ARNOLD & PORTER (UK) LLP

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UK BRIBERY ACT 2010: AN IN-DEPTH ANALYSIS

INTRODUCTION

The UK Bribery Act 2010[1] (Act) received Royal Assent on 8 April 2010. It has not yet come into force and will need to be enacted by secondary legislation, now that the UK general election is over. When it comes into force, the Act will replace and consolidate the previous patchwork of common law offences and offences under the Public Bodies Corrupt Practices Act and the Prevention of Corruption Acts 1906 and 1916.

Although the need for bribery laws fit for modern times has been widely acknowledged for some years, the issue was not seen as a legislative priority. A draft Corruption Bill had been prepared back in 2003, but it but failed to gain any legislative momentum. It was not until the Organisation for Economic Co-operation and Development (OECD) published a critical report on the UK's implementation of the OECD's ''Convention on Combating Bribery"[2] in March 2005 that significant progress was made. One of the key recommendations of the OECD was the need for a wider reform of corruption law.

In anticipation of the new Act, the Serious Fraud Office (SFO) has been seen to be much more active in its investigation and prosecution of offences, particularly with the recent introduction of self-reporting procedures. Following the proposed settlement with BAE, the SFO has secured recent sentences in the *Innospec* and *DePuy Pharmaceutical* cases. However, Judges have been critical of the SFO's approach to plea bargaining and such criticism may complicate the SFO's efforts to persuade companies to self-report corruption.

THE BIG CHANGE FOR COMPANIES: ENFORCEMENT ON TWO FRONTS

While the new Act has swept away the traditional common law and statutory offences of bribery, it effectively has collated and restated the key offences of bribing another person and receiving a bribe (the Primary Offences). As a result, companies still will be liable for an offence where they bribe another person. However, the most striking development in the new Act is the new

1 http://www.opsi.gov.uk/acts/acts2010/pdf/ukpga_20100023_en.pdf.
2 http://www.oecd.org/dataoecd/62/32/34599062.pdf.

London
+44 (0)20 7786 6100

Brussels
+32 (0)2 290 7800

Denver
+1 303.863.1000

Los Angeles
+1 213.243.4000

New York
+1 212.715.1000

Northern Virginia
+1 703.720.7000

San Francisco
+1 415.356.3000

Washington, DC
+1 202.942.5000

arnoldporter.com

offence of failure to *prevent* bribery (the Prevention Offence). This feature of the new Act is likely to be the subject of greatest attention by companies because it will be a strict liability offence, under which a company will be liable unless it can demonstrate that it had adequate procedures in place to prevent the offending conduct.

PRIMARY OFFENCES: BRIBERY BY THE COMPANY

Under the Act, acts of bribery by a company can fall within the Section 1 offence of bribing another person *or* the Section 6 offence of bribing a Foreign Public Official.

Section 1: Offences of Bribing Another Person

Section 1 of the Act describes two cases where this offence applies:

- The first is where a person offers, promises, or gives a financial **or** other advantage with the intention of inducing another person to perform a relevant function or activity improperly or rewarding a person for their improper performance. It does not matter if the person being bribed is the same person who is to perform the act improperly.
- The second is where a person offers, promises, or gives a financial or other advantage **and** knows or believes that acceptance of the bribe would constitute improper performance.

In both cases, it would not matter that a company offered a bribe directly or through a third party. As such, any system of intermediaries could be caught, as long as there is intention to bribe or reward or knowledge or belief that the bribe will lead to improper performance. Unlike the US Foreign Corrupt Practices Act (FCPA), which covers bribery of a "foreign official," this provision extends to bribery of any "person" regardless of whether such person is a government official or a foreign official. It is analogous to commercial bribery laws found in most US states.

Section 6: Bribery of Foreign Public Officials

It also will be an offence for a company to bribe a foreign official in his or her capacity as a Foreign Public Official, with the intent of obtaining or retaining business or a business advantage. This offence also extends to "Public International Organisations", which can include international organisations (e.g., United Nations, North Atlantic Treaty Organization, as well as countries or territories and their governments). This appears to cover those situations where a bribe is paid with the intention that it should curry favour, rather than the intention that there will be improper performance by the official.

This appears to cover any so-called "slush funds" associated with major tenders and contract negotiations. However, there will only be an offence where the official is not permitted by local law to be influenced by the promise or offer of a bribe. The presence of a local law should not always be assumed. Where there is no local law, incentives offered will only lead to a Primary Offence where they are made with the intention that they will lead to improper performance (a Section 1 offence). The FCPA similarly provides for situations where written local law may permit a payment to be made to a foreign official, although it places the burden of proving the payments' legality under the foreign law on the defendant[3]. Under the FCPA, companies cannot rely on local law advice if that advice runs counter to the written law of the country (e.g., it is insufficient to argue that a practice is "customary" or there are "unwritten rules").

Ironically, this could make it more difficult to pursue companies for the types of incentive noted in the Al-Yamamah deal[4]. As long as companies take bona fide local law advice on the legality of such payments and any incentives do not lead to improper performance, there will be no Primary Offence, though a Prevention Offence (discussed later in this advisory) may still apply. This appears to move business practices towards greater transparency in the area of contract incentives and acts to counter the suggestions that the new Act would limit the ability of UK companies to compete for business abroad.

3 *See* 15 U.S.C. §78dd-2(c)(1).
4 *See*, e.g., http://www.guardian.co.uk/world/2007/jun/07/bae1.

THE PREVENTION OFFENCE: FAILURE OF THE COMPANY TO PREVENT BRIBERY

In a bold move without precedent in the FCPA, Section 7 of the new Act creates a strict liability offence for commercial organisations, including partnerships. The effect of the Prevention Offence is that if an "associated person" (which is not limited to subsidiaries, employees, and agents) bribes to obtain or retain business or an advantage for the company, the corporate will be liable. This will apply even where the bribery carried out by the "associated person" is not a Primary Offence under the Act and is irrespective of the nexus between the party offending and the corporate. A company will be liable *unless* it can demonstrate that there were adequate procedures in place to prevent such conduct. In the earliest stages of the draft Bribery Act, the corporate offence was based on a negligent failure. However, this standard was removed as the Bribery Act passed through Parliament.

Section 7 of the Act therefore creates a defence for the corporate in such situations. For the purposes of this new strict liability, an "associated person" is defined as someone who performs services for, or on behalf of, the corporate. It does not matter in which capacity they do this and all relevant circumstances will be examined to determine whether someone is an "associated person", even where they are not an employee, agent, or subsidiary of the corporate.

Under the previous law, a corporate entity could only be liable for any corrupt acts of its employees if it could be shown that:

- the employee intended that the bribe would corrupt; and
- the corporate had shared the same intention or had knowledge of the employee's intentions.

Before the new Act, the knowledge and intention of a company could be imputed from an employee where that employee was the "directing mind and will" of the company for the purpose of the activity in question, provided that it took place within the United Kingdom. The effect of this restrictive view on the practices of a company was obvious—few if any companies would be held liable for a bribery offence unless there was overwhelming evidence of their knowledge or intentions.

THE EFFECTS OF THE CHANGE TO A STRICT LIABILITY REGIME

The public policy benefits of the new Act are obvious. No longer is the SFO tasked with trying to show that an offender was the "controlling mind and will" of a company or trying to prove knowledge or intent of the corporate. Instead, the SFO has turned the tables on commercial organisations, requiring a proactive anti-corruption regime from the corporate to avoid liability.

Although no guidance was available when the Act received Royal Assent, HM Government must publish guidance about the procedures that commercial organisations can implement to avoid liability under Section 7. These may well replicate some content of the recently released OECD "Good Practice Guidance on Internal Controls, Ethics, and Compliance"[5], although the guidance is likely to stop short of providing an exhaustive list of measures to be taken. The SFO's guidance on self-reporting[6], which provides further detail on the types of procedures it would expect commercial organisations to have in place, also will be relevant to companies hoping to avoid the potential pitfalls of this new, stricter regime.

THE REMAINING PRIMARY OFFENCE: ACCEPTING A BRIBE

Section 2 of the Act sets out the four offences that can be committed by a person accepting or requesting a bribe:

- Where a person requests or accepts a financial or other advantage, with the intention that he or she will carry out a function or activity improperly as a result;
- Where a person requests or accepts a financial or other advantage and the request or acceptance of the bribe constitutes improper performance (e.g., breach of applicable policy);

5 http://www.oecd.org/dataoecd/5/51/44884389.pdf.
6 http://www.sfo.gov.uk/media/107247/approach%20of%20the%20serious%20fraud%20office%20v3.pdf.

- Where a person requests or accepts a financial or other advantage as a reward for improper performance; and
- Where a person performs an activity improperly in anticipation of the receipt of a financial or other advantage.

These offences have been drafted broadly to apply in the widest possible circumstances. As such, in all cases, it does not matter if a person requests or accepts the bribe directly or indirectly or whether it is for his or her own benefit or that of a third party. In the case of the latter three offences, it does not matter that the person requesting or accepting the bribe knows or believes that performance of the activity is improper. For the final offence, where the improper performance is by a third party and not the person anticipating the bribe, it does not matter whether that person performing the improper activity knows or believes that what he or she is doing is improper. In contrast, the US FCPA does not hold bribe-takers liable, although there are other US laws (e.g., money laundering) that could potentially cover bribe-takers in certain circumstances.

IMPROPER PERFORMANCE OF A "FUNCTION"

For the offences of bribing another person and of accepting a bribe, it is required that the improper performance relates to a function or activity that is:

- Any function of a public nature;
- Any activity concerning a business;
- Any activity performed in the course of a person's employment; or
- Any activity performed by or on behalf of a body or persons (whether corporate or incorporate);

And that it meets one or more of the **conditions** specified below:

- A person performing the activity is expected to perform it in good faith;
- A person performing the activity is expected to perform it impartially; or
- A person performing the activity is in a position of trust by performing it.

The aim of the function list above is to ensure that the Act applies equally to public and selected private functions, without discriminating between the two. As there can be occasions where the dividing line between public and private activity is blurred, for example in the provision of health services, the drafting removes this as a source of argument.

The Act's requirement that the activity should also meet one of the objective conditions outlined above is founded on the recognition by the Act that not every defective performance of a "function" can amount to a corruption. As such, the conditions must also be met before any activity can be said to amount to bribery.

In practice when assessing whether the conditions have been met above, the courts should be able to review past performance of the activity. However, where an activity is not subject to the laws of the United Kingdom, any review of local custom or practice is to be disregarded, unless it is directly permitted or required by local law. Therefore an argument that "all local officials require a bribe" will not be acceptable. The absence of an exemption for *de minimis* "facilitation payments" is a key distinction between the Act and the US FCPA.

HOW FAR DOES THE ACT REACH?

One of the key differences between the existing law and the new Act is the territorial application of offences. Until 2001, bribery law in the United Kingdom was limited in its geographical scope. The provisions of the Anti-Terrorism, Crime and Security Act 2001 (ATCSA) extended the laws to cover acts conducted outside of the United Kingdom by a UK national or UK company. However, despite the extension provided by ATCSA, it was not until the 2009 case of *Mabey & Johnson* that there was a successful prosecution of a UK company for bribery activity outside of the United Kingdom.

Companies need to be aware that the new Act goes a lot further in relation to the Prevention Offence. Non-UK companies can be caught within the "Relevant Commercial Organisation" definition of Section 7 if they are "carrying on a business" in the United Kingdom. Their failure to prevent bribery will be an offence

under the Act even where the acts of corruption take place outside the UK. This is of particular interest and expands the powers of the SFO to a wider jurisdiction than the US Department of Justice. Richard Alderman, Director of the SFO, commented in February 2010 that "in certain circumstances the SFO will have jurisdiction in respect of corruption by those corporates anywhere in the world"[7].

For example, a US company could be liable under the Act for a Prevention Offence as a result of the activity of any "associated person" (which can include an agent, employee etc.) that takes place in India, as long as the US company is "carrying on a business in the UK". It is not specified that a company has to be doing the same business in the UK as it does in India. As drafted, "carrying on a business in the UK" is very broad and would cover a wide range of activity.

Companies can also be liable for a Primary Offence that takes place outside the United Kingdom if:

- the act or omission would amount to an offence if it had been carried out in the United Kingdom; and
- the person carrying out the act or omission has a "close connection" with the United Kingdom.

In such instances, a "close connection" will be found where the person accused was a British citizen or a citizen of a British Overseas territory, a British National, a British Overseas citizen, a British subject or protected person under the British Nationality Act 1981, a resident of the UK, a body corporate incorporated under the laws of any part of the United Kingdom or a Scottish partnership.

The broad reach of the Bribery Act means that companies doing business in the UK need to take steps to ensure that they have adequate compliance procedures in place to guard against liability from overseas activity. Any company with a UK branch, subsidiary, parent, or affiliate should review their procedures. Companies should also be wary of any liability created by a joint venture overseas. If they are not, they could find themselves investigated and sanctioned in the United Kingdom even if they are a non-UK company and the conduct in question occurred outside the United Kingdom.

A POLITICAL HURDLE? CONSENT REQUIRED FOR A PROSECUTION

Previously, prosecutions had to be sanctioned by the Attorney General, who is a lawyer, but also a political appointee. The prosecution of an offence under the Act now requires the consent of any of the following:

- The Director of Public Prosecutions (or the Director of Public Prosecutions for Northern Ireland);
- The Director of the Serious Fraud Office; or
- The Director of Revenue and Customs Prosecutions.

There may, therefore, still be questions over the political control of investigations. There was significant criticism following the SFO's decision to halt the 2006 investigation into BAE over the Al-Yamamah contract. At the time, it was the decision of the Director of the SFO to suspend the investigation, though this followed a review by the Attorney General and expressions of concern by the then Prime Minister[8]. This requirement for consent is likely to continue to be a hurdle for more politically sensitive investigations. We can, therefore, expect UK-based groups, such as Campaign against the Arms Trade and Corner House, to monitor decisions closely and, as they deem appropriate, to seek judicial review of such decisions.

DEFENCES

Defences under the Act were the subject of much discussion in Parliament. No *de minimis* provision was introduced and no concessions were made for so-called "facilitation payments". While there was some discussion of the benefits of a defence in other circumstances (e.g., corporate hospitality), the only defences to survive into the Act are those applying to the UK Intelligence Services and the Armed Forces. This took up a large part of the later debates on the Bribery Act and replaced an earlier provision under which the Secretary of State would sanction bribery offences by the Intelligence Services and Armed Forces on a rolling basis.

7 http://www.sfo.gov.uk/about-us/our-views/speeches/speeches-2010/the–corporate-investigations-group-seminar.aspx.

8 http://www.guardian.co.uk/world/2007/jun/07/bae1.

PENALTIES

Companies found guilty of an offence under the Act can receive an unlimited fine. Where a company commits a Primary Offence, directors or senior employees can also be liable for unlimited fines or prison terms of up to 10 years, where the Primary Offence is committed with that person's consent or connivance. In the recent *DePuy Pharmaceuticals* case (under previous laws) the Judge at first instance imposed a custodial sentence on a senior employee of a company who had received no personal benefit as a result of his activity. It is a matter of significant concern that the sentence was against the recommendations of the SFO, who had negotiated a plea bargain on the basis of the cooperation the employee had provided. On 13 May 2010, the Court of Appeal modified the sentence in the *DePuy Pharmaceuticals* case to a suspended sentence, but reiterated that decisions on sentencing in bribery cases are "vested exclusively in the sentencing court"[9], not the SFO.

Companies should be aware that a financial penalty may not be the limit of the sanctions imposed. Companies doing business in the EU face the threat of debarment from public procurement under the Procurement Directive (2004/18/EC), which states at Article 45 that any "candidate or tenderer" who has been convicted of an offence, of which the contracting authority is aware, will be excluded from participation in a public contract.

The trigger for such an exclusion has two parts:

- a conviction or final judgment (this does not have to be in the European Union); and
- awareness of a contracting authority within the European Union.

The requirement for a 'conviction' means that a civil settlement with the SFO in the UK would not trigger Article 45(1). While member states were able to include a derogation in their own legislation, which allowed for a right to override this exclusion where "it was in the general interest", there is no such derogation in the United Kingdom.

Given the recent criticisms raised by the courts in *Innospec* and *DePuy Pharmaceuticals* as to the negotiated settlements proposed by the SFO, companies are likely to be even more concerned about the prospect of self-reporting corruption. While they may do this in the hope of a civil settlement and a plea bargain with the SFO, these cases show that the company or an employee could still receive a criminal sanction and this could lead to debarment from public procurement in the European Union. These recent developments should serve as a reminder to all that UK corruption matters are not be taken lightly.

We hope that you have found this advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:

LONDON

Ian Dodds-Smith
+44 (0)20 7786 6216
Ian.Dodds-Smith@aporter.com

Alison Brown
+44 (0)20 7786 6207
Alison.Brown@aporter.com

Jacqueline Bore
+44 (0)20 7786 6211
Jacqueline.Bore@ aporter.com

Benjamin Kieft
+44 (0)20 7786 6132
Benjamin.Kieft@ aporter.com

FCPA PRACTICE

Marcus Asner
+1 212.715.1789
Marcus.Asner@aporter.com

Drew A. Harker
+1 202.942.5022
Drew.Harker@aporter.com

Keith M. Korenchuk
+1 202.942.5817
Keith.Korenchuk@aporter.com

David S. King
+1 202.942.6543
David.King@aporter.com

9 *Dougall, R* v. [2010] *EWCA* Crim 1048 (13 May 2010).