

Corporate Governance

Principles of Corporate Governance

The Calm Before the Storm: Are You Prepared for the Bribery Act 2010?

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My first priority in this role will be to ensure the effective implementation of the Bribery Act 2010, legislation which will help to achieve the highest in international standards and which demonstrates cross-party commitment to the fight against bribery.¹

In the Chancellor of the Exchequer's annual Mansion House speech to the City of London on 16 June 2010, the UK Government re-emphasised its intention to improve detection and enforcement of white collar crime, echoing the announcement from the Ministry of Justice the previous day. Although much remains unclear, the newly-enacted Bribery Act 2010 (Act) and the UK's new regulatory landscape will be critical features for turning this rhetoric into active and aggressive implementation.

The criminal offences which the Act creates are aimed not only at those bribing others, but also at those being bribed, and at companies on whose watch bribery occurs. The offences also have extremely wide geographical reach. All are punishable by potentially unlimited fines, and (for individuals) potentially up to 10 years' imprisonment.

The Act is UK law, and although the offences are not yet in force they are expected to come into force before the end of 2010. Ensuring that the risks presented by the new offences are properly managed should be high on the current agenda of every business.

This article describes the key features of the Act, and the risks which it presents in particular to individuals and businesses in the financial services sector. It considers how the Act will interact with the existing regime under the U.S. Foreign Corrupt Practices Act 1977 (FCPA), and recommends practical issues for companies and individuals to consider.

The Bribery Offences

The Act provides for two general types of bribery offences: bribing, and being bribed. In addition,

the Act provides for a specific offence of bribing a foreign public official.

The Act provides at section 1(2) that the offence of bribing will take place where a person (P) "offers, promises or gives a financial or other advantage to another person, and intends the advantage to induce a person to perform improperly a relevant function or activity, or to reward a person for the improper performance of such a function or activity."

It does not matter whether or not P offers, promises or gives the advantage to the same person who is to carry out the improper performance (section 1(4) Act).

The offences of being bribed are largely complementary to the bribing offence (section 2(1)-(5) Act). In most cases, the Act provides that it does not matter whether the person being bribed knows or believes the relevant performance is improper (section 2(7) Act).

The relevant "functions or activities" are broadly defined. They potentially cover anything connected with a business, trade or profession, even if it is entirely within the private sphere (section 3(2) Act). However, under section 3(3) Act, they are limited to cases where the person performing the function or activity is:

- Expected to perform it in good faith;
- Expected to perform it impartially; and/or
- In a position of trust by virtue of performing it.

A relevant function or activity will be performed improperly if it is performed in breach of a relevant expectation (section 4(1)(a) Act). The test of what is to be expected is "what a reasonable person in the UK would expect" (section 5(1) Act). The Act expressly excludes from this test any local custom or practice, unless it is permitted or required by the written law (either judicial or legislative) of the relevant country (section 5(2)-(3) Act).

A bribery offence is committed if any constituent acts or omissions take place anywhere in the

world by anyone with a “close connection” to the UK (section 12(2)-(4)). For these purposes a person with a close connection is defined as a British citizen or resident (or a person falling into similar defined categories), or a UK company or partnership.

However, a bribery offence is also committed if any acts or omissions which form part of the offence take place in the UK (section 12(1) Act). In this way the Act will apply to foreign individuals and entities.

There are a number of features to note regarding these offences:

- It is not necessary for any advantage to be conferred – an offer, promise, or agreement is sufficient to satisfy this element.
- It is not necessary for any improper performance to take place (nor, if it takes place that the person performing it believes they are acting improperly).
- It is not necessary for the prosecution to prove dishonesty, rather the prosecution need only prove the requisite intent to induce or reward improper performance. This will likely make prosecutions simpler to pursue.
- There is no minimum threshold for the value of the “advantage.”
- Offences can arise from purely private transactions. It is not necessary for there to be any public or governmental element.
- Not all functions or activities are caught, but precisely which ones will require careful thought. The Act will require careful review of many forms of corporate conduct.
- Non-UK individuals or entities might commit offences if relevant acts or omissions take place in the UK.
- The perceived legitimacy of local business practices are liable to be ignored (unless those perceptions are shared by a reasonable person in the UK).
- Facilitating payments (small payments made to government officials to perform routine administrative actions) are not exempt from the Act, and might in principle constitute bribery.

The Senior Officer Offence

The Act contains a sting in the tail for senior officers. Under section 14(2) Act, where one of the above offences (bribing or being bribed) is committed by a body corporate, a senior officer of that body corporate will also commit an offence if the bribery has been committed with his “consent or connivance.” A “senior officer” includes not only a director, but also “a manager, secretary or other similar officer” or anyone “purporting to act in such a capacity” (sections 14(4)(a) and 14(2)(b) Act).

The Act does not define what would constitute “consent or connivance.” It seems clear that it could cover failures to act as well as acts, although the precise state of mind of the senior officer remains unclear.

The Offence of Failing to Prevent Bribery

The Act introduces a key novel offence which will be of paramount concern for commercial organisations.

A relevant commercial organisation commits an offence, if a person “associated” with it bribes another person with the intent to obtain or retain business or obtain or retain an advantage in the conduct of business (section 7(1) Act).

“Relevant commercial organisations” include all UK corporate bodies or partnerships, no matter where in the world they carry on business (sections 7(5)(a),(c) Act). Most significantly, they also include all foreign corporate bodies or partnerships provided they carry on “a business, or part of a business” in the UK (sections 7(5)(b),(d) Act). This term is not defined.

The person in question who bribes another will be “associated with” the organisation if he is a person who “performs services for or on behalf of” the organisation (section 8(1) Act). The person’s precise capacity does not matter: he may be an employee, agent or a subsidiary. This will be determined by reference to all of the relevant circumstances.

The Act provides for one defence, namely that the organisation “had in place adequate procedures designed to prevent persons associated with the organisation from undertaking [the bribery]” (section 7(2) Act). The Act does not specify what would constitute “adequate procedures.”

However, it does oblige the UK government to publish “guidance about procedures that relevant organisations can put in place to prevent” the bribery (section 9(1) Act). The Ministry of Justice

has indicated that the guidance will be published at least three months before the law comes into force.²

There are a number of features to note in relation to the offence of failure to prevent bribery:

- This offence is one of strict liability. That means the offence does not depend on the organisation's state of mind.
- It is not necessary for there to be a separate UK bribery offence. It is sufficient that bribery has taken place somewhere in the world, even if it is not an offence because it falls outside of the Act's jurisdictional reach.
- The prosecution would still have to prove that bribery took place, whether or not the bribery is an offence under the Act.
- The Act requires bribery to take place with the intent to obtain or retain business; if the organisation or its personnel are being bribed, there will be no corporate offence.
- It appears that the bribery itself need not have been in furtherance of the services performed by the person associated with the organisation (although in practice it may well be).
- For obvious reasons, the scope of the adequate procedures defence will be of critical importance.
- The language of the Act indicates that the Government's guidance will not necessarily create safe harbours. In any case, the scope of the defence will be established by the judiciary through case law and, not by the government through publication of guidance no matter how specific.

The Financial Services Sector: Why It Matters

The European financial services sector has not traditionally been perceived as a high-risk sector for corruption. Other sectors, such as property, shipping, and commodities are perceived as far higher risk. In addition, Germany, the UK, and France rank relatively low more generally, for example for perceived levels of public-sector corruption³ and the likelihood of private-sector bribery in business conducted abroad⁴.

Nevertheless, financial services companies would be unwise to ignore the implication of the Act for the conduct of their business. In January 2009, the Financial Services Authority (FSA) fined insurance broker Aon Limited £5.25 million

because it did not take reasonable care to establish and maintain anti-bribery and corruption systems and controls.⁵ The FSA's public statements emphasised the "clear message" that the enforcement action should send to the financial services industry.

Four high-risk activities have been explicitly identified for financial services businesses in London and the principles behind them will apply equally throughout Europe:

- Operating in corrupt environments, for example working in fragile democratic systems or handling transactions which might be related to politically exposed persons;
- Interacting with public officials, for example to obtain approvals, certification and permits, in particular in emerging markets;
- Providing services to other, high-risk, sectors, including (but by no means limited to) defence, construction, and natural resources; and
- Using agents, subsidiaries, or entering into joint ventures, including co-operation with local businesses, or using commission-based incentive structures.⁶

Not all business within financial services will face the same levels of risk. Sub-sectors with higher risks than others will include (as set out above) property and real estate, maritime and shipping, commodities trading, hedge funds, and project finance. In addition, corporate activities such as mergers and acquisitions of financial services businesses may need more careful analysis, and due diligence of target businesses will need to be conducted with the Act in mind. The increased activity in sovereign wealth fund investments has also created risk and compliance concerns under U.S. laws which may be even more pronounced under the Act.

In any case, financial crime presents a significant risk across the entire sector. Firms should already have procedures in place to reduce the risk of, for example, insider dealing, money laundering, and criminal offences involving dishonesty. However, the Act will likely make several activities easier to prosecute as bribery offences, not least because there is no requirement to prove dishonesty.

Furthermore, the financial services sector is more closely monitored than others (no matter where the responsibility for financial services regulation

in the UK will reside), and the prospect of wrongdoing coming to light will be greater.

The Global Context: FCPA and International Investigations

The Act covers some similar ground to the FCPA. However, there are significant differences between the two, and businesses should not assume that compliance with the FCPA will ensure compliance with the Act.

The prohibited offences under the Act are much broader in scope; they apply directly to commercial as well as public misconduct, whereas the FCPA applies only to the bribery of foreign public officials. The Act criminalises the actions of both the person paying the bribe and the recipient of the bribe, in both a domestic and foreign context; the FCPA applies only to the person paying the bribe and only when the recipient is a foreign public official.

The Act does not contain an explicit defence or exception for facilitating payments, or a defence for *bona fide* and reasonable expenditures relating to the promotion, demonstration or explanation of services. The FCPA explicitly provides for both.

The requisite intent requirement also appears to differ in the two laws. The Act focuses upon “improper performance” predicated on an objective standard of a reasonable person in the UK, although not a reasonable person in the country where the bribery occurred. The FCPA requires “corrupt intent” by the person bribing the foreign public official in order to establish criminal liability. Recent U.S. enforcement actions have relied upon expansive “wilful blindness” theories (guilty knowledge established for a defendant who is aware of circumstances creating a high probability of an activity occurring, but does not probe into that activity) which have caused consternation that in the due diligence context for financing a transaction, individuals or entities in the financial sector may have potential criminal exposure.

The Act’s jurisdictional reach is also potentially much broader than the FCPA’s. For example, the FCPA lodges jurisdiction where acts in furtherance of the bribery scheme occur within the territorial U.S. The Act, under the new corporate offence, does not have that territorial limitation relating to the corrupt activity.

New Complications for Global Settlements

These differences (as well as some similarities such as the treatment of third parties) complicate decision-making related to global resolutions of enforcement actions. The U.S. and UK regularly share information regarding anti-corruption investigations, including those stemming from voluntary disclosures, through formal and informal mechanisms.

Moreover, English courts have recently cast doubt on the reliability of “plea-bargains.” In two separate cases, one involving a corporation, Innospec Limited,⁷ and another a co-operating individual,⁸ the court ruled that sentencing was a matter for the court and that agreements as to appropriate penalties were beyond the powers of the UK prosecuting authorities.

This injects a significant degree of uncertainty into the negotiation process for corporations seeking to resolve matters in the UK and could potentially have an impact on related matters in the U.S. These uncertainties arising from the courts will likely be compounded by the uncertainties arising from interpreting the Act and its terminology and by recent proposed changes to the UK’s regulatory structure. These issues may resolve themselves over time, but individually and collectively they create strong disincentives for engaging constructively with either or both the U.S. and UK enforcement authorities.

The UK Regulatory Landscape

Prosecutions under the Act may be instituted only by or with the consent of the Director of Public Prosecutions (DPP), the Director of the Serious Fraud Office (SFO), or the director of Revenue and Customs Prosecutions, (or, for Northern Ireland, also by the DPP for Northern Ireland) (section 10(1)-(2) Act).

However, since the Act came into force, the UK regulatory landscape has changed, and is currently distinctly uncertain. On 20 May 2010, the coalition Government announced that it would create a single agency to take on the work of tackling serious economic crime that is currently done by, among others, the SFO, the FSA and Office of Fair Trading. This commitment was restated on 17 June 2010 as part of the Government’s plans to reform financial regulation and transfer power from the FSA to a number of new regulatory and supervisory bodies.

The uncertainties related to the mission and practices of this new agency will significantly influence how corporations will interact with the

authorities, and how prosecutions might be brought.

The Practical Consequences for Firms

Financial services firms should note the following likely practical consequences of the Act:

- As well as direct damage caused by convictions, prosecutions (of the company, employees, or associated persons) may have severe regulatory consequences, and may cause significant reputational damage to a firm's business.
- There is a clear emphasis on establishing preventative measures. This is apparent most notably from the corporate offence, and the single defence of adequate procedures. However, it is also apparent from the specific senior management offence, where a general offence is committed with their consent or connivance.
- The costs of risk management may rise. Internal procedures should be reviewed at all levels, from board level downwards.
- It will be of particular value to ensure that procedures have a real effect on the conduct of business – the “corporate culture.” Firms should remember that their procedures would come under the scrutiny of the court in circumstances where they in fact failed to prevent the bribery in question from being committed.
- Firms will need to ensure that their internal detection and reporting systems are working. The methodology for dealing with potential problems may be critical. Much will depend on prosecutorial discretion, and firms' ability to demonstrate that they have dealt quickly and effectively with a problem will be of great value in handling potential prosecutions.

Although the Act itself is relatively short, its scope is wide and its effect will likely prove to be far-reaching. There is considerable uncertainty at present, principally over the nature of the general offences, the scope of the adequate procedures defence, and the policy of the relevant prosecuting authority for deciding which cases to bring. Although the Act is not yet in force, companies and senior management in particular should ensure they are braced for the oncoming storm.

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¹ HL Deb 15 June 2010 c80WS – Lord McNally, Ministry of Justice.

² UK Foreign Bribery Strategy – Ministry of Justice, January 2010. Available at <http://www.justice.gov.uk/publications/docs/uk-foreign-bribery-strategy.pdf>.

³ These countries were ranked 14th, 17th and 24th respectively out of 180 countries in Transparency International's Corruption Perception Index of 2009.

⁴ These countries were ranked equal 5th, equal 5th and 9th respectively out of 22 countries comprising approximately 75 percent of total foreign direct investment outflows and export goods worldwide in Transparency International's Bribe Payers' Index of 2008.

⁵ Final Notice to Aon Limited – FSA, 6 January 2009.

⁶ See *Avoiding Corruption Risks in the City: The Bribery Act 2010* – Transparency International Report Prepared for the City of London Corporation of May 2010. Available at http://217.154.230.218/NR/rdonlyres/26DD8F2B-17D9-42B7-AB51-20F1D8542892/0/AvoidingCorruptionRisksintheCity_final.pdf.

⁷ *R v. Innospec Limited* [2010] EW Misc 7 (EWCC) (18 March 2010). See sentencing remarks of Thomas LJ from the sentencing hearing of 26 March 2010 referred to in *R v. Dougall* [2010] EWCA.

⁸ *R v. Dougall* [2010] EWCA Crim 1048.