



# Identification and Quantification of the Proceeds of Bribery

A joint OECD-StAR analysis





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## *Foreword*

Confiscation and recovery of the proceeds of bribery are key elements in the international framework to fight corruption. The two key international legal standards are the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) and the 2005 UN Convention against Corruption (UNCAC).

This study focuses on the identification and quantification of the proceeds of active bribery. It was undertaken as a joint effort between the OECD Working Group on Bribery in International Business Transactions (Working Group) and the World Bank-UNODC Stolen Assets Recovery Initiative (StAR) in order to support countries' efforts to confiscate the proceeds of active bribery, which is required of Parties to both the OECD Anti-Bribery Convention and UNCAC. The final text, approved following a peer review process in the context of the StAR initiative, was discussed and adopted officially by the OECD Working Group on Bribery on 23 June 2011.

The study is intended to provide practitioners, legislators and policy makers with practical information on the technical issues of identification and quantification of proceeds of active bribery. It provides examples of how proceeds have been identified and quantified in different jurisdictions; we use mostly examples from cases that have actually occurred.



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As part of the drafting and the consultation process, an experts' meeting was held in Paris, France (October, 2010). Practitioners brought experience of identification and quantification of proceeds of bribery related to cases involving criminal confiscation, non-conviction based confiscation, and civil actions from both civil and common law jurisdictions, and from both developed and developing countries. The people participating were Mr. Adam Basny (Czech Republic), Mr. Troy Beatty (United States), Ms. Fabienne Borde (France), M. Philippe Bourion (France), Mr. Shantanu Consul (India), Mr. Chris Costa (United Kingdom), Mme Claire Daams (Switzerland), Mr. Flemming Denker (Denmark), Mr. Angel De la Guardia (Mexico), Dr. Alexander Dorrbecker (Germany), Mr. Charles Durross (United States), Dr. Balazs Garamvolgyi (Hungary), Ms. Dorothee Gottwald (UNODC), Mr. V.K. Gupta (India), Ms. Kathleen Hamann (USA), M. Marc Harpes (Luxemburg), Mr. Umar Haryono (Indonesia), Ms. Nuria Homfeld (Germany), Mr. Tomas Hudecek (Czech Republic), Professor Guillermo Jorge (Argentina), Mr. Alf Johansson (Sweden), Mr. John Kelley (USA), Mr. Andrew Maclay (United Kingdom), Mr. Peter Maher (United Kingdom), Ms. Erin McCartney (United States), Ms. Adriana Zawada Melo (Brazil), Professor Olaf Meyer (Germany), Mr. Charlie Monteith (United

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## **Preface**

*by*

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The fight against corruption has become a truly global effort. A vast majority of the world's governments have pledged to criminalize the offering, promising or giving of bribes and to facilitate the confiscation and recovery of proceeds of corruption. They have done so by ratifying the United Nations Convention against Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

Despite progress being made, much remains to be done to implement these conventions. To facilitate countries' efforts, the Organisation for Economic Co-operation and Development (OECD), and, in the context of the Stolen Asset Recovery (StAR) Initiative, the World Bank and the United Nations Office on Drugs and Crime (UNODC), joined forces to conduct a study on the identification and quantification of the proceeds of active bribery. Quantifying the proceeds is one of the most difficult challenges posed by corruption cases. The study explains how to quantify the illegal proceeds and stolen assets in order to confiscate or recover them, and includes practical examples based on hands-on expertise.

While there are already many examples of courts confiscating the benefits gained by corrupt officials, this study also covers the confiscation and the recovery of the benefits obtained by the bribe payer. The message of this study is clear: countries should not shy away from seeking the confiscation or the recovery of proceeds of active bribery just because they may be difficult to quantify. By describing and explaining methods used in different legal systems, the study shows that such quantification can be done, and indeed has been done by practitioners.

Practitioners in some jurisdictions can now apply reliable methods derived from relevant legal principles and current practices to quantify, confiscate, and recover proceeds of active bribery. In addition, for jurisdictions wishing to develop a new legal framework, the methods described in the typology could be considered as a starting point for legislators, policy makers or practitioners involved in the development of practices adapted to their jurisdictions. Moreover, the study's methods and case studies could serve as a tool for training practitioners on quantification methods.

By providing practical advice based on real-life cases, we hope this study will prove a useful and effective tool in strengthening enforcement of countries' anti-bribery laws.



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## Introduction

This study focuses on the identification and quantification of the proceeds of active bribery<sup>1</sup> in international business transactions. Public and private organisations alike have long recognised that bribery of public officials is harmful to good governance, economic development and competitive conditions. Confiscation and recovery of the proceeds<sup>2</sup> derived from foreign bribery are key elements in the international framework to fight corruption of public officials.

As early as 1997, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Anti-Bribery Convention) requires the criminalisation of bribery of foreign public officials in international business transactions (foreign bribery). Today, its 38 State Parties are committed to the prosecution and sanctioning of individuals or corporations who engage in such practices. In addition to requiring sanctions that are effective, proportionate and dissuasive, the Anti-Bribery Convention prescribes that the proceeds of foreign bribery should be confiscated.

In 2005, the United Nations Convention against Corruption (the UNCAC) came into effect; the UNCAC requires State Parties to criminalise domestic and foreign bribery, and sets guidelines on punishment and enforcement, including confiscation of the proceeds of the crime, disgorgement of profits, direct recovery of property, and compensation for damages. At the time of this report, 150 countries are State Parties to UNCAC.

Identifying and defining the monetary value of proceeds derived from corruption is crucial to ensuring that sanctions are sufficiently proportionate, dissuasive and effective, as required by Article 3 of the Anti-Bribery Convention. Moreover, as a practical matter, confiscation or recovery of proceeds of corruption as foreseen under the UNCAC may be impossible in cases where these profits cannot be quantified by investigators or prosecutors.

To date, there is some experience in jurisdictions in identifying and quantifying the amount of the bribe – the proceeds of passive bribery – its

financial equivalent, and even the indirect proceeds derived from the bribe by the corrupt public official. These bribes can typically be confiscated as the proceeds of crime, disgorged as illicit profits or recovered in civil proceedings. There have been examples that reach to the level of very senior government officials, who have been stripped of the proceeds they have derived from bribes taken over the years, and these proceeds have sometimes been repatriated to their home countries. Moreover, the recovery of stolen assets has also been the subject of much attention from academia, think-tanks, other non-governmental organisations and the media. The United Nations Office on Drugs and Crime and the World Bank, in the context of their joint Stolen Asset Recovery (StAR) Initiative<sup>3</sup> produced an Asset Recovery Handbook for law enforcement officials to assist them in the strategic, organisational, investigative, and legal challenges of recovering stolen assets.<sup>4</sup>

Much remains to be done to address active bribery. The proceeds derived by the briber (very often a company in an international business context) are often many times the amount of the bribe paid. Outside of the handful of jurisdictions where many bribery cases have been brought, few courts have reached such issues. Some countries still lack legislation to address the confiscation of the proceeds of active bribery, considering such calculations too complicated.<sup>5</sup> Other countries may have legislation in place but have never tested it in practice. Such situations leave many corporate wrongdoers unpunished, walking away with their ill-gotten proceeds.

One reason for this absence of practice may be that the proceeds of active bribery derive from legitimate business (a contract, a business authorization) illegally obtained by paying a bribe, rather than totally illegal business, such as drug trafficking or trafficking in human beings. In addition, what constitutes proceeds is problematic when a company engages in bribery in respect of a specific transaction but the rest of its business is legitimate. In such cases, law enforcement authorities seeking to confiscate the proceeds of the bribery need to examine carefully what benefit the company has gained by paying a bribe.

In March 2010, the OECD Working Group on Bribery<sup>6</sup> and the StAR Initiative decided that, given the importance of confiscation as a deterrent in the fight against foreign bribery and the difficulties of the Asset Recovery process, more profound knowledge about the identification and quantification of the proceeds of active (foreign) bribery was needed. Accordingly, in October 2010, a meeting was held to bring together experts from Parties and Non Parties to the OECD Anti-Bribery Convention with experience in investigating and prosecuting foreign bribery cases and addressing issues of confiscation and asset recovery.

This report expands on the meeting’s discussions as a point of departure and explores the topic on the basis of additional research undertaken by the OECD and StAR. The study also elaborates on some sections of the Asset Recovery Handbook by providing a specific focus on recovering proceeds of active bribery.

By design, the study does not examine the deterrence and punitive aspects of legal regimes it describes. Whether penalties or remedies are strong enough to deter bribery is an important debate but beyond the scope of this technical study on quantification of bribery.

Similarly, the study does not address in detail the problems linked to the identification of victims of bribery. In some jurisdictions, only the government may be considered a victim. In others, competitors of a contractor, private citizens, or civil society organizations may or may not be considered as victims. Given this diversity of approaches, this issue is beyond the scope of a technical analysis. As a result, the chapters that follow are intended to provide practitioners and policy makers with an introduction on how to deal with the technical issues of identification and quantification of proceeds of active bribery.

Chapter 1 introduces the international legal framework for the treatment of the proceeds of active bribery and catalogues the legal remedies available in various jurisdictions, and how these remedies may interact. Chapter 2 defines five principal types of proceeds of active bribery and analyzes how they may be quantified. Each system is illustrated by examples from countries using such methods, as well as commentary on some practical challenges linked to the calculation of proceeds. Chapter 3 offers a compilation of case summaries to illustrate the principles covered in the preceding chapters.

## Notes

1. Active bribery is the criminal offence committed by paying, offering or promising a bribe or an undue advantage to an official. Passive bribery is the offence committed by the person who receives or agrees to receive the bribe or the undue advantage.
2. In this study, the term proceeds is generally used as a generic term defining the profits, benefits or advantages of monetary value gained by the briber as a consequence of paying or promising a bribe or any undue advantage to an official.

3. The StAR Initiative is a joint initiative by the United Nations Office on Drugs and Crime (which oversees the UNCAC) and the World Bank to address the issues surrounding theft of public assets and their repatriation. See *Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan* for more information.
4. The Asset Recovery Handbook can be accessed here:  
[http://www1.worldbank.org/publicsector/star\\_site/documents/arhandbook/ar\\_handbook\\_final.pdf](http://www1.worldbank.org/publicsector/star_site/documents/arhandbook/ar_handbook_final.pdf).
5. For instance, as noted in its 2005 Phase 2 Evaluation Report (para. 39), Japan had legislation to confiscate the bribe but not the proceeds of active foreign bribery because it was thought too difficult to identify such proceeds. Legislation since enacted still does not expressly provide for the confiscation of the indirect proceeds of active bribery (ADB/OECD Anti-Corruption Initiative for Asia and the Pacific (2010), *The Criminalisation of Bribery in Asia and the Pacific*, p. 252).
6. The OECD Working Group on Bribery, made up of the 38 countries Party to the Anti-Bribery Convention, closely monitors implementation of the Convention through its peer-review process. For more information, consult: [www.oecd.org/corruption](http://www.oecd.org/corruption).



## *Chapter 1*

### **The legal framework for the treatment of proceeds of active bribery**

The OECD Convention Article 3 requires that “bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties.” Each Party must also “take such measures as may be necessary to provide that the bribe *and the proceeds of the bribery* of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.” Under commentary 21 of the Anti-Bribery Convention, proceeds of bribery are defined as “the profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery.”<sup>1</sup>

The UNCAC Article 30 states that “Each State Party shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence.” UNCAC Article 31 obliges each State Party to take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of: (a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds; and (b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention<sup>2</sup>.

This Chapter aims to provide an overview of legal remedies available in various legal systems to confiscate or recover the proceeds of bribery in international business transactions.

#### **A. Overview of legal remedies to confiscate or recover proceeds**

In the context of bribery cases, various criminal as well as civil remedies exist. The main remedies include confiscation of the proceeds of crime,

disgorgement of illicit profits, levying of fines based on the value of the benefit, orders for compensation, contractual restitution or some combination of those remedies. Each shall be addressed below. When competent authorities and courts are asked to employ these remedies to deprive individuals or companies of assets obtained by bribing public officials, they must confront the issues of identification and quantification of the proceeds of corrupt activities.

The use of the legal tools discussed below is significantly facilitated if the proceeds of active bribery can be recovered against a legal person. A corporation is the main beneficiary in many cases of active bribery, especially when the offence is committed in context of an international business transaction. Legal persons generally possess greater resources from which to pay penalties as well. As the discussion below shows, recovery against natural or legal persons could be accomplished through criminal, civil or administrative proceedings, depending on the legal system in question.

The following sub-sections 1, 2 and 3 on confiscation, disgorgement and fines based on benefits, address remedies sought by law enforcement authorities, while sub-sections 4 and 5 on damages and contractual restitution focus on remedies sought by, or on behalf of parties harmed by bribery.

### ***1. Confiscation***

Confiscation is the permanent deprivation of assets by order of a court or other competent authority. In some jurisdictions, it is called “forfeiture.” Confiscation of the proceeds of bribery (or any offence) may be pronounced whether or not any loss or other disadvantage has been incurred by the wronged party (including governments of a bribed official, competitors, consumers etc.).

There are three basic kinds of confiscation: (1) criminal confiscation; (2) non-conviction based confiscation; and (3) administrative confiscation.

1. Criminal confiscation requires a criminal conviction by trial or guilty plea establishing guilt “beyond a reasonable doubt” or sufficient to “intimately convince” the judge or the jury. Once a defendant is convicted, a final order of confiscation can be entered by the court, often as part of the sentence. In some jurisdictions, confiscation is a mandatory order; in others the court (or jury) has discretion in imposing an order of confiscation.
2. Non-conviction-based (NCB) confiscation, sometimes referred to as “*in rem* confiscation,” “objective confiscation or “*extinction de*

*dominio*,” does not require a criminal conviction. NCB confiscation authorizes the confiscation of assets by judicial order without the requirement of a conviction. As it is typically a property-based action against the asset itself, not against the person with possession or ownership, NCB confiscation generally requires proof that the asset is the proceeds, or an instrumentality of, crime.

3. Administrative confiscation occurs without the need for a conviction or even a judicial determination. For example, administrative remedies may be imposed through the Financial Services Authority (FSA) in the United Kingdom.<sup>3</sup> The calculation may range from one to 10 % of the gross revenues.<sup>4</sup> Amounts recoverable through administrative confiscation may be limited.<sup>5</sup>

A confiscation judgment or order can be either: (1) property-based (naming monetary, tangible or intangible asset); or (2) value-based (naming an amount of money owed by a specific person). Criminal confiscation can be either type, but NCB confiscation is almost exclusively a property-based system.<sup>6</sup> Some jurisdictions will employ both systems, permitting confiscation of identified assets and a judgment which can be satisfied from the legitimate assets of a person. Generally, property-based confiscation is based on the exact actual assets or instrumentalities linked to the offence while value-based confiscation aims to reach a quantified monetary amount of benefits, including profits, services or advantages derived from the crime.

#### *a. Property-based confiscation: Assessing direct or indirect proceeds*

Under the Anti-Bribery Convention, proceeds of bribery are defined as “the profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery.”<sup>7</sup> As a result, signatory countries are required to confiscate the profits or benefits gained from the transaction involving the payment of a bribe to a foreign public official.<sup>8</sup> Similarly, UNCAC Article 2 defines the “proceeds of crime” including bribery as “any property derived from or obtained, directly or indirectly, through the commission of an offence.” The same Article states that “‘property’ shall mean assets of any kind, whether corporeal or incorporeal, moveable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets.”

In many jurisdictions, proceeds are defined as anything of value, whether tangible or intangible, obtained directly or indirectly as the result of the offence. In addition to “direct proceeds” accrued directly from the payment of the bribe, “indirect proceeds” may typically include services or advantages derived indirectly from the offence or from the appreciation in

the value of the direct proceeds. For example if a company bribes an official to win a contract and the direct proceeds of the contract are USD 5 million, the indirect proceeds would be USD 500 000 if the company invested the money for one year and earned 10 % simple interest. Other examples of indirect proceeds may include the increase in the value of a company that was awarded a lucrative contract or the value of other contracts obtained as “follow-ups”.

The extent of “direct or indirect proceeds” depends on the legal framework applicable in each jurisdiction. In some jurisdictions, authorities and courts may consider that all revenues or profits gained in the context of a tainted transaction should be confiscated. In other jurisdictions, some of these profits may not be sufficiently linked to the offence. In addition, what is considered direct proceeds in one jurisdiction may be considered indirect proceeds in another. All of these differences and nuances have consequences on how courts or other competent authorities identify and quantify proceeds.

#### *b. Value-based confiscation: Assessing the equivalent value of proceeds*

Under the OECD Anti-Bribery Convention, Parties must be able to confiscate the proceeds of bribery “or property the value of which corresponds to that of such proceeds.” UNCAC Article 31 (4), (5) and (6) makes value based confiscation mandatory for States Parties. Value-based confiscation involves calculating the monetary value of the benefits derived from criminal conduct and then imposing a monetary penalty of an equivalent value. In contrast to a property-based system in which only tainted assets may be seized and confiscated, in a value-based system, an equivalent value of untainted assets may be confiscated. In this system, there is an assessment and quantification of the amount of benefits which flowed from the offence to the offender, including increases in value due to appreciation of the assets. At sentencing, the court will impose liability equal to that benefit on the defendant. This judgment may be enforceable as a judgment debt or fine against any asset of the defendant.

Because it is not necessary to link specific assets to the offence, it is often easier to obtain a confiscation judgment in a value-based system as opposed to a property-based system. However, the benefits must be linked to the offences that form the basis of the defendant’s conviction, and that may be problematic in cases where the prosecutor proceeds or succeeds on only some of the offences. In addition, the assets are limited to those owned by the defendant, although this issue is often resolved through presumptions and broad definitions of “ownership” to include assets that are held, controlled, or gifted by the defendant.

The term “benefits” is usually broadly defined to include the full value of cash or non-cash benefits received by a defendant (or a third party at the defendant’s direction) directly or indirectly as a result of the offence. Benefits will usually cover more than rewards of a financial nature.<sup>9</sup> Some examples include:

- the value of money or assets actually received as the result of committing an offence (for example, the revenues from an initial contract obtained by bribery);
- the value of assets derived or realized (by either the defendant or a third party at the direction of the defendant) directly or indirectly from the offence (for example, supplemental work obtained in the context of that same contract); and
- the value of benefits, services or advantages accrued (to the defendant or a third party at the direction of the defendant) directly or indirectly as a result of the offence (for example, the possibility to obtain future contracts based on the experience gained through that initial contract obtained through bribery).<sup>10</sup>

### *c. Gross or net proceeds/benefits or additional profits models*

In some jurisdictions, the terms “proceeds” or “benefits” may be legally defined or understood as the “gross” proceeds or benefits, and in others, as the “net benefits” or “profit” after deduction of expenses incurred in deriving the benefit.

For example, under the “gross” proceeds definition, if a company paid bribes to win a government contract, the proceeds would be the whole value of or revenues from the contract.<sup>11</sup> Under a “net profit (or benefits)” definition, that same company could deduct certain expenses incurred in connection with the contract to arrive at “net” proceeds. But when bribes are paid not to obtain a contract *per se* but to secure specific advantages or conditions (higher prices, lesser quality of goods or services, excessive quantity), then courts may consider that only the additional profits linked to these specific advantages are proceeds from bribery.

## **2. Disgorgement of profits**

Disgorgement is a civil remedy to require the repayment of ill-gotten gains. Unlike confiscation, this remedy is not derived from statute but from the courts’ equitable power to correct unjust inequality. It is not meant to be punitive. In practice, disgorgement and confiscation achieve the same goal of separating proceeds from wrong-doers and involve similar quantification

methods. In the United States, disgorgement is the most frequently used tool by the SEC to recover proceeds in cases involving violations of the Foreign Corrupt Practices Act (FCPA) by issuers of securities registered in the United States. Additional tools include civil and criminal forfeiture and restitution.

### ***3. Fines based on the value of the benefit***

In certain jurisdictions, fines against individuals or corporations may be based on the value of the advantage gained or intended to be gained. Consequently, these jurisdictions will also need to identify and quantify the proceeds of bribery. These fines are without prejudice to confiscation measures that may also be ordered against the natural or legal person. As a result, fines are often combined with other measures. Generally, fines based on the value of the benefit do not take into consideration any loss or other disadvantage suffered by the victim.

Examples of fines calculated from benefits include Australia, Greece, Hungary and Korea. For instance, in Australia, the maximum penalty for a corporation will be the greater of AUD 11 million or three times the value of any benefit that the corporation has directly or indirectly obtained that is reasonably attributable to the conduct constituting the offence (including the conduct of any related corporation). If the court cannot determine the value of that benefit, it may be estimated at 10 % of the annual turnover of the corporation during the 12 months preceding the offence. In Greece, the corporate liability legislation imposes an administrative fine of up to three times the value of the “benefit” against legal persons who are responsible for foreign bribery. In Hungary, fines for legal persons can be of a maximum of three times the financial advantage gained or intended to be gained, and at least HUF 500 000. In Korea, the maximum fine for a legal person is KRW 1 billion, but if the profit obtained through the offence exceeds a total of KRW 500 million, the legal person shall be subject to a fine up to twice the amount of the profit.<sup>12</sup>

#### **Box 1. Maximum Fines for Legal Persons – Limits based on benefits**

Australia = Greater of: AUD 11 million (USD 12 million) OR 3 x Benefit obtained

Greece = maximum 3 x Benefit obtained

Hungary = maximum 3 x Benefit obtained (or intended to be obtained), and at least HUF 500 000 (USD 2 800)

Korea = KRW 1 billion (USD 927 million) maximum OR 2 x Profit obtained if profit is greater than KRW 500 million (USD 462 042)

#### ***4. Compensation for damages and civil court actions***

In many jurisdictions, private civil lawsuits may be brought by, or on behalf of victims. Tort and contract damages are paid to compensate a plaintiff for loss, injury, or harm directly caused by a breach of duty, including criminal law, immoral conduct, and pre-contractual fault. Beyond the government of the bribed official, plaintiffs may include, for example, harmed consumers, shareholders or unsuccessful bidders.

Where a corrupt act has occurred, the plaintiff generally has to prove the defendant's breach of duty, the occurrence of damage, and the causal link between the corruption and the damage. In most jurisdictions, the basic rule for the determination of damages is that the victim must be placed as much as possible in the circumstances in which he or she would have been if the corrupt act that caused the damage had not taken place.

In addition, courts may be authorized to compensate loss of profits reasonably expected but, because of corruption, not gained, and indirect or non-pecuniary damages that cannot be immediately calculated.

#### ***5. Contractual restitution***

Victims, or parties acting on their behalf, may also claim contractual restitutions. If a government official engages in corruption prior to the award of a contract, then courts or arbitration tribunals may hold that the contract is illegal, thus invalid, void or unenforceable.<sup>13</sup> Invalidity may be based on the fact that the contract was extorted by fraud and that consent was vitiated by corruption.

Breach of contract is another possible action in some jurisdictions, particularly where a contract included clauses wherein the contractor promised not to provide any inducements to public officials in connection with the award or performance of the contract. Violation of this particular prohibition may give the government an entitlement to terminate the contract, avoid its own obligations, and claim damages.<sup>14</sup>

In these situations, governments may be entitled to void or rescind contracts that it has entered into with the briber. Depending on the legal system, avoidance can be either retroactive or limited to the application of the contract in the future. Counter performance and expenses incurred by the contractor may or may not be subject to restitution.

## **B. Challenges linked to the interaction of remedies**

It is important to recognize that each remedy may be utilized in isolation or combined with other remedies as part of a scheme. Thus, a government charged with enforcing its anti-bribery laws may use certain remedies, while a victim seeking redress might use other remedies. For example, a government enforcing its anti-bribery laws may petition a court to order confiscation and also levy a fine. In other instances, an administrative agency in a developed country might seek administrative forfeiture. The government of the victim country may bring a civil suit against the briber for compensation for damages or contractual restitution. In other cases, courts or another competent authority may decide to seek or apply a single remedy, such as confiscation or fine. The existence of a variety of remedies in a given jurisdiction or across different jurisdictions by various parties and for various purposes raises the issue of how to avoid unfair duplication of punishments or equivalent measures. A similar analysis would be performed when attempting to recover proceeds of passive bribery from corrupt public officials by their governments or their victims.

The existence of different remedies to satisfy different purposes also raises the issue of which one can ensure the best prospect of fully confiscating or recovering the proceeds. For example, not all remedies may be available against all parties. In the United States, the SEC can obtain disgorgement against any company registered as an issuer or any other person or entity that benefitted from the company's FCPA violations. The DOJ can forfeit the proceeds of bribery from issuers and non-issuers. As a result, the choice between disgorgement and criminal forfeiture may depend on who possesses the proceeds and which agency has jurisdiction over the conduct.

Since the interaction of remedies varies widely, it is difficult to generalize. Furthermore, there is still very little experience to date, both in terms of interaction between different remedies, and in respect of multi-jurisdictional cases. The following sections aim to identify some challenges which have been or could be encountered by law enforcement authorities as concerns interactions between confiscation, disgorgement, fines, compensation for damages, contractual restitutions, and other remedies applied by foreign courts to recover the proceeds of bribes. In addition to mechanisms to recover the proceeds of bribes, some jurisdictions also have mechanisms to assess fines and penalties that are punitive in nature. The combination of remedies to recover the proceeds of bribes and the ability to assess punitive fines/penalties provides compelling reasons for companies and individuals to cease corrupt activities.



### ***1. Interaction between confiscation, disgorgement, and fines***

Disgorgement and confiscation serve similar purposes, as noted above. Both seek to remove ill-gotten gains. However, disgorgement and confiscation can be computed based on different factors depending on the specific facts and circumstances of the bribery scheme and the relevant jurisdiction. Thus, it is possible to have both disgorgement and confiscation used in the same case. In the United States, disgorgement and restitution are quite similar and are unlikely to be used simultaneously. In the United States, if the SEC has already sought civil disgorgement of profits, generally the DOJ would exercise its discretion not to seek the same funds as a criminal restitution or forfeiture order.

Unlike confiscation and disgorgement, the purpose of fines is to punish the offender, and not to remove the benefits of crime *per se*. In the U.S., the authorities frequently seek a criminal fine and/or a civil penalty in addition to disgorgement and forfeiture. In the United Kingdom, case law makes clear that a fine is to serve as a deterrent and that “offending itself must be severely punished quite irrespective of whether it has produced a benefit.”<sup>15</sup> If a defendant is in a position to pay both a fine and have the benefits confiscated, both may be ordered. In other cases, if the defendant does not have sufficient resources to pay both, confiscation will take primacy over a fine.

Similarly in South Africa, a defendant may be fined and subject to confiscation of all gross proceeds derived from the crime. This principle was applied in a case where an official received bribes in exchange for influencing private transactions. As a result, the briber purchased a 25% shareholding in a corporation that won a government contract. The dividends received from this investment were used to reimburse the loan taken to pay for the 25% share. The court imposed a fine and confiscated both the shareholding and the dividends.<sup>16</sup>

### ***2. Interaction between confiscation and compensation for damages***

Compensation is based on the existence of damages suffered by the victim and may be awarded even in cases where bribery did not generate any profit or benefit for the briber. However, bribes are generally intended to, and often do, ensure that the briber makes a profit. In certain instances, the profit may be greater than the damage suffered by the victim. There are various remedies that can be sought in this instance – the government enforcing anti-bribery laws can seek confiscation and the victim of the bribery can seek compensation for damages.

There can be many victims of a bribery scheme, including governments who paid too much for the government contract or unsuccessful bidders. Each has remedies available to it to pursue its harm. Sometimes, their harm may be overlapping or even identical in nature.

The government victim may file a claim seeking compensation to recover the financial damages suffered from paying higher prices, obtaining lesser quality of goods and services or obtaining incomplete performance of the contract that was procured through bribery by the contractor. Prosecutors also may seek confiscation or disgorgement of profits from the contractor. Primarily, the former seeks to recover his harm while the latter seeks to recover the contractor's gain.

Similarly, an unsuccessful bidder may claim compensation from a winning government contractor for the loss of revenues or profits it would have gained in the execution of the contract. Prosecutors may also seek confiscation of the bribe payer's profits derived from the contract.

In both situations, the money is generally paid to address each specific violation. Thus, a company guilty of bribery may have to pay the government enforcing the anti-bribery laws against it and also have to pay compensation to the victim. However, many jurisdictions have the ability to take into consideration the particular facts and circumstances of all monies paid in connection with a bribery scheme to avoid unfair duplication. Some courts or competent authorities will take into account the earliest imposed remedies and exercise discretion in imposing later ones where the remedies are similar in nature. In some jurisdictions, the principle will be first to award compensation to the victims, either directly or through a confiscation order upon conviction, then to consider other remedies.

### ***3. Interaction between confiscation and contractual restitutions***

In some jurisdictions government agencies have the authority to declare void or invalidate contracts awarded by or through bribed officials. In such instances, the government harmed by the bribery may seek recovery of all the amounts expended and the property transferred under the terms of the tainted contracts. In this situation, contractual restitutions could be as high as the proceeds of crime confiscated by the government enforcing the anti-bribery laws.

For example, if a contractor pays bribes to win a government road contract for which it was paid USD 60 million, and the contract is declared void after the construction is completed, the government could request contractual restitution of USD 60 million. Some jurisdictions might award

the full USD 60 million despite arguments that the government would be overpaid since the road was completed.

In some jurisdictions, the confiscation would be limited to the difference between benefits gained by the contractor and the value of its performance. For example, if a contractor was paid USD 60 million and built half (USD 30 million worth of good road), the amount of confiscation or restitution would be calculated after deducting the value of the roads and would be USD 30 million.

In Italy, for example, funds received as contractual fees by a contractor are subject to confiscation but the highest court ruled that “benefits obtained or accepted by the victim in the context of the contractual relationship” should be deducted.<sup>17</sup>

#### ***4. Interaction between remedies applied in foreign or multiple jurisdictions***

Courts may take into account confiscation decisions or settlements with the same effect in foreign jurisdictions to avoid unfair duplication. For example, in the *Siemens Power Turbines Case*, the German company obtained contracts to sell equipment in Italy by bribing an official of an Italian utility company. When the bribery came to light, Siemens faced criminal prosecution in Italy. Pursuant to these criminal proceedings, Siemens agreed to forfeit the profits arising from the two turbine contracts. In addition, the Italian utility also brought civil proceedings in Italy against Siemens to annul the turbine contracts. Siemens also agreed to make payments to settle these civil proceedings.

Prosecutors in Germany also sought confiscation of profits gained by Siemens. The German court ordered the confiscation of EUR 38 million, corresponding to the profits derived from the two contracts obtained through bribery, less the amount confiscated in Italy and part of the amount paid by the company to settle Italian civil proceedings.<sup>18</sup>

Similarly, in the resolution of the Johnson & Johnson (J&J)/DePuy case, the United States and the United Kingdom simultaneously resolved investigations into some of the same misconduct. In the U.S., J&J’s criminal fine was reduced by 25%, in part in light of anticipated fines in the U.K. and Greece, noting in the deferred prosecution agreement, “J&J and the Department agree that this fine is appropriate given [...] penalties related to the same conduct in the United Kingdom and Greece [...]” J&J was also required to disgorge profits from the conduct in a settlement with the SEC. DePuy settled the U.K. charges by agreeing to financial penalties under a civil recovery order. In reaching the settlement, the U.K. Serious Fraud

Office also took the multijurisdictional nature of the settlement into account, stating that it had “taken particular note of the fact of disgorgement and recovery in more than one jurisdiction for the same underlying unlawful conduct. [...] The Serious Fraud Office has considered the matter from a global perspective. It has worked to achieve a sanction in this jurisdiction which will form part of a global settlement that removes all of the traceable unlawful property and at the same time imposes a penalty.”<sup>19</sup>

## Notes

1. See the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents*, available from the OECD website.
2. In addition, article 31 mentions income derived from the proceeds, as well as transformed or intermingled proceeds.
3. Financial Services and Markets Act of 2000, Section 206(1).
4. The FSA may discount this amount by up to 30 % based on the cooperation of the company
5. For example, in the United States, a seizing law enforcement agency can seek forfeiture of most property that is valued at USD 500 000 or less, unless the property is a monetary instrument, in which case there is no limit.
6. In the Philippines however, the system is not purely property-based because the government can obtain a personal judgment against an individual, not against the asset, although the purpose and impact is to target the asset.
7. See the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents*, available from the OECD website.
8. See commentary 21 of the OECD Anti-Bribery Convention.
9. Some jurisdictions will provide guidance in legislation: See for example the *Proceeds of Crime Act 2002* (Australia), s.122.
10. Recent cases have also revealed bribes in the form of high-priced entertainment, such as travel expenses, trips to theme parks and use of assets including yachts and airplane
11. See Case Summaries in Chapter 3 – Selby & Ashurst (using gross revenue method in the United Kingdom).

12. A review of sanctions available under 21 OECD countries' foreign bribery legislation can be found in the *Mid-Term Study of Phase 2 Reports*. An analysis of sanctions can also be found in the *country specific Phase 2 Reports* on implementation of the OECD Anti-Bribery Convention. All these documents are accessible from the OECD anti-corruption webpage: [www.oecd.org/corruption](http://www.oecd.org/corruption).
13. UNCAC, Article 34 permits such actions by States Parties. See S. T. Grand in Case Summaries in Chapter 3.
14. For example, in the United Kingdom, the contract is voidable at the option of the principal.
15. Regina v. Innospec Limited, Sentencing remarks of Lord Justice Thomas, 26 March 2010 at 9. See Case Summaries in Chapter 3.
16. See S v Shaik and Other 2007 (1) SACR 247 (SCA); S Shaik and Others 2008 (2) SACR 165 (CC) (the defendant was convicted for corruption and fraud, fined for ZAR 2 025 million (EUR 202 500) and was also subject to a confiscation order of ZAR 34 million (EUR 3.4 million)).
17. Corte Suprema di Cassazione , Udienza in Camera di consiglio Sentenza N.7, 27/03/2008
18. See “Siemens Power Turbine Case” (Germany), Chapter 3.
19. U.S. Securities and Exchange Commission Litigation Release No. 21922 (8 April 2011); U.S. Department of Justice Press Release (8 April 2011); Deferred Prosecution Agreement between Johnson & Johnson and U.S. Department of Justice dated 14 January 2011; U.K. Serious Fraud Office Press Release (8 April 2011), “DePuy International Limited ordered to pay £4.829 million in Civil Recovery Order”



## Chapter 2

### Identifying and quantifying proceeds

This Chapter considers the different types of proceeds of active bribery, namely: (a) proceeds from contracts obtained through bribery; (b) business authorisations, permits or licenses to operate; (c) expenses or losses avoided; (d) expedition of delays; and (e) gains from using lax internal controls and inaccurate or incomplete books and records. Each type of proceeds could be identified and quantified by using different methods depending on the legal framework, *e.g.* confiscation/disgorgement, damages or restitution. The quantification methods are illustrated through case examples. The Chapter ends by considering some practical challenges posed by factors including the time period and the interest rates used to calculate proceeds, agent fees, administrative costs, indirect benefits, partial transactions, and the bribe payment(s). More detailed summaries of most of the illustrative cases can be found in Chapter 3.

#### A. Contracts

In the most common international bribery cases, a company may obtain a contract by paying a bribe to a public official. The proceeds gained by the company can also be in the form of inflated quantities or prices, where the bribed official agrees to order goods or services in excess of real needs or to overbill. Contracts obtained often include public procurement contracts for building of infrastructure projects, for the sale of goods, or for provision of services. Many of the cases in this typologies exercise fall into this category. The approach taken to quantifying the benefits of such bribery may depend on whether the legal remedy used in each case is confiscation or disgorgement, compensation for damages or contractual restitution.

## ***1. Identification and quantification of proceeds for confiscation and disgorgement***

In most jurisdictions, the gross or net revenues generated by the contract are the starting point for calculating the benefits. This section presents the principles of these two methods and some of the specific factors to consider when using them. The specific method used and the factors taken into consideration ultimately depend on the specific facts and circumstances of the case. Thus, the approaches set forth can be specifically tailored or combined to ensure that the wrongdoer does not maintain any benefit from the misdeed. For example, a hybrid method can be used based on the quantification of additional or increased profits derived from the bribe.

### ***a. The gross revenue method***

Under this method, also called the “gross contract value” method, all revenues received under the contract obtained by bribing an official are proceeds or benefits of bribery, and are subject to confiscation or disgorgement.

#### **Box 2. Gross revenue method**

Proceeds = Gross revenues derived from the contract

The view taken in such cases is that the contract would not have been obtained if the bribe had not been paid, and no deductions should be allowed. This is typically the position taken by UK courts, illustrated by the *Weir* and *Selby and Ashurst Contract A* cases (See Chapter 3).

For example, Selby and Ashurst Limited obtained a contract valued at GBP 9.1 million from a foreign government by paying a bribe to foreign officials in the amount of 12% of the contract value (approximately GBP 1.1 million). The court ordered confiscation in the amount of GBP 9.1 million (see Case Summaries in Chapter 3).

### ***b. The net proceeds (also called net revenue, or net profits) method***

Other confiscation cases assess the benefits gained by the briber as the net profits derived from the contract. In other words, the benefits subject to confiscation or disgorgement are the contract revenues minus certain legitimate costs or expenses incurred by the briber in executing the contract, e.g. the cost of supplying the goods or services. Some jurisdictions will add the amount of the bribe to calculate the benefit subject to confiscation or disgorgement. This is generally referred to as the “net revenue” method.<sup>1</sup> As a variant of the calculation of net revenues, some practitioners in Germany consider calculating the *expected* margin of profit at the date of signature.



### Box 3. Examples of the net revenue method

Proceeds = Net revenues (gross revenues from the contract minus costs/expenses)

In the *Sales of Goods and Services Case*, in return for bribes amounting to USD 5 million, a company obtained projects to build communications networks and control systems for state-owned enterprises. The revenues from the projects were valued at USD 100 million. The company paid USD 25 million for the goods sold for the projects. The company also disguised the bribes as a legitimate expense in its books and records, and deducted the expense from its taxes.

#### *Calculating the Benefit*

The benefit subject to confiscation was calculated using the “net revenue” method:

Revenues received from projects :	USD	100 000 000
- Cost of goods sold for projects:	USD	25 000 000
+ Total amount of bribes paid:	USD	5 000 000
= Total benefit derived:	USD	80 000 000

In Denmark, assets subject to confiscation in the “Oil For Food” cases were calculated as net profits taking into account revenues less direct expenses effectively incurred in the execution of contracts obtained by bribing officials. Deductible expenses included cost of production, sales and distribution. There was no deduction for indirect expenses, including costs related to depreciation of equipment, sales, administration and financing. Moreover, special expenses that were not deducted included bribes incorporated in the final price charged to the client but paid to agents as “after sales services”, and finally received by corrupt officials. These expenses were accounted separately as amounts to be confiscated as proceeds or instruments of the crime.

In the *Siemens Power Turbine Case* (see Chapter 3), German courts calculated criminal confiscation by deducting overhead costs from the net profits attributable to the contract tainted by bribery.

In some instances, German authorities use administrative fines instead of criminal confiscation. In the *Siemens Telecom and Other Sectors Case* (see Chapter 3), the benefit was determined by deducting costs from the gross revenues attributable to the contract. This amount was used to calculate the confiscatory part of the administrative fines. As a variant of the calculation of net revenues, some practitioners in Germany consider calculating the *expected* margin of profit at the date of signature.

See the also *Volume-Based Contract Case*, and the *Contracts and Other Advantages Case* (Chapter 3, Case Summaries)

The net revenue model brings some particular complications that result from the need to separate costs and attribute them to the specific contract. Materials purchased or staff hired to fulfil a specific contract are generally considered as variable costs that can be directly allocated to the contract. More problematic are fixed costs which the business is incurring in any event but are allocated against revenues through the businesses costing system. Such costs might include inter alia the cost of buildings used in the performance of the contract, and the cost of the time of permanent staff and management who spend part of their time working on the contract tainted by bribery.

While the method of allocating these costs is clearly defined in many businesses there will always be an element of judgment in determining how such fixed costs are allocated to a specific contract. The following examples, which occur frequently in the normal conduct of business, show how difficult and potentially contentious cost allocation models can be even in systems that clearly prescribe how costs should be allocated:

- Example 1 – Stock allocation: When stock is used for the tainted contract but purchased before its signature or before requests for tenders, should that stock be allocated against the contract and, if so, at what value? To consider this situation, the following questions need to be answered: how long has the company been holding the stock? Is there any other use or market for the stock, or is it obsolete? The entire motivation for the bribery may have been to find a market for stock that is either obsolete or has one specific market. It may be necessary to study the company's existing policy on how to charge the cost of stock against a contract.
- Example 2 – Unutilized or under-utilized permanent staff: the company will need to pay these staff whether it obtains the contract or not and there will be a clear temptation to allocate more time that is necessary against the tainted contract. To begin to address these and other similar problems authorities and experts need to obtain a thorough understanding as to how the businesses and the internal accounting systems work.

*c. The additional profit method - What if the bribe had not been paid?*

Beyond the calculation of the actual profit made on the tainted contract, this system introduces the necessity of calculating the profits that would have been made if no bribery had occurred. In addition, the benefit obtained from the bribe often is not as simple as the award of a new contract. For example, sometimes the benefit might be a contract with better terms than would ordinarily be expected. Thus, one would need to look at similar

contracts where no bribery occurred to compare them to the contract involving bribery. A few other scenarios spring to mind.

- Scenario 1: The contract obtained by bribing an official simply replaces other contracts which would have been obtained anyway. Courts, competent authorities and experts may determine this by looking at the nature of the business and the market which the company is operating. In this case, courts, competent authorities and experts could be asked to calculate the additional profit made by performing the contract obtained by the briber and not the contracts which would have been obtained otherwise. This may be possible by comparing the contract with actual or estimated results obtained on similar contracts performed by the company or its competitors.
- Scenario 2: The contract obtained by bribing an official does not replace other contracts, but represents additional business that could not otherwise have been obtained. In other words, it would never have been obtained but for the bribery. In this case, the whole of gross or net profit made on the contract can be defined as proceeds of bribery.
- Scenario 3: The bribe was paid to secure specific conditions or advantages, not to obtain the contract. In this case, courts may have to calculate the difference between the actual profits derived from the contract and the profits that would have been made in the absence of specific conditions secured by paying the bribe.

## ***2. Identification and quantification for claims based on compensation for damages***

In most jurisdictions, the basic rule for determining damages is that the victim must be placed as much as possible in the circumstances in which he or she would have been if the corrupt act that caused the damage had not taken place. In the case of Government contracts, damages caused by bribery are often the same as increased profits gained by the contractor. For example, if a bribe was paid to obtain prices 10% higher than the market price, the damages for the Government amount to 10% of the revenue received by the contractor.

In this method, courts often quantify the difference between the price or the quality of goods and services provided by the briber and the price or quality that the customer would have accepted if its agent had not taken the bribe. To this end, it may become necessary to look beyond the price obtained by a successful bidder to the prices offered by other businesses that either quoted or would have quoted if they had been given the opportunity to do so.

#### Box 4. Quantifying proceeds of contracts in claims based on compensation for damages

In the *Fyffes Case* (UK), this company sought to recover damages from an employee who took bribes while negotiating a service agreement with a shipping contractor. The judge rejected an account (restitution) of all profits made by the contractor because it was “highly probable that Fyffes would have entered into a service agreement with the contractor if the employee had not been dishonest.” As a result, “ordinary” profit from the contract was not caused by bribery, but by “the provision of services for which there would have been a contract in any event.” Then the judge compared for each year of the contract what the company paid and what it would have agreed to pay given market conditions if it had been represented by an honest and prudent negotiator. The difference was the financial damages awarded to the claimant. (See Case Summaries in Chapter 3.)

However, the situation is different in cases where an unsuccessful bidder or a competitor shows that it would have been awarded the contract if the successful bidder had not paid a bribe. In this situation, the damage is not linked to specific advantages obtained by the contractor, but to the loss of all profits that the competitor would have earned in the course of the contractual relationship. As a result, compensation may be quantified as the net profits derived from the contract by the dishonest bidder if the competitor could show that his profit margin was similar to that of the dishonest bidder. It could also be alternatively calculated as the hypothetical net profits that the unsuccessful competitor would have earned. This method is illustrated in the South African case of *Gore NO v Minister of Finance and others*.<sup>2</sup>

### Box 5. Quantifying proceeds of corruption – Compensating a competitor for loss of a contract

In the case of *Gore NO v Minister of Finance and others*,<sup>3</sup> a dishonest bidder was awarded a contract using biometric technology for the payment of old age pensions, disability grants and child support grants. The rival bidder sued the Ministry of Finance because corrupt Ministry employees were the ones who had accepted the bribes from the dishonest bidder. The court found that, but for the corruption, the contract would have been awarded to the rival bidder, which sought compensation for damages. Since the dishonest bidder had not yet actually performed under the contract, the judge based his decision on hypothetical calculations performed by the forensic accountants employed by each party.

The primary basis of calculation was the representations made in the tender of the plaintiff. In addition, directly comparative financial information was available to check the reasonableness of the calculations. The corruptly acquired contract to pay pensions was cancelled and a new contract was awarded to a company called Allpay. This contract was for the same services that the plaintiff would have provided.

The three main bases of comparison used in this case were gross income, costs and gross margin. To determine the net profit that the plaintiff would have earned by performing the contract, income and expenditure were considered as follows:

#### Income (revenue)

1. Initial enrolment income: fees which would have been received from the government for enrolling pensioners in the first year of the tender.
2. Payment income: fees received from the government for the payment of pensions
3. Interest income on daily balance resulting from the cash advance government and used to pay pensions.
4. Interest on surplus cash and profits re-invested.

#### Costs

1. Personnel costs
2. Direct costs (items such as vehicle running costs, maintenance, insurance, petrol, license fees, modem lines, telephones etc.)
3. Indirect costs (items such as office rental, cash insurance, auditor's remuneration, life insurance, regional service levies (RSC levies), travelling, bank charges and extra budget items).
4. Initial enrolment costs.
5. Rental costs.

### ***3. Quantification for claims based on contractual restitution***

Governments that have entered into a contract with a company that bribed an official may be entitled to avoid or rescind the contract. Depending on the legal system, avoidance can be retroactive or limited to the application of the contract in the future. In addition, counter performance and expenses incurred by the contractor may or may not be subject of restitution. As a result, the claimant may be entitled to recover all sums paid pursuant to the contract (gross revenue) or revenues after deduction of the value of expenses and counter performance incurred by the briber (net revenue).

In some jurisdictions, courts have held that the government was entitled to recover all contractual fees already paid in application of the contract and that the contractor could not recover unpaid fees or the value of the work done. These methods would often arrive at the same result as confiscation of the gross revenues as illustrated by the case *S.T. Grand, Inc v. City of New York*.<sup>4</sup>

#### **Box 6. The Grand case, an example of contractual restitution**

The *Grand Case* is a civil case in which a company, S.T. Grand, Inc., had entered into a contract for with the City of New York to clean a reservoir approximately USD 840 000. Grand completed the cleaning as required by the contract. The City had paid Grand about USD 690 000 at the time of allegations of bribery surfaced.

The City refused to pay the balance it owed for the cleaning work performed, approximately USD 150 000 and sought to recover the approximately USD 690 000 it had already paid.

The highest court of the State of New York held that, under State law, the contract was illegal by reason of the bribery. The court then applied the prevailing general rule that “where work is done pursuant to an illegal municipal contract, no recovery may be had by the vendor [here Grand], either on the contract or in quantum merit” and that the City could recover all amounts paid from the vendor. Thus, the contractor, Grand, was ordered to forgo the entire amount of the contract, approximately USD 840 000.

In other cases, however, courts have declined restitution of the full value of a bribery-tainted contract if the government of the bribed official benefited from the contract. Instead, the government may be awarded the contract price minus any benefits that it has received, as illustrated in the *Cameroon Airlines Case*. In that case, the Arbitration Court of the International Chamber of Commerce considered that the benefits received by the plaintiff government were equal to the value of the bribes paid. On judicial review, a court agreed with the panel that the government was not entitled to restitution of the full contract price but allowed the appeal on other grounds.<sup>5</sup>

## **B. Business authorisations, permits or licenses to operate**

This category concerns situations where the company obtains an official authorisation in exchange for a bribe. The benefit gained in that case can, for instance, take the form of customs clearance, a permit for vehicles authorising certain types of transport, or a license to drill oil or to operate a mobile telephone network. The benefits may also include authorisations to carry out business not otherwise allowed under local law. For instance, the company, by paying a bribe, may be authorised to import goods which do not comply with local regulations.

The proceeds gained by the company will likely not be immediate. Once the permit or license is delivered, the initial operations may not yield immediate profit for the company. For instance, a license to drill oil will allow the company to move into the country and install its oil-drilling equipment. Only after a period of major infrastructure investment will the company start gaining profits.

In some jurisdictions, it may be difficult to quantify proceeds when the authorisation, permit or license has expired. In this situation, authorities may seek to confiscate property of an equivalent value. However, in cases made available under this exercise, the authorities had to rely on the value of the bribe to quantify and confiscate any proceeds. In some jurisdictions, other operating costs may also be added to the bribe payments to calculate the proceeds to be confiscated.

**Box 7. Quantifying proceeds in cases of business authorizations, permits and licenses, taking into account bribe payments**

In the *Cost and Loss Avoidance Case*, one of the purposes of bribe payments made by the company was to obtain customs authorisations. For this aspect of the case, the benefits derived by the company were neither apparent nor easily calculable. The benefit subject to disgorgement was estimated based on the sum of the bribe payments.

In the *Willi Betz Case* bribes were paid to obtain truck licenses. By the time the crime was discovered, the licenses had already expired and thus could not be confiscated, and confiscation of property of equivalent value was sought. The German court considered that the amount the company was willing to pay for the permits included not only the amount of the bribe, but also the cost of establishing the operations in the host country. A minor adjustment was made to deduct the costs of running the company which were not related to bribery.

(See Case Summaries in Chapter 3.)

In some cases where a briber pays a bribe to obtain a business authorisation, a permit or a license, the benefits gained by the briber could be quantified in terms of the damages suffered by the bribed official's government. The extent and the limits of this remedy are illustrated by the case *Surya Dumai Group*.<sup>6</sup> In this case, a company paid bribes to obtain a permit for logging in a prohibited area and defendants were ordered to pay compensation to the government for the lost timber. But the court rejected claims based on environmental damages which were considered insufficiently linked to the payment of the bribe.

### **C. Expenses or losses avoided**

In this category the bribe is paid to avoid paying costs otherwise owed. Typical examples involve bribes paid to avoid the payment of taxes, or custom duties.<sup>7</sup> Other cases may entail the payment of a bribe to avoid having to move equipment out of the country as required by law, which could result in savings from moving costs or avoid lost revenues because of equipment downtime. Bribes may also be paid to avoid paying for legally required certifications.

The benefit accrued by the company may also be the possibility of buying a more efficient product for a lesser cost. This would be the case, for



instance, where an oil-company gets more efficient crude oil at a lesser cost than the market rate, as a result of bribery.

The most common cases where expenses or loss avoided constitute the proceeds of bribery involve bribes to officials in order to escape taxes or custom duties. Another approach of law enforcement authorities in such cases is to rely on the “derived benefit” method. Under this method, the proceeds are calculated by adding up all the benefits that the company gained from paying the bribe.

### Box 8. Quantifying proceeds in cases of expenses or losses avoided

In the *Tax Avoidance Case*, the company bribed tax officials to avoid paying taxes on goods sold. In relatively simple cases such as this one, the proceeds are calculated based on the amount of taxes which ought to have been paid under normal circumstances. Similar to the contracts cases above, the bribe may sometimes be added to the calculation, as was done in the Tax Avoidance Case.

In the *Cost and Loss Avoidance Case*, the company paid bribes to avoid having to move its large equipment out of the country, as normally required. The company saved on customs duties and moving costs, and was also able to continuously operate the equipment and generate revenues. The “derived benefits” of this bribe for the company were therefore deemed to include not only the cost avoided by not having to move the equipment, but also the revenues from the extended period of operations of this equipment, and the custom duties avoided.

The same method was used in the *Expenses and Import Controls Avoidance Case*, where bribes were paid to enable the company to import and export equipment without the necessary licences or authorisations. This saved the company expenses associated not only with custom duties, but also with storage, additional transportation costs, cost of buying replacement goods, and downtime of its equipment.

Bribers can also gain by obtaining a price or fee reduction. In the *More Efficient Product Case*, the briber was able to purchase a more efficient oil product at a discount. The savings in the purchase price were disgorged, and the amount of the bribe was added to the calculation.

See Case Summaries in Chapter 3.

## D. Expedition of delays

Under the fourth category, bribes are paid by companies to expedite delays, thus triggering earlier profits. Such situations typically concern bribes paid to customs officials to expedite shipping. Another example could be where bribes are paid to secure a partial, rather than a full inspection of imported goods. The benefits sought by the company in paying bribes is to enter markets earlier, thus triggering earlier profits, and possibly improving its market position by getting ahead of competitors.

When a company bribes an official to speed up the process for obtaining an authorisation, license or permit, the proceeds may be calculated by reference to the time saved by the company and the benefits accrued over that time period.

### Box 9. Quantifying proceeds in cases of expedition of delays

In the *Expedition Case*,<sup>8</sup> a company bribed customs officials to expedite its equipment into a country six months earlier, thus allowing production to begin six months sooner. The benefits to the briber were assessed as the time value of obtaining these profits six months earlier, based on an appropriate discount rate.

In the *Expenses and Import Controls Avoidance Case*, bribes were paid to customs officials to avoid certain custom formalities. This may in turn have allowed the goods to enter the market earlier. The proceeds were calculated based on the expenses saved in additional transportation costs, cost of buying replacement goods, and downtime of operations, as well as storage costs.

(See Case Summaries in Chapter 3.)

## E. Proceeds in cases involving lax internal controls and inaccurate or incomplete books and records

The crime of bribery is often committed in an environment where a company fails to maintain adequate internal controls, and books and records. For example, a company may have obtained a contract through bribery only because it did not have adequate internal controls to prevent the bribe payments, or because the payments were unnoticed since they were improperly described in the company's books and records. Statutes and

international conventions on bribery thus often include provisions dealing with books and records, internal controls, and corporate compliance.<sup>9</sup> In addition to substantive bribery charges, bribers may often face charges relating to insufficient internal controls and/or books and records.

In such situations, confiscation may be sought if there is a causal connection between the false accounting and a subsequent benefit. When this is the case, then confiscation may be possible by applying the same principles as above, so that, for instance, if the false accounting led to a contractual benefit, the principles on contractual benefits, as described above, would apply. This was the approach taken in the *Books and Records Case* (see Case Summaries in Chapter 3).

## F. Adjustments and other factors to consider in calculating proceeds

Law enforcement and other competent authorities may also take into account other specific factors to adjust their calculations. While the examples presented in this section are based on contract cases, these factors may also be taken into account for other proceeds.

### Agent fees

Agent fees paid by the briber may affect the assessment of the benefits. In the *Weir Case* (United Kingdom),<sup>10</sup> the defendant used an agent to deliver kickbacks to public officials and paid the agent substantial fees for its services. The value of the confiscation order included not only the contract revenues but also the agent fees. The approach taken was that the contract would not have been obtained but for the agent fees paid, and that these should therefore be included in the calculations.

### Administrative costs including cost of bidding

The cost of bidding for a contract is generally not deducted from the benefits subject to confiscation or disgorgement. Defendants have argued that costs such as expenses in preparing for a tender should be deducted like other costs incurred by a defendant. But in the *Siemens Power Turbine Case*,<sup>11</sup> the court rejected this argument, noting that the defendant would have incurred the costs of bidding for the contract regardless of whether it was awarded the contract.

### Indirect benefits

Indirect benefits obtained by the briber are often covered by confiscation or disgorgement. This is specifically the case for benefits other than the revenues or profits arising directly from the contract. For example, a company may pay a bribe to gain “a foot in the door” to secure additional contracts with the same customer without the need to pay further bribes (e.g. *Siemens Power Turbine Case*). The bribe paid to gain a first contract may also increase opportunities of securing other customers in the same market (e.g. *Siemens Power Turbine Case* and *Siemens Telecom and Other Sectors Case*). A contract obtained through bribery can also generate goodwill for the company (e.g. *Siemens Telecom and Other Sectors Case*).<sup>12</sup> Information on these indirect proceeds may be found in corporate or financial documentation (including income statements, quarterly or annual reports, business plans, minutes of management meetings, contract documentation, etc.).

### Revenues or profits generated by a part of a transaction

Revenues or profits generated by a part of a transaction can also be confiscated. In the *Volume-Based Contract Case*, a company had a long-term contract to sell chemicals. The company bribed a public official in order to obtain an additional sales order. The benefit gained by the briber was determined to be the profits under this additional order.

### Amount of the bribe payment

Bribes are treated differently regardless of whether gross revenues or net profit methods are used. Some defendants have argued that the bribe is a cost or expense in obtaining a contract. The benefit gained by the briber should therefore be the contract revenues or profits *minus* the bribe. This argument was not accepted in any of the cases in this Typology. On the contrary, some cases *add* the bribe to the revenues (*Weir Case*, *Medical Equipment Case*) or the profits (e.g. *Sale of Goods or Services Case*, *Volume-Based Contract Case*, and *More Efficient Product Case*). The main justification used by courts or competent authorities in these cases is that the briber has falsely described the bribe as a legitimate expense in its books and records, and then deducted the expense from its taxes.<sup>13</sup> As a result, the value of the bribes is an approximation of the amount by which the company’s taxes were illegitimately reduced.

Some other cases simply *ignore* the value of the bribe, i.e. neither adding it to nor subtracting it from the revenues or profits (e.g. the *Siemens Power Turbine Case*, or *Siemens Telecom and Other Sectors Case*).<sup>14</sup>

In addition, the value of the bribe may be confiscated or disgorged in cases where the contract revenues or profits cannot be ascertained. For example, in the *Contracts and Other Advantages* and the *Volume-Based Contract Cases*, both companies paid several public officials travel and entertainment expenses, it was difficult to attribute the bribes paid directly to specific contracts. In the *Contracts and Other Advantages Case*, the company also paid bribes to obtain a contract that was ultimately not performed, and hence did not obtain actual revenues or profits from the contract. In both cases, an amount equal to the bribe was disgorged on the assumption that the benefit to the briber is equal to at least the bribe.

### Time period

The period to consider for calculating proceeds may start well before the bribe is actually paid and last long after a contract was concluded. An example where the period to consider may start long before the bribe was paid is when the bribe is paid to avoid paying tax on previous years' profits. A case where the period must be extended long after the contract was concluded would be if growth of a business area could be directly attributed to the business obtained as the result of a bribe. In addition, the value of a long term contract may depend on future revenues or profits derived from recurrent transactions. For example, it will be possible to calculate the present value of a contract to supply electricity over an extended period before it is actually completed. Accounting or financial methods would require applying or estimating future quantities, prices and costs involved in the execution of the contracts.

### Applicable interest rate

Money has a time value. As a result, interest income earned on illicit profits will often be included in the calculation of the proceeds of corruption. For long term contracts with recurrent transactions, the present value of future profits may have to be calculated by using discounted interest rates.<sup>15</sup>

When lengthy periods are being considered, the interest rate or cost of capital becomes critical as does the period over which it is applied. In some jurisdictions there will be a prescribed interest rate which the courts use. In others, the weighted cost of capital, which is normally found in the financial statements, will be taken into account. Interest calculations can significantly increase the quantum of the proceeds. The primary questions to be addressed by courts in this case are: what interest rate should be used? And over what period should the interest is calculated?

Irrespective of the interest rate that is chosen, interest should be applied to the benefits of bribery from the time the briber obtains them to the time when a court orders confiscation, disgorgement, compensation etc. The case in the following box is an example of how a court chose the interest rate for part of the relevant period, namely from the commencement of litigation to when the court ordered damages be paid.

**Box 10. The Interest Calculation – what rate and over what period?**

In the South African case of *Gore NO v Minister of Finance and Others*, the main area to be adjudicated was the period over which interest on the award was to be calculated. The rate was not in dispute because in South Africa interest rates on such claims are governed by The Prescribed Rate of Interest Act, No 55 of 1975. It is of interest to note that the prescribed interest rate is 15.5 %.

The plaintiff claimed interest from the date on which the summons was issued, January 1999, until October 2008. This is in accordance with the general rule in South African law that interest should run from the date of summons or demand. Section 1 (1) of The Prescribed Rate of Interest Act states ‘the aforesaid applicable rate shall apply, unless a Court of law, on the ground of special circumstances relating to the debt, orders otherwise’.

In this case the Fourth Defendant was able to successfully argue that the following special circumstances applied: Firstly the plaintiff did not provide a reasonable estimate of the amount of the claim until October 2007 and secondly there had been an agreement between all parties to the case that no action would be taken on the issue of the amount of damages until the courts had ruled on whether the plaintiff had a case. The trial to determine whether there was a case was concluded in February 2007 before the plaintiff had provided a reasonable estimate of the claim.

The court held that interest on the claim should be payable from the period November 2007 (the start of the month after a reasonable estimate of the claim had been provided) until October 2008 (the date of the ruling in the amount of compensation). It is noteworthy that had the court ruled in favour of the plaintiff regarding the period over which interest could accrue (1999-2008), the claim would have more than doubled. At the prescribed rate of interest 15.5 % a debt will double in just less than 5 years.

## Notes

1. See Case Summaries in Chapter 3 – Sale of Goods or Services Case; Medical Equipment Case (Switzerland).
2. See Case Summaries in Chapter 3.
3. Gore NO v Minister of Finance and others (11190/99) (30 October 2008).
4. See Case Summaries in Chapter 3 – *Grand*.
5. See *ibid* – *Cameroon Airlines v. Transnet Limited*.
6. See Case Summaries in Chapter 3.
7. See Case Summaries in Chapter 3 – Tax Avoidance Case.
8. See Case Summaries in Chapter 3 – Expedition Case.
9. For instance, see Article 8 of the Anti-Bribery Convention; 2009 OECD Anti-Bribery Recommendation X and Annex II; UNCAC Article 12(3); and the U.S. Foreign Corrupt Practices Act provisions on internal controls, and books and records.
10. See Case Summaries in Chapter 3.
11. *Ibid*.
12. *Ibid*.
13. The OECD adopted a Recommendation in 1996 (revised in 2009) requiring Member countries to explicitly disallow tax-deductibility of bribes in their tax legislation.
14. See Case Summaries in Chapter 3.
15. As a result the present value of a contract and/or the related increase in the “goodwill” of the contractor will be less than the addition of net profits over the period.





## Chapter 3

### Case summaries

The purpose of this Chapter is to provide case studies and examples of quantification of proceeds in cases of active bribery. It is not meant to provide an exhaustive catalogue of cases involving identification and quantification of the proceeds of active bribery. The case studies draw from official sources (e.g. court documents) or, where the information is confidential, cases which have been “anonymised”, i.e. the names of companies or individuals have been deleted. Anonymised cases may also contain features drawn from one or more actual cases.

#### 1. Contracts

##### *Sale of Goods or Services Case (United States)*

*Source: Anonymised case*

##### Facts

A company sells communications networks and control systems to state-owned enterprises between 2003 and 2007. The company made approximately 5 000 payments totalling USD 5 million to third parties who delivered the payments as bribes to foreign officials. In return for the bribes, the company obtained projects to build communications networks and control systems for the state-owned enterprises. The revenues from the projects were valued at USD 100 million. The company paid USD 25 million for the cost of goods sold for the projects. The company also disguised the bribes as a legitimate expense in its books and records, and deducted the expense from its taxes.

### Calculating the Benefit

The benefit subject to disgorgement was calculated using the “net revenues or “net profits” method:

	Revenues received from projects:	USD	100 000 000
-	Cost of goods sold for projects:	USD	25 000 000
+	<u>Total amount of bribes paid:</u>	<u>USD</u>	<u>5 000 000</u>
=	Total benefit derived:	USD	80 000 000

In essence, the benefit is the profits received by the company under the contracts (revenues minus costs) plus the amount of bribes paid. The bribes are added because the company benefitted by deducting the bribes from its taxes.

To test the numbers, the large difference between the amount of bribes paid (USD 5 million) and the benefits gained (USD 80 million) justifies the bribery transaction. A further test could involve comparing the profit margin for this particular contract with those for similar contracts that are not tainted by bribery. Another alternative is to compare internal profit margin projections for the contract to the actual profit margin.

### *Volume-Based Contract Case (United States)*

*Source: Anonymised case*

#### Facts

A company has a long-term contract with a state-owned enterprise to sell approximately 100 tons of chemicals. The company pays USD 2 million in bribes to foreign officials to encourage the officials to order a volume of chemicals in excess of 100 tons. This additional order would generate USD 5 million in revenues and cost the company only USD 1.8 million. The company also pays USD 100 000 for lavish travel and entertainment for foreign officials to further encourage the officials to order the chemicals.

### Calculating the Benefit

The benefit gained by the briber was calculated essentially using the “net revenues” or net profits” method:

	Revenue from sale of chemicals above 100 tons:	USD	5 000 000
-	Cost of goods sold:	USD	1 800 000
+	Total amount of bribes paid:	USD	2 000 000
+	Total value of travel and entertainment:	USD	100 000
=	Total Benefit Derived:	USD	5 300 000

The benefit gained by obtaining a certain volume of sales was determined by taking the revenue from sales above 100 tons. The bribe was added to the profits since the company benefitted by deducting the bribe from its taxes (see the Sale of Goods or Services Case for further explanation).

The costs of the travel and entertainment were also added because it is presumed that the company benefitted in paying this bribe, and this benefit could be beyond the extra sales. For example, the travel and entertainment could have generated goodwill for the company. Determining the benefit from the company's payment of lavish travel and entertainment of foreign officials was neither apparent nor easily calculable. The amount of the bribes was thus used as the estimate of the benefit.

To test the numbers, the benefits gained (USD 5.3 million) relative to the amount of bribes paid (USD 2.1 million) demonstrate the utility of the bribery transactions.

### ***Weir Case (United Kingdom)***

*Source: Press Release, Crown Office and Procurator Fiscal Service (15 December 2010)*

#### **Facts**

A Scottish engineering company paid GBP 3.1 million in kickbacks to foreign officials to secure 16 contracts for water treatment equipment worth GBP 34.3 million. The kickbacks were paid through an agent, who received a fee of GBP 1.4 million.

#### **Calculating the Benefit**

The benefit subject to confiscation was calculated using the gross revenue method. The agent's fee and the improper payments were added to the benefit:

	Gross revenues for the 16 contracts	GBP	9 414 283
	Agent’s fee	GBP	1 427 152
+	<u>Kickbacks to foreign officials</u>	GBP	<u>3 104 527</u>
=	Total benefit derived:	GBP	13 945 962

### ***Selby and Ashurst Contract A Case (United Kingdom)***

*Source: Provided by the U.K. Authorities*

#### Facts

Selby and Ashurst Limited (“S&A”) is part of a conglomerate that supplies pre-fabricated housing. S&A itself specialises in the design and manufacture of pre-fabricated houses overseas. To obtain Contract A valued at GBP 9.1 million from a foreign government, S&A paid a bribe to foreign officials in the amount of 12% of the contract value (approximately GBP 1.1 million). The bribe was paid through S&A’s agent and was disguised as a commission for the agent’s services.

S&A pleaded guilty to conspiring with certain of its directors and agents to give corrupt payments to foreign public officials, contrary to Section 1 of the Criminal Law Act 1977. S&A was fined GBP 4.8 million and ordered to submit its internal compliance programme to an independent monitor. The prosecution also sought confiscation of the benefits obtained by S&A as a result of the crime. Under U.K. legislation, the court will confiscate the full amount of the benefit unless it exceeds the value of the defendant’s “realisable property” (Criminal Justice Act 1988 (as amended)).

#### Calculating the Benefit

The U.K. prosecutorial authorities took the position that the benefit should be calculated using the “gross contract value” method. Thus, the benefit figure is not adjusted based on costs or expenses incurred by a briber in executing or obtaining the contract, fees paid to intermediaries or agents, or the amount of the bribe received by a foreign official. This method is based on the view that the contract would not have been obtained “but for” the bribe.

In the present case, the benefit figure was the contract amount obtained, i.e. GBP 9.1 million. S&A had sufficient funds and accordingly the confiscation order was ordered in this sum. Whilst the Criminal Justice Act 1988 prescribes that a confiscation order takes priority over a fine, S&A’s

funds (i.e. realisable property) were sufficient to satisfy both orders. The court accordingly ordered confiscation in the amount of GBP 9.1 million.

### ***Siemens Power Turbine Case (Germany)*<sup>1</sup>**

*Source: Decision of the German Regional Court (Landgericht of Munich I) (14 May 2007)*

#### **Facts**

Siemens is a German engineering company. Two of its executives bribed officials of an Italian utility company in which the Italian government held shares. A EUR 2.65 million bribe led Siemens to win a EUR 132.5 million contract to supply gas turbines and related equipment. Siemens then won a second turbine contract worth EUR 205.6 million after paying bribes of EUR 2.987 million and USD 483 990. Siemens made pre-tax profits totalling EUR 103.8 million from the two contracts. This does not include EUR 3.1 million in overhead costs attributable to the two contracts, and EUR 3.5 million in the costs of bidding for the contracts. The profits are then subject to corporate income tax at a rate of 40%.

When the bribery came to light, Siemens faced criminal prosecution in Italy. Pursuant to these criminal proceedings, Siemens agreed to forfeit EUR 6.121 million, which the Italian authorities assessed as the profits arising from the two turbine contracts.

In addition, the Italian utility also brought civil proceedings in Italy against Siemens to annul the turbine contracts. Annulment would be extremely costly for Siemens, as it would require Siemens to uninstall and repossess the turbines, return the purchase monies, and compensate the Italian utility for any expenses. This would destroy any profits that Siemens acquired under the contracts. Ultimately, Siemens settled these proceedings by agreeing to (1) pay the Italian utility company EUR 20 million, (2) provide two sets of turbine vanes worth EUR 23 million each for free, (3) provide four sets of turbine vanes worth EUR 23 million each at half price, (4) modify certain equipment to allow for higher operating temperatures at a cost of EUR 1 million, and (5) rescind an agreement that gave Siemens the exclusive right to service the Italian utility company's turbines and related equipment.

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1. The case was reversed on appeal on grounds unrelated to the issue of confiscation.

In addition to prosecuting the two executives for foreign bribery, the German authorities sought confiscation against Siemens under Sections 73-73c of the Criminal Code.

### Calculating the Benefit

The benefit was calculated using the “net revenue” or “net profits” method but (1) without including the value of the bribes in the benefits, and (2) allowing for various deductions.

The starting point was the profits (before accounting for overhead) from the two contracts, not the revenues or the contracts’ gross value. The court then deducted the overhead costs attributable to the two contracts to obtain the profits under the contracts. The court also deducted profits already forfeited in criminal proceedings in Italy to avoid double forfeiture. However, the court did not allow several deductions including: (1) income tax on the profits, (2) costs of bidding for the contract, since Siemens would have incurred these costs regardless of whether it was awarded the two contracts, and (3) the value of the bribes (though the court also did not add the value of the bribes to the benefits):

	Pre-overhead profits from the two contracts	EUR	103 800 000
	Profits forfeited in Italian criminal proceedings	EUR	6 121 000
-	<u>Overhead costs attributable to the two contracts</u>	EUR	<u>3 100 000</u>
=	Total benefit derived before Italian settlement:	EUR	94 579 000

The court then dealt with the settlement between Siemens and the Italian utility company. Siemens agreed to provide to the Italian utility company funds, turbines, turbine vanes, and equipment modification. The court disregarded the rescission of the exclusive service agreement since it was speculative whether such an agreement represented a financial benefit:

	Funds provided to the Italian utility	EUR	20 000 000
	Two sets of turbines vanes for free	EUR	46 000 000
	Four sets of turbines vanes at half price	EUR	46 000 000
+	<u>Modifying equipment</u>	EUR	<u>1 000 000</u>
=	Total cost of Italian settlement:	EUR	113 000 000

The court then held that this settlement served two purposes for Siemens: (1) it avoided annulment of the two contracts, which otherwise would have destroyed any profits under the contracts, and (2) it maintained Siemens’ access to the Italian market, and also reduced the penalties that Siemens would have faced in Italy. The court held that the value of (2) should not be deducted from the benefit subject to confiscation. However, the value of (1) should be deducted, since if Siemens did not

make this expenditure, then the two turbine contracts could have been annulled. This would destroy all profits accruing to Siemens under the contracts, leaving no benefit to be confiscated or disgorged. In the end, the court held that it was not possible to determine the precise value of (1) and (2). The court accordingly gave equal weight to each purpose, and deducted half of the settlement (representing the value of (1)) from the benefit subject to confiscation.

	Total benefit derived before Italian settlement	EUR	94 579 000
–	<u>Half of cost of Italian settlement</u>	EUR	<u>56 500 000</u>
=	Total benefit confiscated:	EUR	38 079 000

### ***Siemens Telecom and Other Sectors Case (Germany)***

*Source: Decision of the German Regional Court (Landgericht) of Munich I (4 October 2007); Decision of Public Prosecution Office Munich I in proceedings regarding an administrative offence (15 December 2008)*

#### Facts

Siemens, a German engineering company with worldwide operations, engaged in a widespread and systematic practice of foreign bribery between 2001 and 2007 to obtain business contracts. The scheme involved officials in at least ten countries, several subsidiaries, different lines of business and thousands of payments, many through intermediaries. Administrative fines were imposed against Siemens in Germany. The fines contained two parts: a punitive component and a confiscatory component. The confiscatory component is equal to the financial benefits acquired by Siemens through bribery.

#### Calculating the Benefit

In determining the amount of the confiscatory component of administrative fines, the German authorities essentially applied a modified “net revenues method. The confiscatory component includes direct benefits from a contract obtained through bribery:

	Revenues from a contract obtained through bribery
–	<u>Costs incurred in executing the contract (but not the bribe)</u>
=	Direct benefits from a contract obtained through bribery

The confiscatory component also includes indirect benefits. These include the opportunity to obtain additional contracts from the same company; the opportunity to obtain additional contracts from other

companies (i.e. market access); increase in Siemens' goodwill; improvement in market position because of the elimination of competitors; and avoidance of losses due to greater utilisation of Siemens' production capacity. These indirect benefits may exist even if the contract obtained through bribery does not generate a profit. Indeed, companies have been known to intentionally enter into loss-making contracts because of indirect benefits, such as the opportunity to obtain additional contracts that do generate profits:

	Direct benefits from a contract obtained through bribery
	Opportunity to obtain additional contracts from the same company
	Opportunity to obtain additional contracts from other companies
	Increase in goodwill
	Improvement in market position
+	<u>Avoidance of losses due to greater utilisation of production capacity</u>
=	Total amount of confiscatory component of administrative fine

In the case of Siemens, the value of the confiscatory component of the administrative fines totalled EUR 200 million (telecoms operations) and EUR 394.75 million (other business sectors). The German public prosecution office arrived at these figures based on “the results of its investigations and on the statements made by Siemens itself, which it found logical and credible in this regard.”

### ***Medical Equipment Case (Switzerland)***

*Source: Anonymised case*

#### **Facts**

A small unlisted company specializes in trading technical medical equipment. Between 2000 and 2006, it submitted tenders for approximately 20 projects. By bribing foreign public officials, it won all but one of the tenders. The bribes paid varied per contract and ranged up to 30% of the contract value. Bribes were paid through different means including direct payments to foreign public officials, indirect payments through intermediaries, medical treatment of the officials and/or their relatives, and travel, leisure and gifts for the officials and their families.



## Calculating the Benefit

The investigation of this case largely focused on the financial aspects of the company's behaviour. According to the books and records of the company, there was no separate or specific calculation for each project. Therefore a full cost/benefit analysis could not be performed. However, most of the bribe payments made could be identified and related to one or more contracts. This allowed the application of the net profit (or net value) method, i.e. the benefit is the contract revenues minus the total costs incurred while executing the contract. In addition, Swiss law allows an estimation of the proceeds if the exact calculation poses an insurmountable burden on the prosecution. An estimate was permitted in this case since many of the necessary invoices were forged and the company did not maintain specific calculations for each individual project. Confiscation also covered additional amounts - such as bribes paid to officials, fees paid to intermediaries, the value of medical services rendered, and the cost of travel, entertainment and gifts - that were identifiable. In the end, an estimated benefit of CHF 2 million (approx. USD 2.2 million, EUR 1.5 million) was forfeited.

### *Contracts and Other Advantages Case (United States)*

*Source: Anonymised case*

#### Facts

A company made improper payments through its subsidiaries to foreign public officials in two foreign countries, in several sets of transactions.

1. A company subsidiary paid USD 2 million in kickbacks to foreign public officials. It also offered (but ultimately did not pay) additional kickbacks in the amount of USD 2 million USD. These payments allowed the company to obtain several contracts worth approximately 50 million USD and profits in the amount of USD 20 million.
2. The company paid USD 1 million in bribes to foreign public officials, in return for a sale of goods contract generating USD 100 million in revenues, and USD 10 million in profits.
3. The company bribed a foreign public official to secure a contract for the sale of goods. The company paid USD 3 million in bribes and hospitality expenses, obtaining in return a contract generating USD 50 million in revenues and USD 20 million in profits.

4. The company paid USD 150 000 in bribes to foreign public officials to ensure its product would be retained for a public procurement contract. Ultimately, the contract was however not executed.
5. The company covered hospitality expenses for foreign public officials amounting to USD 100 000. The advantage obtained in return was not established.

### Calculating the Benefit

The benefit subject to disgorgement was calculated using essentially the “net revenues” or “net profits” method:

Profits from 1st contract	USD 20 million
Profits from 2nd contract	USD 10 million
Profits from 3rd contract	USD 20 million
Bribes paid in relation to 4th contract	USD 150 000
<u>+ Hospitality expenses for foreign public officials</u>	<u>USD 100 000</u>
= Total benefit derived	USD 50 250 000

The benefit is based on the net profits (revenues minus costs) of the contracts obtained. In addition, the bribes paid to secure the 4<sup>th</sup> contract are included in the benefits. Although the contract ultimately was not performed, the benefit accruing to the company is presumed to equal to the value of the bribes paid. Finally, the hospitality expenses for the foreign public officials are also added, as it is presumed that the briber benefited in an amount equal to the cost.

### ***The case of Fyffes Group and others v. Templeman, Seatrade and others (UK)***

*Source: Fyffes Group Ltd.v. Templeman (2000), 2 Lloyd’s Rep. 643 (U.K.)*

#### Facts

Fyffes was a company involved in the banana trade. It found that an employee who negotiated a service agreement with a shipping contractor took bribes amounting to more than USD 1.4 million between 1992 and 1996. Fyffes sought to recover damages from the employee, the shipping company, and its agents.

All defendants were found jointly liable for the value of the bribes. The court ruled that “there can be no dispute that [the bribes] were taken into

account by *the contractor* in agreeing the amount of the freight for each year, which would have been correspondingly less for Fyffes if they had only had to pay the net sum which *the contractor* were prepared to accept.” The shipping company and its agents were liable to pay additional compensation for the loss that Fyffes suffered from entering into the contract under unfavourable terms.

To reach this conclusion, the judge rejected an account (a disgorgement) of all profits made by the contractor because it was “highly probable that Fyffes would have entered into a service agreement with the contractor if the employee had not been dishonest.” As a result, “ordinary” profit from the contract was not caused by bribery, but by “the provision of services for which there would have been a contract in any event.”

### Calculating the damages

The judge considered evidence from shipping experts testifying for both Fyffes and Seatrade to determine the difference between the amounts actually paid by Fyffes to Seatrade and the amounts that would have been paid if Fyffes had been represented in the negotiations by an honest and prudent broker. This is, in effect, an example of an additional profit calculation. The following extract in respect of “Steaming saved” shows how specialist the evidence in quantifying these damages is in this case:

*Under clause 10 of the service agreement Fyffes were obliged to pay Seatrade for any bunker fuel consumed in additional mileage from a substitution of ports on any voyage. There was no converse provision entitling Fyffes to a rebate for the reduction in bunker fuel consumed if steaming was saved. The expert for the plaintiff considered it very unusual for such a provision not to work both ways and that an honest and prudent charterer would not have agreed to the clause as drafted. The defence effectively conceded the point. Fyffes are entitled under this head to USD 471 940 as claimed.*

Each item in the clause in the contracts between Fyffes and Seatrade was considered in a similar way. Only when there was a clear disagreement as to how an expense or income should be calculated, did the judgment discuss the actual calculation. In particular, the judge considered for each year, what Fyffes would have normally agreed to pay if it had been represented by a prudent and honest negotiator. There was no evidence that actual payments would have been different in 1992, 1994, and 1995. But the court ruled that payments were inflated by USD 830 022 in 1993 and by USD 1.1 million in 1996 because actual rates were higher than what a prudent and honest negotiator would have accepted given market conditions.

## ***Gore NO v. Minister of Finance and others Case (South Africa)***

*Source: Judgment in Gore NO v Minister of Finance and others (11190/99) (30 October 2008)*

### Facts

A dishonest bidder was awarded a contract using biometric technology for the payment of old age pensions, disability grants and child support grants. The rival bidder sought compensation for damages. The dishonest bidder had not yet actually performed under the contract and the plaintiff never delivered a service. The contract was cancelled and a new contract was awarded to a third company called Allpay.

In this case relatively few adjustments had to be made to the comparative data. In cases where such directly relevant information is not available it may be necessary to use more than one set of comparative financial statement and make multiple adjustments.

### Calculating the damages

To determine the net profit that the plaintiff would have earned by performing the contract, income and expenditure were considered as follows:

**Income (revenue):** Initial enrolment income (fees which would have been received from the government for enrolling pensioners in the first year of the tender) + Payment income (fees received from the government for the payment of pensions) + Interest income on daily balance resulting from the cash advance government and used to pay pensions. + Interest on surplus cash and profits re-invested

**Costs:** Personnel costs + Direct costs (items such as vehicle running costs, maintenance, insurance, petrol, license fees, modem lines, telephones...) + Indirect costs (items such as office rental, cash insurance, auditor's remuneration, life insurance, regional service levies (RSC levies), travelling, bank charges and extra budget items) + Initial enrolment costs + Rental costs

The judge based his decision on hypothetical calculations performed by the forensic accountants employed by each party and comparative data.

In respect of income the judgment reads "Allpay's cost per beneficiary from 1995 to 1999 inflation adjusted and imputed to the plaintiff's beneficiary numbers ranges from ZAR 7.23 in 1999 to ZAR 9.30 in 1995. By contrast, the plaintiff's tender VAT-inclusive price per head for paying

beneficiaries would have ranged from ZAR 17.40 in 1995 to ZAR 22.55 in 1999. The massive profit margin is self-evident.

On costs the judgment reads “a table produced by the plaintiff substituting the plaintiff’s costs with Allpay’s costs (derived from their financial statements), adjusted for inflation indicated that the plaintiff would, on the basis of Allpay’s expenses have made a five year pre-tax profit of ZAR 322 165 662. This amount is significantly higher than the pre-tax profit claimed by the plaintiff namely some ZAR 253 million.”

Regarding operating margin the Gore judgment also reports that “a comparison with the Allpay operating margin supports the case of the plaintiff. I pointed out that according to the plaintiff’s calculation the Allpay average operating margin was 28%...” The Allpay average operating margin is some 61.7 % of the plaintiff’s projected operating margin. Part of the differential is attributable to the fact that Allpay’s first year did not involve any payment of beneficiaries, and thus no real income. By contrast, the plaintiff would have received income from its first year. “Most of the difference is, however, accounted for by the comparatively high tender price of the plaintiff. If one were to raise Allpay’s price per beneficiary upwards towards the national average (*other firms provided similar services in other provinces of South Africa*) its operating margin would likewise rise significantly, and be comparable with that projected for [the plaintiff].”

A redacted extract from the judgment relating to the simplest and least contested of these categories illustrates how the judge reached conclusions on specific items:

### **Indirect Costs**

The calculations offered by the respective parties are the following for the five year period: Plaintiff ZAR 26 680 000 [approximately USD 4.44 million]; Second Defendant ZAR 26 680 000 [approximately USD 4.44 million]; Fourth Defendant ZAR 29 881 368 [approximately USD 4.98 million].

There are no indications that [*the Forensic Accountant for the fourth defendant*] adjusted his calculations based on any input from someone with a personal knowledge of the service which the plaintiff would have performed. Counsel for the plaintiff also lists a number of mistakes made by [*Forensic Accountant for the fourth defendant*]. He, mistakenly, took the plaintiff’s budgeted monthly expenses for 1995 and inserted them into his 1994 column without de-escalating the amounts to take inflation into account.

For these reasons, as particularly bearing in mind that two of the three parties are in agreement, I see no basis for interfering with the plaintiff's figure.

***S.T. Grand, Inc v. City of New York Case (New York State)***

*Source: 32 N.Y.2d 300, 298 N.E.2d 105 (1973)*

**Facts**

The Grand case is a civil case in which a company, S.T. Grand, Inc., had entered into a contract for with the City of New York to clean a reservoir approximately USD 840 000. Grand completed the cleaning as required by the contract. The City had paid Grand about USD 690 000 at the time a criminal allegation surfaced.

Subsequently, Grand and its president were convicted of conspiracy to commit bribery for having paid a kickback to a City official in return for being selected for the contract.

Grand then sued the City for the unpaid balance it was owed for the cleaning work it had performed, approximately USD 150 000. The City refused to pay and argued that the contract was illegal by reason of the bribery. The City counterclaimed to recover the approximately USD 690 000 it had already paid.

**Calculating contractual restitutions**

The highest court of the State of New York held that indeed the contract was illegal by reason of the criminal conviction for bribery. The court then applied the prevailing general rule that “where work is done pursuant to an illegal municipal contract, no recovery may be had by the vendor [here Grand], either on the contract or in quantum merit” and that the City could recover all amounts paid from the vendor. Thus, the contractor, Grand, was ordered to forgo the entire amount of the contract, approximately USD 840 000.

### ***Cameroon Airlines v. Transnet Limited (International Court of Arbitration)***

*Source: ICC Case no. 11307 of 2003, reversed in part [2004] EWHC 1829 (Comm) (UK)*

#### **Facts**

The company Transnet Limited entered into two maintenance agreements with Cameroon Airlines, a state-owned company. Transnet entered into a contract with an intermediary, ATT, under which the intermediary was to negotiate the price at which Transnet was to supply services to Cameroon Airlines, against payment of a commission. Cameroon Airlines paid Transnet over USD 50 million under the maintenance agreements, with Transnet making proportional payments to ATT in commissions. These payments to ATT were channelled as bribes to senior employees of Cameroon Airlines and senior government officials. Transnet ultimately performed the services and provided materials as required under the contract before the bribery was uncovered.

Cameroon Airlines filed a request for arbitration by the Arbitration Court of the International Chamber of Commerce against Transnet, arguing that the maintenance agreements were tainted by corruption and bribery, asking for restitution of the entire sum of the maintenance agreement contracts, plus interest. By agreement among the parties, the dispute was decided under South African law.

#### **Calculating contractual restitutions**

The ICC held that, although Cameroon Airlines was entitled to avoid the maintenance agreements, it was not entitled to restitution of the total sums paid thereunder. Transnet performed services and provided materials as required under the maintenance agreements. Cameroon Airlines is thus entitled to only the value of the contracts minus the value of the benefits that it received under the maintenance agreements. The tribunal thus had to determine the value of these benefits, or the lower price Cameroon Airlines would have paid to another contractor had bribery not been involved.

The tribunal quantified Cameroon Airline's restitution by deducting the "fair value" of services provided by Transnet from the amount paid for the maintenance contracts. The "fair value" consisted of the commercial price of the contracts minus any "commission" added by Transnet on top of the contract price in order to recoup the amount paid for bribes. The tribunal

granted restitution to Cameroon Airlines in the amount of USD 8.4 million, the estimated amount of the bribe payments.

The award was later annulled by the U.K. High Court of Justice for procedural reasons, because it considered that a party to the arbitration proceedings had not been given a fair opportunity to address, in an oral hearing, the key issue of the tribunal's approach to quantification. The High Court nevertheless agreed with the tribunal that Cameroon Airlines was not entitled to restitution of the full contract price. It remarked in *obiter* that Transnet should not be entitled to keep the profit from the contract, and that only its own cost of rendering the services should be excluded from restitution.

## 2. Business authorisations, permits or licenses to operate

### *Willi Betz Case (Germany)*

*Source: Judgment of the Stuttgart Regional Court, 10th Chamber of the Criminal Division (Chamber for Economic Crime), 10 KLS 180 Js 103224/05 (20 March 2008)*

#### Facts

Willi Betz is a company that runs a road haulage business. To operate in Europe, Willi Betz must obtain permits issued by the European Conference of Ministers of Transport (ECMT) for its trucks. Willi Betz set up offices in Georgia and Azerbaijan, the primary purpose of which was to apply for ECMT permits in those countries. Once obtained, these permits would allow Willi Betz's trucks to operate throughout Europe. In the case of Georgia, BT, Willi Betz's managing director, gave USD 1 074 000 in bribes to a Georgian public official to obtain ECMT licenses. In the case of Azerbaijan, BT paid an Azeri official EUR 1 647 436 in bribes to obtain ECMT licenses, and an additional EUR 422 500 in bribes to obtain vehicle registrations. In total, Willi Betz spent EUR 9.2 million to set up and run the firms in Georgia and Azerbaijan, to bribe Georgian and Azeri officials, and to pay the (legitimate) license fees.

The German authorities sought confiscation against Willi Betz pursuant to Sections 73-73a of the Criminal Code. The ECMT licenses could not be confiscated as they had expired or no longer existed. The German authorities therefore sought confiscation of property of an equivalent value.



## Calculating the Benefit

The value of the benefit subject to confiscation was calculated using the “derived benefit” method. The court held that the benefit derived was, as a minimum, the amount which B was willing to pay in obtaining the ECMT licenses. This includes not only the bribes paid to foreign officials, but also the cost of establishing and operating the companies in Georgia and Azerbaijan, which were set up primarily to obtain the licenses. A small deduction was allowed since a small part of these firms’ operation did not relate to bribery or the ECMT licenses:

	Bribes and cost of running firms:	EUR	9 200 000
–	Cost of running firms unrelated to bribery:	EUR	700 000
=	Total benefit confiscated:	EUR	8 500 000

## ***Compensation for damages in the logging case in re Surya Dumai Group (Indonesia)***

*Source: Corruption Eradication Commission of Indonesia (KPK)*

### Facts

A company paid bribes to obtain a permit for logging in a prohibited area. In addition, the company had represented that if they were permitted to harvest the timber, they would build a small palm oil factory on the land they cleared and replant the area with palm oil trees. The company did the logging but never built the factory or replanted. The removal of the trees destroyed the local environment.

### Compensation calculation

Five persons (four government officials and the company owner) were convicted. The defendants were ordered to pay compensation to the government of IDR 350 billion (about USD 30 million) for the lost timber. This loss was estimated by identifying the areas where trees were harvested, and by applying the market rate to these surfaces. The company owner delivered “substitute money” of IDR 350 billion rupiah to the Indonesian anti-corruption agency, the KPK in March 2008. The company owner and some of the other defendants were sentenced to jail time. No fine was levied.

In calculating the amount of compensation, an argument was made that the court should take into account the multiplier effect of the damage such as increased risk of floods and erosion, since the environmental damage had

been significant. The court rejected that argument, ruling that under Indonesian law judges cannot order compensation greater than the amount of the bribes paid plus the direct proceeds of the corrupt conduct. Thus, the State's loss amount was limited to the timber lost in the concession area.

### ***Costs and Loss Avoidance Case (United States)***

See below the **Costs and Loss Avoidance Case** regarding bribes to customs officials to avoid completing necessary customs paperwork and inspections.

## **3. Expenses or loss avoided**

### ***Costs and Loss Avoidance Case (United States)***

*Source: Anonymised case*

#### **Facts**

A company provides offshore drilling services and equipment to oil companies throughout the world. In one particular operation, the company was required by the host government to move its large equipment out of the country for a period of time. If the company moved its equipment out of the country, then the equipment would not generate revenue during the period of non-operation. The company paid bribes to customs officials to avoid having to move the equipment. This kept the equipment operational and generated an additional USD 4 million in revenues. The company also saved moving costs of USD 2 million.

The company also paid bribes to avoid paying USD 1 million of customs duties owed on shipments into the country. The bribes ranged from 20% to 30% of the actual duties owed.

Finally, the company also paid USD 50 000 in bribes to customs officials to avoid completing necessary customs paperwork and inspections to facilitate inward clearance and expedite customs clearance of shipments.

#### **Calculating the Benefit**

The benefit subject to disgorgement was calculated using the “derived benefit” method:

	Costs of moving equipment avoided:	USD 2 000 000
	Profits from extended period of operations:	USD 4 000 000
	Custom duties avoided:	USD 1 000 000
+	<u>Benefit from avoiding paperwork and inspections:</u>	<u>USD 50 000</u>
=	Total benefit derived:	USD 7 050 000

The benefits derived from the USD 50 000 in bribes paid to facilitate inward clearance and expedite customs clearance of shipments were neither apparent nor easily calculable. The amount of the bribes was therefore used to estimate the benefit.

### ***More Efficient Product Case (United States)***

*Source: Anonymised case*

#### Facts

A company provides gas and energy-related products. It paid USD 1 million in bribes to foreign officials to get a more efficient crude oil product at USD 0.30 per barrel less than the market rate. As a result, it paid USD 17.5 million for the crude oil product that would have otherwise cost USD 25 million at market rates.

#### Calculating the Benefit

The benefit gained by the briber was calculated using the “traditional” method:

	Cost to obtain oil at prevailing market rate:	USD 25 000 000
-	Cost to obtain oil at rate due to bribery:	USD 17 500 000
+	<u>Amount of bribes:</u>	<u>USD 1 000 000</u>
=	Total benefit derived:	USD 8 500 000

The derived benefit was calculated by determining the difference between the price that the company would obtain on the crude oil at market price (USD 25 million) and the price of crude oil procured through bribery (USD 17.5 million).

To test the numbers, the company paid bribes to secure crude oil that was below the prevailing market price and that was a more efficient product than competitors. Therefore, at the time of purchase, the utility of the transaction was to secure the crude oil at a reduced cost.

### ***Tax Avoidance Case (United States)***

*Source: Anonymised case*

#### Facts

A company that sells computer and software components to state-owned entities pays USD 250 000 in bribes to foreign officials to avoid paying USD 1.25 million in taxes on its goods sold.

#### Calculating the Benefit

The benefit gained by the briber was calculated using the “derived benefit” method:

	Taxes avoided:	USD	1 250 000
+	Amount of bribes:	USD	250 000
=	Total benefit derived:	USD	1 500 000

### ***Expenses and Import Controls Avoidance Case (United States)***

*Source: Anonymised case*

#### Facts

A company’s subsidiaries bribed foreign public officials in two sets of transactions:

- a) A subsidiary of the company paid USD 150 000 in bribes to foreign customs officials, in return for lower customs duties, as well as to avoid obtaining necessary import licences. The majority of these payments were infrequent and of minor value. As a result of these payments, the company avoided USD 200 000 in expenses.
- b) Another subsidiary of the company paid USD 25 000 in bribes to foreign customs officials, allowing the company to avoid customs inspections which could have resulted in not allowing certain products to be imported. As a result, the company avoided USD 170 000 in expenses and equipment downtime.

In all, over 50 payments totalling USD 200 000 were made to foreign customs officials. The company did not record the true nature and purpose of these payments in its books and records.

### Calculating the Benefit

The benefit subject to disgorgement was calculated using the “derived benefit” method:

	Expenses avoided through 1st set of payments:	USD	200 000
+	Expenses avoided through 2nd set of payments:	USD	170 000
=	Total benefit derived:	USD	370 000

## 4. Expedition of delays

### *Expedition Case (United States)*

*Source: Anonymised case*

#### Facts

A company bribes customs officials in a foreign country to expedite the shipping into the country of equipment that is needed to produce oil. This allowed the company to get the equipment into the country six months sooner, thus allowing the company to reach oil production six months faster. (Determining the amount of time saved requires one to look at historical operations and data.) In those first six months, the project produced USD 500 million in profits for the company.

### Calculating the Benefit

Because of bribery, the project began producing revenues sooner than otherwise. The economic benefit to the company is therefore the time value of obtaining the profits sooner, which is calculated as:

$$\text{Benefit} = (\text{Profit per week}) \times (\text{time saved in weeks}) \times (\text{discount rate in weeks})$$

In this particular case, the derived benefits were determined to be approximately USD 12 million.

## 5. Violations of provisions on internal controls, and books and records

### *Books and Records Case (United States)*

*Source: Anonymised case*

#### Facts

A wholly-owned subsidiary of a company paid bribes totalling USD 200 000 to several foreign state-owned enterprises to secure a public procurement contract. The bribes generated sales contracts worth USD 4 million and profits of USD 1 million, which includes the value of the bribe payment. The bribe payments were improperly recorded in the subsidiary's books and records. The company did not properly record the bribe payments in the subsidiary's accounts and thus violated the applicable laws on maintaining proper books and records.

#### Calculating the Benefit

The benefit subject to disgorgement was calculated using a “net revenues” method: the benefit is the net profit derived from the contracts obtained through bribery. The value of misrecorded transactions (i.e. the hidden bribe payments) is also part of the benefit. The company accordingly paid disgorgement of USD 1 million in addition to prejudgment interest.

## Conclusion

As exemplified by the relatively small number of cases, limited to a handful of jurisdictions, the potential for use of measures to confiscate the proceeds of active bribery has still to be fully realised. This study has aimed to demonstrate how the technical challenges of identifying and quantifying such proceeds can be addressed, and that the process is neither too complicated nor too costly for widespread use.

This typology exercise has highlighted the diversity of methods in use in different jurisdictions to identify and quantify proceeds of active bribery. The use of available legal tools – whether confiscation, disgorgement, fines, compensation for damages or contractual restitutions – may lead to different results in terms of calculating amounts to recover as proceeds of bribery. Not only is quantification possible, but there are various alternative and reasonable approaches, all of which serve State parties in complying with their obligations under the OECD Anti-Bribery Convention and the UNCAC.

While this diversity of legal frameworks and the complexities of legal and financial concepts may at first blush make quantification sound daunting, it should not be viewed as an obstacle for jurisdictions which have no significant experience in quantifying proceeds of active bribery and wish to develop their practices. To the contrary, it appears that jurisdictions that have effectively developed their capabilities have been able to do so by applying traditional legal principles that were available to practitioners. For example, equitable remedies such as disgorgement initially grew out of case law in the United States. Germany and other countries have enacted legislation on confiscation and fines. A combination of case law and statutes in the United Kingdom, South Africa and other jurisdictions has provided workable remedies such as compensation for damages and contractual restitutions.

As to the specific challenges linked to quantifying proceeds derived from bribery-tainted contracts, practitioners have generally addressed these by relying on concepts just as the gross revenue, net proceeds or additional profit. The different methods have been analysed in this report, and real case

examples provided by contributing experts from different jurisdictions. The possibilities for applying by analogy generally accepted concepts are considerable, thus ensuring that bribe payers do not slip away with their ill-gotten gains.

All of these quantification methods can be developed through applying existing legislation, enacting new legislation, as well as developing case law or guidelines to guide practitioners. As a result, practitioners can benefit from the legal certainty brought by laws or reasonably well established practices. They can apply foreseeable methods which are logically derived from legal principles and current business practices to quantify proceeds of active bribery. For jurisdictions wishing to develop a new legal framework, the methods described in this typology study could be considered both as a demonstration that quantification of proceeds of active bribery is possible, and as a starting point for legislators, policy makers or practitioners when developing or implementing practices adapted to their legal context. In addition, the methods and case studies could also serve as a tool for training practitioners on quantification methods.



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# Identification and Quantification of the Proceeds of Bribery

## A joint OECD-StAR analysis

This joint OECD-StAR study examines existing methods for calculating the gains made by companies that pay bribes to win contracts or gain unfair advantages. Calculating the proceeds of bribery is the first step in confiscating and recovering ill-gotten gains. This publication intends to help policy makers, legislators and practitioners develop and implement practices based on an analysis of bribery cases in various jurisdictions.

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