or consultant to that company, as that might be a conflict of interest. As we saw yesterday, a large audit company is facing prosecution in the United Kingdom for a conflict of interest. So this might be used in that way. We may want to start asking the following questions. Who is advising me? Who is in charge of the compliance programme? Is it only a compliance officer? Is it an audit firm? Is it a law firm? When should the internal investigation start and who should conduct it? Is there a rule of confidentiality when the lawyers come in to start the internal investigation? Should it be separate? Should a public authority have some control over that? Is a consultant the same as an auditor? Are consultants and auditors the same as lawyers? Who should be part of this?

Those are the considerations that should be taken into account when thinking about this. It is not that it should be exactly as it is in French law, but there should perhaps be some regime under which a public authority could require ex ante certain information about compliance.

Q183 **Lord Grabiner:** Are there lessons that the United Kingdom could learn from other jurisdictions on the use of deferred prosecution agreements and other comparable mechanisms? The other comparable mechanisms

that we have heard about include—you will have more knowledge of this from the American perspective—the concept in the States of non-prosecution agreements, which are similar to DPAs, as we understand it, but do not involve the need, in effect, to plead guilty. Also, something that has been separately suggested, although I do not think that it exists in the States, is a corporate probation order.

***Roger A Burlingame:*** Sure. The non-pros is very similar to the DPA. The DPA, as it works in the United States, is essentially a confession of conduct. If the company survives a period of what is usually a period of three years without any further trouble, the charges go away with the payment of the fine. Non-pros is essentially the same mechanism, but it does not involve court oversight. If you had a violation during the relevant period, it could be used against you to secure a criminal conviction [in either instance].

**Lord Empey:** Sorry for interrupting, but is there no judicial oversight of that?

***Roger A Burlingame:*** When you have reached resolution with the DPA, you go to court and present the agreement and the court blesses it. There is some discussion among judges about whether they should be rubberstamps in this process. As a practical matter, judges do not play a role. They do not rewrite the agreement, dictate the terms or say whether they are fair. They could reject the agreement, but it is difficult for the judge to do because they are not presented with any information to judge whether it is a correct deal.

The only other area that we have not talked about and that fits into this question is whistleblowing, where the UK seems to have taken a very principled position. The US has taken a more practical position on whether it is appropriate financially to incentivise whistleblowers. Part of the success from a law enforcement perspective of the FCPA is in providing incentives to people potentially risking their livelihoods and career progression in coming forward to report wrongdoing. It is a notable difference, and one where the United States has an advantage in what prosecutors would think of as the intake—there are just more cases coming in the door because there is a greater incentive for people to bring the prosecutor's conduct.

**Lord Grabiner:** The American approach is obviously strongly tied to the plea bargain concept, which, as Lord Thomas indicated earlier, we do not have in this country. Do you think we should have a plea bargain mechanism? Would that improve the speed of resolution or be a more just way of going about dealing with such cases?

***Roger A Burlingame:*** I think of the DPA as being essentially a plea bargain. The UK system is not so far apart as far as corporates are concerned and how the process works out, the main distinction being the increased role of the judge in reaching such an agreement.

**Lord Grabiner:** But there is a difference between the DPA and your NPA,

which is that you do not—if you will forgive the crudeness—cop a plea to secure the NPA.

***Roger A Burlingame:*** Right [in court].

**Lord Grabiner:** We obviously regard that at the moment as an important red line. Do you have a view about that?

***Roger A Burlingame:*** The Department of Justice has more tools by which to punish or reward a corporate's behaviour. The corporate enforcement policy is now in place, where if a company comes in, fully co-operates, self-reports in the first instance and follows the other dictates laid out, the presumption is that it will get a complete declination of prosecution.

One can also make companies plead to criminal wrongdoing, which is the result that a company least likes and is hoping to avoid. If it has not behaved well during the investigation or has made an effort to hide the conduct and prevent it being discovered, that is a more likely result. If it has behaved perfectly from the beginning, the non-pros is the more likely result and the prosecutor has a wider spectrum of options.

The DOJ would look at that as incentivising companies to do the right thing. If the ultimate purpose of the law is to eradicate the behaviour, farming out the on-the-ground enforcement responsibility to companies that are highly incentivised to avoid it in the first place or at least be rewarded for their good corporate conduct is the way most effectively to avoid the behaviour taking place.

**Lord Thomas of Gresford:** Is a penalty paid on a DPA in the United States? It is a feature of the deferred prosecution agreements here. In addition to paying compensation for any profit, it would be a penalty equivalent to a fine.

***Roger A Burlingame:*** Yes. Then there is a multiplier based on how good or bad your co-operation is deemed. One of the more controversial features for the past few years is that such co-operation now entails providing human beings for the Government to prosecute. There was a view that these were in effect corporate speeding tickets: that a company could engage in wrongful conduct and then write a large cheque. People were saying, "Well, if there's criminal activity going on here, some human being is engaging in this criminal wrongdoing. Why are none of them being prosecuted?" That has now created this incentive for companies to provide human beings to prosecute in order to receive full co-operation credit, which brings along its own host of problems.

***Dr Branislav Hock:*** I did not speak so much about deferred prosecution agreements, but I want to make a few notes. It is not only about effectiveness; we are speaking here about effectiveness, but there are other values, too. Ultimately, it is about a choice between effectiveness and the rule of law. I do not think that there is much rule of law in the US system. It is really a business deal. That is fine, because such large

enforcement schemes can hardly be tackled if we stick to classic concepts of the rule of law.

What is inside these deferred prosecution agreements? Most of them involve more than $30 million. I started asking, "What is a foreign bribery case?" I got lost. What is inside those agreements? It is not that somebody bribed somebody else in a certain market. Many of them may include 100 schemes in20 jurisdictions. They happened in the 1990s, the 2000s and the 2010s and could involve conduct that lasted for 20 years. In fact, it summarises how business was done for the past 20 years in some really large cases.

In terms of what information is publicly available, just some of those schemes are explained. I call them anti-bribery bundles. A prosecutor will have many different charges to pursue, with some conduct falling under US jurisdiction—statutes of limitation, for instance, play a role. Still, overall, it is value-maximising for the corporation to agree to enter all such schemes, and somehow the sanction is determined.

Do we want a system like this? When it comes to multinationals, it is probably the only way to be really effective, because then, of course, the corporation has the information advantage with prosecutors. That is one thing to note.

The second thing to note is that it is not only about corporations. We should not forget that behind corporations are people. Not so many individuals, as opposed to corporations, are prosecuted. Now, we increasingly see more individual prosecutions in the United States, but what is worse: to get a $50 million fine or to get five top managers who were involved in bribery sent to jail? What is the greater deterrent in terms of future mis-conduct?

We should not forget about physical presence. If someone could go to jail for 20 years or 10 years, they would be more reluctant to admit all their actions. A paper published by aHarvard University scholar suggests that if the Department of Justice engaged in more enforcement against physical persons, it would ultimately lead to more adjudication of these cases. As a result, prosecutors could get weaker in relation to corporate cases; it might impact on corporate cases. So it is not all about effectiveness: there are other considerations.

**The Chairman:** Is there anything else you would like to tell us before we finish?

***Dr Branislav Hock:*** I would like to mention one important thing as a suggestion. When we see what the United States authorities are doing, as opposed to those in the UK, we see that they are much more active; they are actively co-operating, educating and training their counterparts in other jurisdictions. In exchange for that, they have gained more trust and more co-operation in those jurisdictions. They are able to operate more effectively. In most cases, the evidence lies outside the United Kingdom or the United States. There have been developments—there are task

forces; there is close co-operation between Australia, the UK, Canada and the United States—but I am thinking about central and eastern Europe, central Asia and other jurisdictions. It would make enforcement much easier if co-operation extended there.

Secondly, joint investigation teams are crucial. With some new enforcement actions, the easiest thing is to join some enforcement conducted by the United States and others. One could even negotiate: "Oh, you're going to get 20% of sanctions and the United States 50%." You could perhaps do it more actively as a leader and not as a follower of the United States. The United Kingdom jurisdiction could then create its own policy. It could start co-operating more closely with France and other enforcement authorities on cases where there is shared jurisdiction. There are many such cases, because jurisdiction for the Section 7 offence of failure to prevent bribery is so broad that UK enforcers might ask, "Do I want to prosecute that corporation?" Jurisdiction is not limited any more.

**The Chairman:** Thank you very much. As a non-lawyer, could I ask one question? It is about triggers. When FIFA—where there were undoubtedly some difficulties—was prosecuted in the United States, was that because the DOJ would have nudged somebody's elbow or because a bank had said, "We may have been dealing with this company and we are therefore in some difficulty". Or would it be grandstanding by some district attorney, thinking, "This is a good way to build my reputation?"

***Roger A Burlingame:*** I am trying to remember how it actually started because it was my old office. The prosecution was led by a guy who I recruited and who spent years working on that case. Everyone said, "What's happening with your supposedly fantastic FIFA investigations?" He said, "It's gonna be good one of these days. You'll see". And he was right. I probably should not be disclosing it anyway if I could remember, but I cannot. Often in such cases, somebody is prosecuted for something totally different. They agree to co-operate to try to secure a better deal for themselves and they happen to know something about a wildly different set of facts. That would be a way for such a case to come about.

**The Chairman:** Thank you very much. I thank you both very much for your most interesting evidence.