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Insight: White Collar

February 2011

The Bribery Act 2010: The dawn of a new approach?

- The UK government has recently confirmed that the introduction of the long awaited Bribery Act 2010 will be delayed.
- The Act sweeps away the multiplicity of statutory and common law offences, and replaces them with a set of four, seemingly, straightforward offences.
- The modernisation of the law, however, could have alarming consequences for corporates with a presence in the UK due to the legislator's failure to clarify key areas of the Act.
- The areas corporates should be aware of:
  - The corporate liability offence
  - The extra territorial scope of the Act
  - The illegality of facilitation payments
  - The illegitimacy of payments to foreign public officials
  - The potential of debarment from public procurement contracts
  - The liability of senior officers
- Corporates should, as a matter of urgency, carry out a full anti-bribery and corruption risk assessment. The risk assessment should:
  - Ascertain the corruption risks faced by their businesses
  - Determine and clarify the status of relationships with third parties: UK corporates could be responsible for the third parties' failings
  - Review the appropriateness and effectiveness of all internal policies, procedures, and training

The enactment of the Bribery Act 2010 has, together with a series of recent headline grabbing actions taken by the UK regulatory authorities, been hailed as the beginning of a clear and aggressive attack by the UK on misconduct. However, what does the Bribery Act 2010 actually encompass and will corporates be in a better position as a result of the new legislation?

Our White Collar Group

An important trend in regulatory enforcement is the rapidly increasing cooperation among national and multi-national authorities. Regulators often pursue investigations simultaneously across multiple jurisdictions requiring companies to marshal national and transnational responses.

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The Bribery Act 2010 under the spotlight

The Bribery Act 2010 (the "Act") received Royal Assent on 8 April 2010, just prior to the dissolution of the UK parliament.

The Act was expected to come into force in April 2011. However, due to the delay in publication of guidance by the Ministry of Justice, the introduction of the Act has now been delayed.

The Act codifies the following general offences:

- promising or offering a financial or other advantage; and
- requesting, agreeing to receive or accepting a financial or other advantage.

These general offences are intended to target circumstances where the advantage constitutes, results in, induces, or rewards the improper performance of a function or an activity.

The Act also introduces the following new offences:

- a corporate offence of failing to prevent bribery by persons associated with the corporate; and
- bribing a foreign public official.

The Act imposes a maximum penalty of ten years imprisonment and/or unlimited fines for those individuals and corporates in breach.

Whilst the Act has been broadly welcomed as a much needed overhaul of the UK's response to bribery and corruption, there are key areas of the Act which cause concern for all corporates, whether they are incorporated in the UK or not.

The long arm of the Act: Extra-territorial effect

In a similar vein to the US Foreign Corrupt Practices Act, the Act applies to non-UK based businesses and individuals too. So, for example, if a foreign corporate carries on business or part of a business in the UK, that corporate could be criminally liable in the UK for the corporate offence if it failed to prevent acts of bribery by its employee, agent, or subsidiary anywhere in the world. The mere fact that the foreign corporate has a connection to the UK will give the UK prosecutors and courts jurisdiction. This extends the reach of the Act well beyond that of the current regime.

Corporate liability: The strict liability offence

Whilst a corporate can be convicted of the general offences and the new offence of bribing a foreign public official, of greatest concern to corporates is likely to be the new targeted offence of failing to prevent bribery.

A corporate will be guilty of failing to prevent bribery where a person associated with it bribes another person, intending to obtain or retain business, or to obtain or retain an advantage in the conduct of business, for the corporate.

A defence to this strict liability offence will *only* exist where the corporate in question has in place adequate systems and procedures to prevent bribery. The burden is on the corporate to prove that it had adequate procedures in place.

Unlike the US position, an "associated person" is not defined by reference to the control exercised over it by the corporate, but by the mere performance of a service for or on behalf of the corporate in any capacity. Not only would employees and subsidiaries be caught by the Act but, for example, so too could joint venture relationships.

On the one hand, the imposition of strict liability in this area has been generally welcomed particularly as the historic test for corporate criminal liability (the "controlling mind" doctrine) proved notoriously difficult to apply. However, lack of express statutory guidance on what "adequate procedures" or an "associated person" actually means leaves corporates in a state of uncertainty. This lack of certainty is particularly frustrating in, for example, the construction and oil and gas industries where joint ventures are a common necessity and often involve state owned entities over which corporates have little, if any, control. In those circumstances, how can a corporate ensure that it has "adequate procedures" in place to escape liability for the acts of its joint venture partner and/or entity? Are negotiating contractual safeguards in the underlying joint venture agreement enough?

The government refused to follow the US model whereby companies can obtain formal advice on their individual circumstances and express sanctions from the Department of Justice, on the ground that it would be "inappropriate" to do so. Instead, the solution proposed is for the government to publish non-statutory guidance on the scope of the defence. That guidance will be formulated around "Principles for Bribery Prevention." These principles can be summarised as follows: thorough risk assessments; a top level commitment to ensure that bribery is considered unacceptable across the organisation; due diligence of all business relationships; clear, practical and accessible policies and procedures; effective implementation of the policies and procedures; and effective monitoring and audit of the policies and procedures.

The guidance was due to be published in January 2011. However, it was recently announced that the guidance is being reviewed and will be published at a later date. Whilst we await formal publication of the guidance by the UK government, UK corporates should take immediate steps to ensure that: (i) they have guidelines in place as to their liabilities and responsibilities under the Act as well as clear disciplinary procedures for breach of those responsibilities; (ii) they carry out a review of all of their relationships with third parties to determine whether they could be regarded as "associated persons"; (iii) they have audit rights and monitor their associated persons' compliance with the Act; (iv) they provide regular training to educate and inform their employees; and (v) they have a clear system in place for employees to report breaches and to request advice.

Senior officer liability

Where one of the general offences or the new offence of bribing a foreign public official has been committed by a corporate, the Act extends liability to that corporate's "senior officers." The Act provides that the corporate's senior officers (which includes directors, managers, company secretaries, other "similar officers", and any persons purporting to act in such a capacity) will also be found liable of that offence if they consent to or connive in the commission of the offence. In other words, if proven to have consented to or connived in the wrongdoing, those senior officers will be treated as if they had committed the offence and will be subject to the punishment of imprisonment and/or an unlimited fine as provided for in the Act.

The Act provides a limit on the territorial application of this liability by providing that the senior officer (or person purporting to act in that capacity) must have a "close connection" with the UK in order to be prosecuted. Importantly, not only does the Act include, for example, British citizens and British Overseas citizens as having a "close connection" to the UK, but it also extends to *any* individuals ordinarily resident in the UK.

In practice, however, it may prove difficult to prosecute senior officers for corporate failings. An important exclusion from the scope of senior officer liability is in relation to the corporate offence of failing to prevent bribery: a senior officer will not be held liable for the corporate's failure to maintain adequate systems and procedures to prevent bribery in breach of the Act. This is in stark contrast to the position in the US where senior officers (in their capacity as "control persons") can be liable for failing to devise and maintain anti-corruption controls. Moreover, senior officer liability under the Act only exists in relation to breaches by a corporate of the general offence and the offence of bribing a foreign public official. The Act is silent as to how corporates will be held liable for these offences so, one must assume that, the existing test for corporate criminal liability (the "controlling mind" doctrine) will continue to apply in relation to those offences. As noted previously, this doctrine has proved notoriously difficult to apply.

Facilitation payments

A "facilitation payment" refers to the practice of paying a small sum of money to (usually) an official as a way of ensuring that they perform their duty. Whilst not necessarily desirable, such payments are a business reality in many jurisdictions and industries.

Following much debate, facilitation payments remain illegal under the Act and, therefore, subject to prosecutorial discretion. The UK Serious Fraud Office (the "SFO") expressed its dissatisfaction with the practice, stating *"any facilitation is unjustifiable and should be removed because these payments cut across transparency and openness. They also render a corporate (and other corporates) more vulnerable to demands for larger bribes. They are a major contributor to the belief that bribery is a necessary part of business culture."*

The position is different in other jurisdictions, notably the US, where anti-corruption legislation includes a specific exception or defence for small facilitation payments. However, the UK government has indicated that small payments may not necessarily be prosecuted under the Act.

Legitimacy of payments made to foreign public officials

There are many circumstances in which corporates will make payments or offer hospitality to or through a foreign public official ("FPO") in order to, for example, engage or educate the FPO about products which their countries are considering acquiring.

Unlike the US, the Act does not carve out payments for "reasonable and bona fide expenditure" in connection with promoting products and performing contracts. Moreover, and perhaps most notably, there is no requirement to show "impropriety" on the part of the paying party in the FPO offence. Section 6 simply requires an intention to influence the FPO in order to obtain or retain a business advantage. The only defence to the Section 6 offence is where the FPO is permitted or required by written local law to be influenced by the bribe. Clearly, the circumstances in which there will be a written law, rather than a custom or practice, allowing the acceptance of "bribes" will be rare.

In response to concerns that the Act will catch legitimate payments or hospitality, the government has made clear that prosecutorial discretion would apply and that reasonable and proportionate expenditure would not be prosecuted. Whilst this clarification is welcome, it still leaves corporates in a difficult situation. Can they, for example, pay for an FPO's flights and accommodation so that the FPO can visit their manufacturing plant? It is unrealistic to expect corporates to ban outright any form of advantage, financial or otherwise, to FPOs. In order to continue to take advantage of certain business opportunities, it appears that corporates are left in the uncomfortable position of allowing payments or hospitality to FPOs on the basis that, whilst they are technically illegal under the Act, they are unlikely to be prosecuted. Given the severe penalties for breaching the Act, this is clearly an area where further government guidance is required.

Self reporting and public procurement

A potential consequence of being convicted of a bribery offence under the Act is the debarment from participating in future public contracts as a result of the UK Public Contracts Regulations 2006 (as amended) which implemented the European Commission's Directive 2004/18 regarding public procurement.

One possible escape route from the negative effects of criminal prosecutions was previously thought to be for corporates to self refer potential misconduct to the SFO so that, pursuant to the SFO's guidelines issued in July 2009, the wrongdoing is treated as a civil matter rather than criminal. However, despite the SFO's best efforts to encourage corporates to self report in its 2009 guidelines, the availability of this route is riddled with uncertainty. In R v Innospec, Lord Justice Thomas criticised a global settlement that

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had been agreed by the SFO and the US authorities stating that "*it would rarely be appropriate for criminal conduct by a company to be dealt with by way of a civil recovery order*" and that "*it was in the public interest that the serious criminality of any who engage in* [corruption] *is made patent for all to see by the imposition of criminal not civil sanctions*."

Lord Justice Thomas in R v Innospec and the Court of Appeal in R v Dougall also cast doubt on the SFO's use of plea agreements in the context of bribery and corruption. It is now clear that whilst there may be discussion and agreement as to the basis of a plea, that plea will be rigorously scrutinised in open court and the court will make the ultimate decision as regards penalty.

It is as yet unclear whether the SFO will amend its guidelines in light of these recent decisions. Moreover, it is still unclear whether the corporate offence of failing to prevent bribery will trigger debarment under the Regulations given the strict liability nature of the offence. In the interim, corporates are left in limbo as to whether they should self report to the SFO and what the effect of immunity and plea agreements entered into with the SFO and with other regulators will be.

Conclusion

There is no doubt that the Act is a clear sign of an increasingly forceful stance being taken by the UK in relation to misconduct. It is unfortunate, however, that the UK's single-minded determination to prove itself as a "zero tolerance" state has resulted in the application of key areas of the legislation being left to prosecutorial discretion. At best, this leaves corporates having to incur significant costs in order to second guess the true scope of the Act. At worst, it could result in corporates forgoing certain trade and investment opportunities in order to ensure that they do not fall foul of the Act.

Only time will tell what the true impact of the Act will be and whether it does actually provide a clearer framework for the successful prosecution of bribery and corruption offences. In the meantime, all corporates with a presence in the UK have no choice but to wake up to the potentially draconian effects of the Act and attempt to review their policies accordingly.

LON_0211026