Anti-bribery & corruption: the fight goes global

Commercial Fraud Commission

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National Report of the United Kingdom

Jasvinder Nakhwal

Peters & Peters
15 Fetter Lane
London, EC4A 1BW
United Kingdom
+44 (0)20 7822 7753
jnakhwal@petersandpeters.com

General Reporters:

Lina MROUEH-LEFEVRE Gutkès Avocats 40 rue Vignon – F- Paris, 75009 FRANCE	Aaron STEPHENS Berwin Leighton Paisner LLP Adelaide House London Bridge London EC4R 9HA UNITED KINGDOM

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1. THE LEGAL FRAMEWORK

1.1 What criminal and/or civil/administrative law(s) exist in your jurisdiction which are specifically targeted at bribery & corruption? Please provide:

a. a brief summary of the offences;

b. any affirmative defences that are available; and

c. the penalties that may be imposed upon offenders.

Introduction

The major UK legislative response to bribery and corruption is the Bribery Act 2010 ('the Bribery Act'), which came into force on 1 July 2011. The introduction of the Bribery Act saw a root and branch reworking of the law on public and private corruption, replacing all previous common law and statute in this area in an effort to bring the law into line with modern business practices.

The Bribery Act contains two novel features. Firstly, it is ambitious in its territorial scope, drafted to provide for a wide "*long arm*" jurisdiction to deal with bribery committed outside the UK, in a manner which bears some comparison to the equivalent US legislation (the Foreign Corrupt Practices Act). Secondly, it creates a new offence which can only be committed by a corporate entity, and which requires that corporates implement adequate procedures to militate against bribery and corruption risk.

Alongside the Bribery Act itself a number of guidance documents have been produced by the UK government to assist parties in understanding their responsibilities under the legislation. These include:

- The UK Ministry of Justice has produced guidance entitled, "*Bribery Act 2010: Guidance about procedures which relevant organisations can bring into place to prevent persons associated with them from bribing*" ('the MoJ Guidance'). The MoJ Guidance is designed in particular to assist with what the UK investigative agencies will consider to constitute adequate procedures in the context of the section 7 corporate offence (discussed below).

- The Serious Fraud Office ('the SFO') (the relevant enforcement agency in the UK) has produced guidance entitled, "*Bribery Act 2010: Joint Prosecution Guidance of the Serious Fraud Office and the Director of Public Prosecutions*" ('the SFO Guidance'). The SFO Guidance explains the circumstances in which the SFO will bring prosecutions under the Bribery Act, and is of particular relevance in explaining where UK prosecutorial agencies will draw a line between proportionate (and permitted) and disproportionate (and so criminal) offers of gifts and hospitality, and the circumstances in which prosecutors will bring proceedings against a person for making so-called "*facilitation*" or "*grease*" payments.

- Although the Financial Conduct Authority ('the FCA') does not have responsibility for enforcing the provisions of the Bribery Act, it does have responsibility for ensuring that regulated firms working in financial services have adequate systems and controls in place to mitigate bribery and corruption risk. The FCA's publication, "*Financial Crime: a guide for firms*", has helpful guidance which may assist both regulated and non-regulated entities with complying with their obligations under the Bribery Act.

- The Sentencing Council for England and Wales has published a "*Definitive Guideline*" for "*Fraud, Bribery and Money Laundering Offences*", to assist courts in sentencing both natural persons and corporate entities convicted of offences including those under the Bribery Act.

The Offences

The Bribery Act sets out four distinct criminal offences relating to bribery:

The provision or offer of a bribe (section 1)

Making or offering a bribe is criminalised by section 1 of the Bribery Act . This offence may be committed by both natural persons, and corporate entities.

The section 1 offence applies where a person offers, promises, or gives a financial or other advantage to another person:

> (a) intending to induce them, or another to perform improperly a relevant function or activity; or,
>
> (b) knowing or believing the acceptance would in itself constitute improper performance of a relevant function or duty.

Liability does not depend on whether the person to whom the advantage is offered is the person intended to improperly perform the relevant function. The section 1 offence will also extend to where a bribe or corrupt payment is provided, or offered, to an intermediary.

The receipt of a bribe (section 2)

Section 2 of the Bribery Act criminalises passive bribery – the receipt of a bribe, or an agreement to receive a bribe – in four separate ways. As with the section 1 offence, it may be committed by both natural persons and corporate entities. The offence targets recipients or potential recipients of a bribe where they request, agree to receive, or accept a financial or other advantage:

> (a) Intending that, in consequence, a relevant function or activity should be performed improperly;
>
> (b) Where the request, agreement, or acceptance itself constitutes the improper performance by the recipient, or proposed recipient, of a relevant function or activity;
>
> (c) Where the advantage is meant as a reward for prior improper performance of a relevant function or activity; or,

(d) Where in anticipation or in consequence of the recipient or potential recipient requesting, agreeing to receive, or accepting a financial or other advantage, a relevant function or activity is performed improperly by that individual, on their behalf, or by their assent or acquiescence.

Save for point (a), it is not necessary for the prosecution to demonstrate that the recipient or potential recipient knew or believed the activity to be improper at the time of the request for, agreement to, or acceptance of the advantage.

Bribery of foreign public officials (section 6)

It is an offence under section 6 of the Bribery Act to bribe a foreign public official ('FPO'). The offence is committed if an individual bribes an FPO with the intention to influence that person in their capacity as an FPO; and intends to obtain or retain some business, or an advantage in the conduct of business, by doing so. In common with the section 1 and 2 offences, it may be committed by both natural persons and corporate entities.

It is irrelevant whether the bribe is offered by a third party acting on the person's behalf and / or received by a third party acting on the FPO's behalf. Nor is it relevant whether the FPO is, in fact, influenced by the offer or advantage.

Contrary to the requirements under sections 1 and 2 of the Bribery Act, section 6 offences do not require any proof of intention on the part of the giver of the bribe to procure any improper performance on the part of the public official. The section 6 offence thus operates to criminalise so-called "*facilitation*" or "*grease*" payments (where a government official is given money or goods to perform – or speed up the performance of – an existing duty).

Failure by a corporate body to prevent bribery ('the Corporate Offence') (section 7)

One of the most significant changes to the law brought in by the Bribery Act is the Corporate Offence, under section 7, of a failure by a body corporate to prevent bribery. This offence can only be committed by a "*relevant commercial organisation*" in circumstances where an individual associated with the organisation bribes another person, or makes some other corrupt payment to a third party, with the intention of obtaining or retaining business or some advantage in the conduct of business for that organisation.

An associated person is one who "*performs services*" for or on behalf of the organisation. Whether a person performs services for or on behalf of an organisation is determined by reference to "*all the relevant circumstances*". This definition may include employees, agents, contractors, and any subsidiary.

The section 7 offence is one of strict liability. It is not necessary to prove any intention on the part of the corporate body that a bribe should be paid. However, it is a defence to the section 7 offence for the corporate body to demonstrate that it had adequate procedures in place to prevent persons associated with it from undertaking such conduct, at the time the bribe or other corrupt payment was made.

The MoJ Guidance (referred to above) is designed to assist corporate entities with identifying whether their bribery and corruption controls constitute adequate procedures for the purposes of the defence to the section 7 offence. The MoJ Guidance sets out six key principles for organisations to take account of when evaluating the adequacy of their procedures to prevent bribery:

(a) Procedures must be proportionate to the bribery risks faced by the organisation;

(b) The top level personnel of any organisation (e.g. Board of Directors, partners, or owners) must take part in an ongoing process of determining and implementing adequate procedures;

(c) Organisations must periodically assess the risk of bribery that they face in their market sector generally;

(d) Organisations must exercise due diligence in assessing the risk of bribery with respect to their specific business and business partners;

(e) Organisations must communicate clearly to their staff and business partners that bribery is not acceptable, and ensure that all anti-bribery policies and procedures are understood; and,

(f) Procedures must be subject to regular review and improved where necessary.

Penalties

A natural person convicted on indictment of an offence under sections 1 (offering or giving a bribe), 2 (receipt or agreeing to receive a bribe), or 6 (bribing a foreign public official) faces a maximum sentence of 10 years imprisonment, and an unlimited fine.

A corporate entity convicted on indictment of any offence under the Bribery Act is liable to an unlimited fine.

In either case, sentencing courts will be guided by the Definitive Guideline (promulgated by the UK Sentencing Guidelines Council) referred to above. Alongside financial penalties and / or imprisonment, persons convicted of bribery offences may be required to meet compensation orders or confiscation orders.

Company directors who are convicted of an offence under the Bribery Act may also find themselves in breach of their duties under Part 10 of the Companies Act 2006. They may also be disqualified under the Company Directors Disqualification Act 1986 for up to 15 years.

Under the EU Public Sector and Utilities Procurement Directives, incorporated into UK law by the Public Contracts Regulations 2006 and the Utilities Contracts Regulations 2006, public authorities are under a duty not to offer public contracts to any entity convicted of, inter alia, a corruption offence.

1.2 Does your jurisdiction outlaw "private" bribery/corruption (i.e. transactions between two or more private entities or persons) as well as "public" bribery/corruption? If so, please explain how the distinction is drawn between private and public bribery/corruption.

In the UK, paying bribes or making corrupt payments to private persons, or to public officials, are both prohibited.

The section 1 offence of offering or giving a bribe makes no distinction as to the status of the recipient or proposed recipient. The offence focuses on the function or activity that the recipient is expected to perform. If the recipient is exercising a function which it is expected will be performed in good faith, impartially, or by someone in a position of trust, then any attempt to induce that person to discharge that activity or function improperly will amount to an offence.

The section 6 offence creates a distinct offence of bribing an FPO which (as referred to above) does not require proof that the giving of a bribe was intended to induce improper performance of that official's duties.

1.3 Is your law extra-territorial? If so, in what circumstances can it be enforced if the relevant acts/omissions of bribery/corruption occur outside your jurisdiction?

The Bribery Act has been intentionally drafted to allow for extra-territorial effect.

Bribery Act offences under section 1, 2 and 6, set out above, apply to any acts of bribery committed within the UK by any person or corporate body, or outside the UK by a person or corporate body which has a "*close connection*" to the UK, where the conduct would constitute an offence under the Bribery Act if done or made in the UK.

A person with a "*close connection to the UK*" is exhaustively defined by the Bribery Act, as follows:

(a) a British citizen;

(b) a British overseas territories citizen;

(c) a British National (Overseas),

(d) a British Overseas citizen;

(e) a person who under the British Nationality Act 1981 was a British subject;

(f) a British protected person within the meaning of that Act;

(g) an individual ordinarily resident in the United Kingdom;

(h) a body incorporated under the law of any part of the United Kingdom; or,

(i) a Scottish partnership.

The Corporate Offence under section 7 has a wider jurisdictional reach. The offence can apply irrespective of whether the conduct which forms part of the offence takes place in the UK or elsewhere. For a corporate to face proceedings under the section 7 offence, it is sufficient for the prosecution to show either that the defendant:

(a) Is incorporated under the laws of the UK, and carries on a business; or,

(b) Is incorporated outside the UK, and carries on a business in the UK.

The MoJ Guidance (referred to above) provides some guidance on when a foreign corporate may be said to be carrying on a business in the UK for the purpose of the section 7 offence. The MoJ Guidance suggests, for example, that the fact that a foreign corporate's shares are listed on the London Stock Exchange will not (of itself) amount to carrying on a business in the UK, and so will not found jurisdiction for the purposes of proceedings under the Bribery Act. To this extent, the section 7 offence carries a more limited jurisdictional reach that the US FCPA, which extends to foreign corporations simply by virtue of their shares being traded on a US regulated stock exchange.

1.4 Are there any "safe harbours" or exemptions in relation to transactions that might otherwise be regarded as bribes, such as "facilitation payments", which are expressly excluded from being illegal? If so, is this determined by statute/codified law, by case law or otherwise?

There is no exemption under the Bribery Act for facilitation payments. Facilitation payments are payments requested by officials in order to secure or expedite the performance of their ordinary duties. The issue is ultimately one of prosecutorial discretion, and the circumstances in which the SFO will institute proceedings against a natural person or corporate entity suspected of making a facilitation payment are set out in the SFO Guidance (referred to above).

Corporate hospitality is permissible under the Bribery Act. The issue is one of proportionality. The MoJ Guidance (referred to above) states that,

> "*Bona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations, is recognised as an established and important part of doing business and it is not the intention of the Act to criminalise such behaviour*".

The MoJ Guidance adds that reference will be made to the "*standards or norms*" of the industry sector in question, and that hospitality which is overly "*lavish*" or not of "*genuine mutual convenience*" may risk qualifying as a bribe.

1.5 Does the financial regulatory system (i.e. the law and regulations governing the operation and conduct of banks and other financial institutions) in your jurisdiction address the topic of bribery & corruption? If so, please provide a brief summary of the obligations (including systems/controls and reporting obligations) that are imposed on banks and other financial institutions in this regard.

In the UK, the FCA is the regulator with responsibility for the conduct of banks and other financial institutions.

FCA regulated firms are required to comply with a broad range of responsibilities as set out in the Conduct of Business Sourcebook ('the COB'). The COB provides, inter alia, that regulated firms act with "*integrity*", and that they have adequate systems and controls in place to mitigate financial crime risk, including bribery and corruption risk.

In parallel to their obligations under the Bribery Act, regulated firms must regularly assess their systems and controls to ensure that they are comprehensive and proportionate to the nature, scale, and complexity of the firm's activities. They must also allocate overall responsibility for these systems and controls to a director or senior manager.

The FCA does not need to obtain evidence of corrupt conduct in order to take regulatory actions against a firm. It may target organisations simply because they have deficient anti-bribery and corruption systems in place.

A range of civil enforcement powers and penalties are available to the FCA to respond to bribery and corruption by banks and financial institutions, including:

(a) withdrawing a firm's authorisation;

(b) fining firms or individuals in breach of their rules;

(c) suspending a firm's activities, for example by banning recruitment;

(d) applying to the Court for injunctions and restitutions orders; and

(e) bringing criminal prosecutions to tackle financial crime.

For example, in 2011, the FCA fined Willis Limited some £7million as a consequence of failings in that firm's anti-bribery controls.

2. CORPORATE CRIMINAL LIABILITY

2.1 In the context of bribery/corruption, does your law recognise the concept of corporate criminal liability? E.g. can a corporate entity be found guilty of bribery?

UK law recognises the concept of corporate criminal liability. In the context of bribery and corruption, corporate bodies may be found guilty of offences under the Bribery Act and penalised as set out above.

2.2 If the answer to 2.1 above is "yes", please provide a brief explanation of the legal theory of corporate criminal liability (i.e. what circumstances must be established for corporate liability to arise and what form does that liability take) as well as the penalties that may be imposed upon a corporate offender.

In English law, the default position is that a company may only be convicted of a criminal offence where a natural person identified as its 'directing mind' may be fixed with the necessary criminal intent at the time the alleged unlawful conduct was carried out: see *Tesco Supermarkets Limted v Nattrass* [1972] AC 153, HL.

Critics of this 'identification principle' test have pointed to the difficulties in identifying an individual who could properly be said to be the controlling mind of the company in the context of large, sophisticated modern corporate entities. It was largely as a result of this criticism that the section 7 Bribery Act offence was enacted, to ensure that corporates that tolerate bribery or other corrupt commercial practices may be held criminally responsible.

2.3 Are there any pending or expected changes to the law of corporate criminal liability in your jurisdiction? If so, please explain the proposed changes and the expected timeframe for implementation.

David Green QC, Director of the SFO, has recently suggested that the section 7 corporate offence be extended to cover not only bribery and corruption, but also other financial offences, including fraud. Although this proposal has found favour with policymakers and politicians, at the time of writing, it does not feature on the UK Government's legislative agenda and may take some time to reach the statute books, if it does at all.

3. MUTUAL LEGAL ASSISTANCE / CO-OPERATION

3.1 Is your jurisdiction a signatory to any bi-lateral or multi-lateral treaties or other instruments regarding mutual legal assistance / co-operation in the context of bribery & corruption? If so, which ones?

The UK is signatory to a number of treaties, both bi-lateral and multi-lateral, regarding mutual legal assistance.

The 2003 United Nations Convention Against Corruption, which has 140 signatories, is of particular relevance in the context of bribery and corruption. Article 46 of the Convention requires parties to "afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings" in relation to corruption offences.

The UK is a signatory to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ('the OECD Convention'). 45 states have ratified the OECD Convention, of which Article 9 requires states-parties to "provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention".

Treaties relating to criminal proceedings in general are also relevant. For requests for assistance within Europe, prosecutors may rely on the 1959 European Convention on Mutual Legal Assistance in Criminal Matters and the 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union. The 1990 European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime requires signatories to co-operate with one another in relation to investigations and proceedings aimed at confiscation.

In addition to the multi-lateral treaties above, the UK has bilateral treaties with a number of states, including the USA, although these may be modified, as in the case of the UK-USA agreement, by treaties existing between the EU and the state in question.

The power of judges and prosecutors in the UK to make requests for assistance obtaining evidence abroad is contained in section 7 of the Crime (International Co-operation) Act 2003. Requests relating to the confiscation or restraint of the proceeds of crime may be made pursuant to section 74 of the Proceeds of Crime Act 2002. Under these Acts, prosecutors may request information from states with which the UK does not have a formal assistance agreement, although the absence of such an agreement means that the state in question is not obliged to comply.

3.2 Are the regulatory/prosecution authorities in your jurisdiction parties to any formal or informal co-operation arrangements with equivalent authorities in other jurisdictions (e.g. a memorandum of understanding, etc.)? If so, please provide a brief summary of the arrangements and the other authorities/jurisdictions.

UK prosecutors frequently co-operate with foreign authorities on both a formal and informal basis. The SFO has published an international strategy which strongly encourages co-operation with overseas law enforcement partners. It has a history of working particularly closely with the United States Department of Justice and Securities Exchange Commission, and regularly collaborates with other authorities from around the world, as illustrated by the cases described below.

The Overseas Anti-Corruption Unit of the City of London Police, which focuses on investigating UK companies and individuals alleged to be involved in bribery in developing countries, is a member of the European Cross Border Bribery Taskforce.

The UK is also a member of Interpol and Europol.

4. CASES

4.1 Please describe in brief three (3) cases of bribery/corruption in (or involving) your jurisdiction which illustrate the trend towards cross-border/global investigation and enforcement of anti-bribery laws. For example, cases where:

a. your jurisdiction's law(s) were enforced on an extra-territorial basis;

b. there was a degree of cooperation/assistance provided by your jurisdiction to another jurisdiction, or vice versa; and/or

c. penalties were imposed by your jurisdiction as well as by other jurisdictions, in relation to the same set of facts.

Smith & Ouzman Limited

This case is a recent example of the UK's anti-bribery law being enforced on an extra-territorial basis. Smith & Ouzman is a UK based printing company, which supplies secure and sensitive documents, such as ballot papers and exam certificates, often to clients in Africa. Charges were brought against the company, its former chairman, its sales and marketing director, its international sales manager and an agent alleging bribery in Mauritania, Ghana, Somaliland and Kenya. The company, its former chairman and its sales and marketing director were convicted of the charges relating to Kenya and Mauritania in December 2014. The other two defendants were acquitted. The case involved co-operation between the SFO and authorities in foreign jurisdictions including Kenya, Ghana and Switzerland.

Securency International

This is an joint investigation between the UK SFO and The Australian Federal Police, which has been ongoing since 2010 and involves co-operation with authorities in a number of juridictions, including Nigeria and Malaysia. It concerns allegations of widespread bribery for the purposes of securing contracts to supply mints with polymer substrate, a material on which bank notes can be printed. Individuals have been prosecuted in the UK and Australia, including a UK businessman, who was found not guilty of conspiring to bribe a Vietnamese official by obtaining and funding his son's place at Durham University. Charges brought in Australia involve the alleged bribery of officials in Malaysia, Indonesia and Nepal. Allegations relating to bribery in Nigeria are also under investigation, in respect of which the UK has recently made a number of extradition requests.

R v Innospec Limited [2010] EW Misc 7 (EWCC)

The sentencing of corporate defendant Innospec provides an illustration of the complexity of cross-border, multi-issue investigations, in which penalties are imposed in more than one jurisdiction. In 2010, the company pleaded guilty in the US to FCPA violations, wire fraud and violating an embargo against Cuba, after investigations by the DOJ, SEC and the US Office of Foreign Assets Control. On the same day in the UK, it entered a guilty plea in relation to the SFO's investigation into alleged bribery in Indonesia.

Discussions between the UK and US authorities determined that the appropriate penalties for the offending behaviour combined would amount to a sum far greater than the funds available to Innospec, which were $40.2 million. Therefore, the authorities came to an agreement whereby they would divide $40.2 million between them, with the SFO obtaining $12.7 million, the DOJ $14.1 million, the SEC $11.2 million, and OFAC obtaining £2.2 million.

When sentencing the company, UK judge Lord Justice Thomas considered that it would be unjust in the circumstances to impose a fine greater than that agreed by the SFO, but stated that it was a fundamental constitutional principle that matters of sentencing were reserved for the courts. The SFO had had no power to enter into an agreement with the US authorities that would bind the hands of the court. Lord Justice Thomas stressed that the SFO should not enter into any such arrangement again.

These cases will be discussed in greater detail during the workshop in London.