

The UK Bribery Act – A Year Later And FCPA Updates

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*A Broader Perspective*SM

UK Bribery Act – General Bribery Provisions

- Came into force 1 July 2011 – prior anti-corruption laws still apply to activities before that date
- General offences of bribery and accepting a bribe – offer, promise or gift of a financial or other advantage intending to induce or reward improper performance of a public or private function
- Improper performance: Expectation based on what a reasonable person in the UK would expect in relation to performance of the type of function or activity – good faith, impartiality or position of trust

Bribery of Foreign Public Officials

- Separate offence of bribery of a foreign official (Section 6) (in addition to general bribery provision in Section 1)
 - Direct or indirect offer, promise or gift of a financial or other advantage to a foreign public official or at his/her request or assent or acquiescence
 - With intent to influence the official in his/her official capacity
 - includes an act or omission
 - use of official position, even if not within official's authority
 - With intent to obtain or retain business or a business advantage
- **Note: No improper performance element**

General Bribery and Bribery of Foreign Officials

Who Can Be Liable?

- Companies and individuals
- Where a company is liable, if the offence is proved to have been committed with the “consent or connivance” of senior officers and persons purporting to act in such a capacity who have a close connection to the UK (e.g., British nationals and individuals ordinarily resident in the UK), that person will also be guilty of the offence along with the company
 - Senior officers include directors, managers, corporate secretary and similar officers
 - Connivance – Serious Fraud Office (SFO) takes the position that this can include wilful blindness
- Be aware of director obligations under other laws such as the Companies Act



General Bribery and Bribery of Foreign Officials Territorial Reach

- Acts or omissions in the UK
- Acts or omissions outside the UK by persons with a close connection to the UK
 - companies formed in any part of the UK
 - British nationals
 - individuals ordinarily resident in the UK

New Failure to Prevent Bribery Offence

- Strict liability offence if a UK company or a non-UK company that carries on a business or part of a business in any part of the UK fails to prevent bribery by an “associated” person intending to obtain/retain business or a business advantage for the commercial organisation
- Statutory defence to the strict liability offence if the commercial organisation can prove it had in place “adequate procedures” designed to prevent associated persons from undertaking such conduct

Associated Persons

- Associated person – a person anywhere who performs services anywhere for or on behalf of a relevant commercial organisation
 - Includes not only employees, but also agents, sales representatives, distributors, subsidiaries, other contractors, joint ventures/joint venture partners (depending on the circumstances)
- No requirement for the associated person to have a close connection with the UK
- No requirement for the bribe to be related to the UK business of a non-UK relevant commercial organisation

Company Liability

- Under prior corruption law and normal English criminal jurisprudence, a legal person is only criminally liable if its “directing mind” had the requisite *mens rea* (guilty intention) to commit the crime – the “identification theory” of liability
 - This means it is extremely difficult to convict a company of a crime, particularly a large company with decentralised operations away from the corporate head office and where directors and senior management are shielded from knowledge
 - In addition, there is no aggregation of the states of mind of different people in the company

Company Liability

- The new strict liability offence for failure by a commercial organisation doing business in the UK to prevent bribery by associated persons with the intention of obtaining or retaining business or a business advantage for (unless adequate procedures are in place) does not require a showing of guilty intent by the directing mind of the commercial organisation
- Thus, prosecution and conviction of companies for failure to prevent bribery should be made easier, although it is still necessary to show that the associated person committed bribery with the intent of benefiting the commercial organisation

Comparison to the FCPA

- Includes domestic as well as foreign bribery
- Includes acceptance of a bribe
- Extends to “private to private” bribery
 - e.g. payment to an employee in procurement department to favour a bid
- No “corrupt intent” or “improper performance” element in bribery of foreign officials
- No statutory carve-out for facilitation payments
 - dependent on prosecutorial discretion with some guidance
- No statutory carve-out for reasonable and bona fide promotional expenses – prosecutorial discretion and some guidelines
- Compliance programs will have similar elements

Facilitation Payments

- The UK Bribery Act prohibits facilitation payments – generally defined as payments to government officials to perform or speed up a routine or normal duty they are obliged to perform
 - Also prohibited under prior corruption laws, although no prosecutions brought
- Recognition that such payments will not end overnight
 - A small one-off facilitation payment unlikely to be prosecuted
 - But a course of business approved by company policy of several such payments increases the chance of a criminal investigation and prosecution according to statements of prosecuting agencies

Facilitation Payments – Joint Prosecution Guidance

- Sufficient evidence and in the public interest to prosecute (Full Code Test in Code for Crown Prosecutors)
- Factors in favour of prosecution
 - Large or repeated payments
 - Planned for or accepted as a part of a standard way of conducting business
 - Element of active corruption of the official in the way in which the offence was committed
 - An appropriate policy and procedures to be followed if payments are requested have not been followed

Facilitation Payments – Joint Prosecution Guidance

- Factors against prosecution
 - Single small payment
 - Payments came to light as a result of a genuinely proactive approach to involving self-reporting and remedial action
 - A clear and appropriate policy setting out procedures to be followed if facilitation payments are requested and those policies are followed
 - The payer was in a vulnerable position arising from the circumstances in which the payment was demanded
 - e.g., imminent threat to safety

Facilitation Payments – Prior SFO Guidance (Now Withdrawn)

- Has the Company issued a clear policy on facilitation payments?
 - Zero tolerance approach
- Do employees have access to written guidance on procedures to be followed if asked to make a facilitation payment?
- Do employees follow those procedures?
- Is the company recording all facilitation payments?
- Is the company taking proper action to tell appropriate authorities in other countries that such payments are being demanded?
- Is the company taking any practical steps to curtail facilitation payments?

Facilitation Payments – Current SFO Guidance

- Withdrew 6 step solution and movement to zero tolerance guidance
- Reverts to Full Code Test in Code for Crown Prosecutors and Joint Prosecution Guidance
- Response to OECD recommendation of coordinated approach with other prosecuting agencies – but did not adopt criteria for moving toward zero tolerance as suggested
- Q&A indicate flexibility remains and interest in serious and complex cases
- If Full Code Test not met, SFO may consider a civil remedy

US Approach to Facilitation Payments

- FCPA includes a safe harbor permitting payment to a foreign official to facilitate the timely performance of non-discretionary government functions
- Very narrow exception with grey area
- Decision to use safe harbor is “fraught with peril”
- Practical effect: policies prohibit facilitation payments or create disincentive to make facilitation payments

Corporate Hospitality – What are the limits?

- MOJ Guidance: The Government does not intend for the Act to prohibit reasonable and proportionate hospitality and promotional or other similar business expenditure intended to improve the image of a commercial organisation, better to present products and services or establish cordial relations
- In order to amount to a bribe, there must be an intention for a financial or other advantage to influence the official in his or her official role and thereby secure business or a business advantage
- Role of industry standards?

Corporate Hospitality – SFO Guidance (Now Withdrawn)

- Is there a clear issued policy?
- Does the scale of expenditure fall within the policy and if not, was higher permission sought?
- Was the expenditure proportionate with regard to the recipient?
- Was the expenditure properly recorded?
- Was the recipient entitled to receive the hospitality under the law of recipient's country?
- Unjustifiable add-ons? Higher the expenditure the greater the inference?

Corporate Hospitality – SFO Guidance

- Withdrawal of prior guidance
- Reverts to Full Code Test in Code for Crown Prosecutors and Joint Prosecution Guidance
- OECD Concern – MOJ Guidance high risk examples; private versus public sector issues; industry standards
- Reconfirms reasonable and proportionate, but without examples
- SFO interest only in serious and complex cases
- If Full Code Test not met, SFO may consider a civil remedy

Corporate Hospitality

- Corporate hospitality packages for Wimbledon and the Olympics (thousands of £££s per person) continued to be offered – although uptake may have been more subdued this year
- SFO: “Not the Serious Champagne Office”
- £350,000 trip to the Monaco Grand Prix for a Sainsbury potato buyer – City of London Police prosecution under proceeds of crime act – prison terms

US Approach to Corporate Hospitality

- Reasonable and bona fide expenditures related to business promotion are allowed
- Expenditures must be closely tied to objective business promotion
- Payments generally should not go directly to the government officials, other than as documented for those officials' reasonable out of pocket expenses
- Are the government officials attending the presentation to learn about the company's products and services, or to receive perquisites?
- Practical effect: seek guidance and internal vetting of such an expenditure

Non-UK Companies

- Potential for enforcement against non-UK companies “carrying on business” in the UK for failure to prevent bribery by associated persons anywhere in the world
 - Carrying on business? Buying and selling in the UK? Subsidiary? Listing? Beware of technical interpretations
 - No requirement for the associated person to have a close connection with the UK
 - No requirement for the bribe to be related to the UK business of a non-UK company
- Prosecutorial discretion – SFO priority to target foreign companies that through bribery deprive an ethical UK company of a business opportunity

Shareholder Liability

- Generally shareholders should not be liable for acts of bribery by affiliates without some sort of collusion or unless the affiliate is performing services for or on behalf of the shareholder
- What about non-UK parent company liability for failure of a subsidiary to prevent bribery and have in place adequate procedures?
 - Questions remain as to whether a non-UK parent is doing business in the UK
 - Associated person issues

Shareholder Liability

- Recent use of civil recovery order under the UK's Proceeds of Crime Act (POCA) to recover dividends paid to shareholders that were proceeds from an offence (Mabey & Johnson)
 - This case was unrelated to bribery (UN sanctions violation) and was an agreed settlement, but has the potential for use in bribery situations
 - SFO stated intention to seek similar orders in the bribery context, with focus on dividends received by institutional investors which are better able to conduct due diligence on companies in which they invest
 - Oxford Publishing Limited civil recovery order for dividends generated through improper payments of subsidiaries in Tanzania and Kenya (July 2012)

Shareholder Liability

- Recent UK Supreme Court case limiting the territorial scope of jurisdiction to make a civil recovery order with respect to property representing the proceeds of crime or to require disclosure under POCA (Perry v SOCA, 25 July 2012)
 - Only property situated in the UK can be the subject of a civil recovery order (and property must be described specifically)
 - Disclosure orders (failure to comply with which constitutes a criminal offence) could only be served on persons within the UK or UK nationals
- Judgment does not determine the extra-territorial effect of the primary money laundering offences (which deals with criminal property wherever located) – only these types of orders

UK Bribery Act Penalties

- Conviction on indictment risks unlimited fines and up to 10 years imprisonment
- No discretion on imposition of EU public procurement ban for bribery conviction
 - Discretionary ban for violation of the strict liability offence of failure to prevent bribery by associated persons

Enforcement of the FCPA and the UK Corruption Laws

- The same acts may be caught by both laws – risk of multiple enforcement actions
 - Aon
 - Innospec
 - BAE
 - MW Kellogg
 - DePuy (Johnson & Johnson)
- Cooperation between enforcement agencies, including sharing of results of investigations
- US continues to lead the league in enforcement
- Limited UK resources – outsourcing and piggy backing?

Recent Enforcement Actions

- Only one minor prosecution under the new Act so far – a court clerk convicted for accepting bribes to fix traffic offences
- Although there has yet to be a corporate prosecution under the new UK Bribery Act, these are early days
- Since 2009 there has been increased UK enforcement under prior corruption and current anti-money laundering laws – major fines and jail time for individuals, as well as civil recovery under money laundering laws

Recent Enforcement Actions

- Since 2009, criminal sanctions have been imposed against at least 8 individuals for foreign bribery under other criminal statutes, all of which resulted in imprisonment or suspended terms ranging from 1 year to 5 years, and in some cases involving disqualification as company director
- There have also been a number of individuals who have received criminal sanctions involving imprisonment for other acts of domestic bribery
- Two companies have received criminal penalties for foreign bribery (*Mabey & Johnson* and *Innospec*), and one for failure to keep adequate accounting records (*BAE – Tanzania*) – all the result of guilty pleas

US Enforcement

- Both the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have authority to enforce the FCPA
- Continued increase in enforcement efforts:
 - SEC: 2004 (3 actions) vs. 2011 (25 actions)
 - DOJ: 2004 (2 actions) vs. 2011 (23 actions)
- Average FCPA sanction (2011): \$33.8 million (removing high and low outliers drops the average to \$22.1 million)
- Individual prosecutions now tend to follow corporate settlements
- Corporate acquisitions and successor liability for FCPA violations

Plea Bargains, Deferred Prosecution Agreements

- Current uncertainties in the UK about plea bargaining
 - A defendant in the UK may negotiate and reach an agreement with the prosecutor before entering a guilty plea and being sentenced
 - But certain rules must be followed – must be reasonable and just and reflect the seriousness of the crime and give the court adequate sentencing powers: the court plays a key role
 - The defendant and the prosecutor can make a joint submission on the appropriate sentencing range, but cannot agree on or submit a specific sentence
 - The court is the final decision maker on the sentence

Plea Bargains, Deferred Prosecution Agreements

- In the *Innospec* case, which reflected a global settlement with the US Department of Justice, the SFO agreed to seek a specific sentence
 - Although the court reluctantly agreed in that case, it severely criticised the practice, sending a message that this sort of thing would not be permitted in the future
- In the *Dougall* case involving an individual whistleblower who was involved in the bribery, the court refused to follow the recommendation of the SFO for leniency and imposed a jail sentence (suspended on appeal)

Plea Bargains, Deferred Prosecution Agreements

- Government consultation on introducing legislation to allow deferred prosecution agreements for companies (but not individuals) to add to the tools available to the SFO and other prosecuting agencies
 - Contemplates hands-on judicial involvement
 - Devil in the details
 - Possibility of joint negotiations, e.g., with the US?
 - Avoidance of mandatory debarment
- No draft legislation at present

Civil Recovery Orders

- In light of the difficulty with plea bargains, since *Innospec*, the SFO has resolved foreign bribery enforcement actions against corporate defendants exclusively through consent civil recovery orders under the Proceeds of Crime Act
 - OECD has criticised the lack of transparency in respect of civil settlements
 - The *Innospec* court questioned whether serious crimes should be settled civilly rather than criminally, although the question of whether to prosecute remains with the prosecutor

SFO Enforcement

- New Director of the Serious Fraud Office (SFO) since April 2012, David Green, has stated an intention to rebalance the relationship between prosecution and civil settlement with an emphasis on criminal investigations and prosecutions
- Strong emphasis on pursuing the most serious cases with links to the UK
 - approach in prosecution of non-UK firms focused on activities that affects level playing field for UK companies – that deprive “ethical” UK firms of a business opportunity
- Other prosecuting agencies (e.g., the Crown Prosecution Service) also have jurisdiction over bribery enforcement -- likely to be involved in less high profile cases

SFO Enforcement

- Investigations
 - New Chief Investigating Officer appointed
 - SFO Whistle Blowing Hotline “SFO Confidential”
 - Use of open source resources, investigative journalism and Suspicious Activity Reports (SARs)
 - Whistleblowers
 - Self reporting
- Several new investigations, including:
 - GPT (ultimately owned by EADS) – Saudi National Guard contract
 - BP – Azerbaijan

Voluntary Disclosures

- SFO has recently withdrawn its updated “Approach to Dealing with Overseas Corruption”
 - Reflected the intent to conduct more criminal investigations and prosecutions
 - But encouraged corporate self-reporting with the prospect in appropriate cases of a civil rather than criminal outcome, and an opportunity to manage issues and publicity
 - Required establishment of genuine commitment to resolve the matter and move to a better corporate culture, including cooperation on further investigation and remedies

Voluntary Disclosures (Prior Guidance)

- Timing of approach under prior guidance
 - Generally following advice and degree of investigation by professional advisers
 - If a disclosure is also to be made to the US Department of Justice, the SFO would expect to be notified at the same time
 - Does not remove the obligation to make any report required by law – e.g., reports required for regulated companies under anti-money laundering rules, which may affect timing

Voluntary Disclosures (Prior Guidance)

- Further investigation – assuming genuine commitment of the company and cooperation, scope to be agreed and generally to be done by the company’s professional advisers under prior guidance
 - Importance of the credibility of the internal investigation and cooperation
 - Where Board members of the company have engaged personally in corrupt activities and have personally benefited, SFO more likely to conduct its own criminal investigation
- Confidentiality – SFO indicated it would generally treat voluntary disclosure discussions as confidential

Voluntary Disclosures

- Withdrawal of prior guidance to emphasize SFO's primary role of investigator and prosecutor of serious and complex fraud, including corruption
- Confirms the SFO still encourages self-reporting and will consider civil recovery where the requirements of the Full Code Test are not met
- No guarantee of no prosecution
- It is not the role of the SFO to provide advice about future conduct

Voluntary Disclosures

- Certainty of outcome cannot be guaranteed – does this discourage voluntary disclosures?
 - Criticism by the courts of plea agreements and civil settlements
 - Ability to reach global settlements in multi-jurisdictional cases?
 - More certainty in US voluntary disclosures and negotiations?
 - Benefit of double jeopardy in settling with the US first?
 - Potential benefits to companies, individual criminal liability judged on the merits

US Voluntary Disclosures and Plea Bargaining

- Is voluntary self-disclosure in a company's best interest?
- NYU Working Paper (Oct. 2012): not clear that voluntary self-reporting of FCPA violations yields significant breaks in sanctions from SEC/DOJ
 - Study of 80 enforcement actions from 2004-2011: 52 self-reported, 25 involuntarily disclosed
- Considerations:
 - Egregiousness of violation
 - Ability to direct/manage investigation
 - Predictability



Other US Developments

- Corporations and practitioners await DOJ's FCPA compliance guide
- Key areas of concern:
 - Definition of “foreign official”
 - Corporate compliance defense
 - Successor liability

Whistleblowing

- Several enforcement actions have come to the attention of UK prosecuting authorities through whistleblowers (or from the US DOJ as a result of whistleblowing)
- The SFO has established a confidential means of reporting suspicions of fraud or corruption
 - No US-style reward or incentive for reporting (although apparently there may have been rewards in certain financial institution cases)

Whistleblowing

- The UK's Public Interest Disclosure Act 1998 (PIDA) protects employees from detrimental treatment for good faith disclosures of misconduct, including bribery
 - to their employers
 - to certain prescribed regulators if reasonably believed to be true and relevant to the regulator
 - to the police, media, consumer groups or non-prescribed regulars if not for personal gain and
 - reasonable fear of victimisation if raised otherwise, or
 - no prescribed regulator and fear that evidence would be concealed or destroyed, or
 - already raised, or
 - exceptionally serious nature

Whistleblowing

- But, does not apply to expatriate workers of UK companies unless strong connections with the UK and UK employment laws
 - Foxley, a UK national employee of a UK company who was based in Saudi Arabia and was allegedly fired for reporting suspicions of foreign bribery to his employer – UK employment tribunal found it did not have jurisdiction to hear the claim
- Anonymity issues under data protection laws
- Most protection, if any, only under labour codes
- Conflicts with confidentiality obligations and ability to disclose evidence of wrongdoing – when does “public interest” prevail?

Conclusion

- As investigations progress at the SFO, attention will focus on future enforcement and the tools available for resolving cases
- The availability of resources is an important issue, but it should not be assumed that that no enforcement will take place
- DOJ's upcoming FCPA compliance manual to provide additional guidance, but likely not the roadmap the business community seeks