Not so fast

Although anti-corruption laws at home are in disarray, UK companies can't avoid the long arm of US foreign corruption law

Corruption is a global problem. From Scotland Yard's cash for peerages investigation to the recent arrests in Brussels, corruption, in its many guises, is never far from the headlines. Despite this, the UK's anti-corruption laws are in disarray: just a week after the Serious Fraud Office director, Robert Wardle, called for reform of the UK's anti-corruption laws, the Home Office announced, on March 5 2007, that the government had, for the second time, abandoned its 2003 draft Corruption Bill.

The government has, instead, asked the Law Commission to undertake a "thorough review" of the UK's anti-corruption laws. It is envisaged that this review process will take around 18 months to complete. This means that the UK's anti-corruption laws will remain in their existing disparate and outdated form, comprising a combination of common law and three Acts, which originated in the 19th century and remained largely unchanged until 2002 (when they were amended by the Anti-terrorism, Crime and Security Act 2001 (the 2001 Act) to give them extra-territorial reach).

The UK's anti-corruption laws

The generally accepted definition of the common law offence of bribery is:

"... receiving or offering any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity" (Russell on Crime, 12th Ed. 1964, p 381).

Under Section 108(1) of the 2001 Act, it is immaterial for the purposes of common law bribery if the functions of the person who receives or is offered a reward have no connection with the UK or are carried out in a country or territory outside the UK.

Section 1 of the Public Bodies Corrupt Practices Act 1889 makes the bribery of any member, officer, or servant of a public body a criminal offence. In particular, the 1889 Act prohibits the giving or receiving of:

"... any gift, loan, fee, reward, or advantage whatever as an inducement to, or reward for, or otherwise on account of any member, officer, or servant of a public body ... doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body as aforesaid is concerned".

The term *public body* includes: "any ... body which has power to act under and for the purposes of any Act relating to local government, or ... to administer money raised by rates in pursuance of any public general Act, and includes any body which exists in a country or territory outside the UK and is equivalent to any body described above".

This definition was extended by Section 4 of the Prevention of Corruption Act 1916 to include "local and public authorities of all descriptions (including authorities existing in a country or territory outside the UK)".

Section 1 of the Prevention of Corruption Act 1906 made bribery of or by an agent an offence. In particular, the 1906 Act prohibits an agent from obtaining, and any person from giving an agent "consideration as an inducement or reward for doing ... any act in relation to his principal's affairs". It is immaterial if the principal's affairs or the agent's functions have no connection with the UK or if these functions are conducted in a country or territory outside the UK.

There are no prescribed penalties for the common law offence of bribery, but the maximum statutory penalty for bribery is imprisonment for a term not exceeding seven years and/or a fine with no upper limit.

International agreements

Since the Law Commission first published its proposals for reform in 1997, although progress has been slow in relation to domestic legislation, the UK has ratified two important international agreements.

First, the UK signed the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials on December 17 1997. The UK ratified the OECD Convention on December 14 1998 and it came into force on February 15 1999. In total, there are now 36 signatories to the OECD Convention.

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A main function of the OECD Convention is requiring each signatory to adopt the necessary national legislation to criminalize the bribery of foreign public officials. Signatories must also establish corporate liability for overseas bribery and must interpret territorial jurisdiction as widely as possible to establish both national jurisdiction and extra-territorial jurisdiction over their nationals for offences committed abroad. The 2001 Act extended the scope of the UK's domestic legislation to meet the requirements of the OECD Convention.

Second, on December 9 2003, the UK signed the United Nations Convention Against Corruption (UNCAC). UNCAC is the first global anti-corruption instrument designed to fight corruption both in the public and private sectors. It now has 140 signatories and has been ratified in 88 countries (UNCAC was ratified in the UK on February 9 2006).

UNCAC focuses on four main areas:

- the prevention of corruption both in the public and private sectors;
- the criminalization of corruption both in the public and private sectors;
- international cooperation to improve cross-border law enforcement (for example, by extradition of offenders and the introduction of less formal cooperation in cross-border investigations); and
- asset recovery (signatories must establish mechanisms including civil and criminal recovery procedures, whereby assets can be traced, frozen, seized and returned).

UK law became fully compliant with UNCAC when the Criminal Justice (International Co-operation) Act 1990 (Enforcement of Overseas Forfeiture Orders) Order 2005 came into force on the December 31 2005 and the Proceeds of Crime Act 2002

The UK can't hide from US anti-corruption measures

(External Requests and Orders) Order 2005 came into effect on January 1 2006.

Despite the UK's ratification of these international agreements, its domestic anti-corruption regime remains disjointed and outdated. In particular, its emphasis on the concept of principal and agent is less relevant in the 21st century than it was when the relevant Acts came into force, and this emphasis fetters the SFO's ability to bring successful prosecutions. Also, the existing law focuses on imprecise state-of-mind concepts such as deception rather than the alleged offender's actions.

It is clear that the government accepts that the regime requires consolidation and updating, and recognizes that, to improve its record in corruption prosecutions, the SFO's powers need to be reformed and enhanced. However, until these reforms take place, UK companies and their officers would be ill-advised to ignore either domestic or international anti-corruption laws and it is now more critical than ever for UK companies to understand the broad reach and potential pitfalls of the US Foreign Corrupt Practices Act (the FCPA).

The FCPA

First enacted into law in the US in 1977, the FCPA was amended in 1998 after the US ratified the OECD Convention. Recent years have witnessed an increase in enforcement activity by the US authorities. In February, three Vetco International subsidiaries (two of which were UK companies) were fined $26 million for FCPA violations. Over the past seven years, foreign businesses have been forced to pay almost $100 million in fines, penalties and disgorgement of profits to settle FCPA matters brought by US authorities.

The jurisdictional provisions of the FCPA reach beyond the US in a number of ways. First, the FCPA expressly applies to all companies with securities that are registered in the US or that trade on a US exchange. The FCPA also applies to any "officer, director, employee, or agent ... or any stockholder ... acting on behalf of" such a company. So any UK company with US-listed securities (as well as its officers, directors, employees and agents) are subject to the FCPA. Second, the FCPA applies to any foreign person or company acting "while in the territory of the US" and makes it a crime to corruptly "make use of the [US] mails or any means or instrumentality of [US] interstate commerce" in furtherance of a scheme to bribe a foreign official. This provision has been broadly interpreted to apply to any *act* that occurs within US territory, including for example, an email to the US or a wire transfer through a US bank. In our global economy, the combination of these provisions brings most UK companies within the broad sweep of the FCPA's prohibitions on bribery.

The FCPA prohibits the payment, or offer of payment, of "anything of value" to a foreign government official, party, or candidate, for the purpose of obtaining or retaining business or for securing any other "improper advantage".

- Companies are potentially liable for the actions of employees, subsidiaries, third-parties and intermediaries.
- Anything of value can trigger liability – even if the amount is minimal or the payment is customary in the country (for example, this might include charitable contributions, if clearly made solely to induce action by an official).
- US prosecutors contend that knowledge is not required – conscious disregard or deliberate ignorance can establish that conduct is "knowing".
- Any person acting in an official capacity may qualify as a foreign official.

The FCPA also requires any publicly traded company to have an adequate system of internal accounting controls.

The penalties for violations of the FCPA's anti-bribery provisions are severe. For criminal violations, companies could be fined the greater of $2 million for each violation or twice the gain earned on any business obtained through conduct that violated the FCPA. In addition to similar criminal fines, individuals can be imprisoned for up to five years. For civil violations, penalties of $10,000 for each violation may be imposed both on companies and individuals. Moreover, in recent years, the Securities and Exchange Commission (SEC) has insisted that companies disgorge all profits earned through conduct that violated the FCPA. As a result, companies have paid tens of millions of dollars to resolve FCPA matters.

In the US, the SEC has civil enforcement authority in matters involving public companies, while the Department of Justice prosecutes criminal cases. Factors that might influence government authorities in exercising their discretion to take action against a company include blatant wilfulness, actors at the highest level of the company, falsification of records, or a determination that there has been perjury or obstruction in the course of an investigation. Other indicators, for example recidivism or lack of internal controls, might also influence the penalty sought by civil and criminal authorities.

No room for complacency

The UK has a woeful record for successful prosecutions for foreign bribery and corruption. According to data from Transparency International, the corruption watchdog, the UK has not brought a single successful prosecution for bribery of foreign officials and it has only conducted four serious investigations since the OECD Convention was brought into effect by the 2001 Act. However, after a period of inaction, the UK's European neighbours are beginning to take a more active interest in eradicating corruption (which is listed in Article 29 of the EU Treaty as a means of achieving the objective of creating a European area of freedom, security and justice). So it seems inevitable that the UK will have to raise its game in this regard and it can only be a matter of time before the regulators come under pressure to make an example. Further, in light of international agreements such as the OECD Convention and UNCAC, it seems likely that there will be a convergence of world standards with respect to combating corruption.

Meanwhile, the extra-territorial scope of the FCPA highlights the significance of international anti-corruption laws for any UK company that is registered or trades in the US. Despite the status of domestic anti-corruption laws, UK businesses cannot afford to ignore the implications of the FCPA and, given the surge of prosecutions involving foreign persons and/or subsidiaries, a robust compliance programme, tailored to both industry and country specific risks, is essential.

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