

Bribery Act: Are Reports of Its Demise Premature?

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If recent press reports are to be believed, the much discussed UK Bribery Act will have only a limited impact, and its good intentions will be negated by weak enforcement. In the past, there have been reports about the reorganisation of the UK Serious Fraud Office (SFO), the UK investigator and prosecutor of economic crime offences, that have suggested that its investigatory function will be incorporated into the new investigatory agency, the National Crime Agency (NCA). It was suggested that its prosecutorial function will be incorporated into the Crown Prosecution Service (CPS), thus resulting in the abolition of a fused agency dedicated to investigating and prosecuting economic crime. As a result, so the thinking goes, the UK will revert to being a light touch when it comes to enforcement. Having followed the new law from the earliest stages, we disagree. While there will be challenges to overcome, both for the new law and the SFO, companies should not bank on there being a reduction in UK enforcement activity. Clients would be well-advised to ensure they have taken the steps required to improve their compliance programs by the time the UK Bribery Act comes into force on the 1st of July this year and ensure if they do detect issues, these are handled appropriately.

The Bribery Act and the Promise of a Climate of Increased Enforcement

The Bribery Act was greeted with a great deal of applause when it became law in 2010. While this

may have been in part due to the impending general election (the new law received broad cross-party support and was one of the last Acts passed in the previous parliamentary session), HM Government was also keen to show that it had taken steps to bring UK laws in line with best practices in this area. The Organisation for Economic Co-operation and Development (OECD) had previously been very critical¹ about the lack of enforcement activity by the SFO.

Law firms have scrambled to interpret the new law for their clients, and businesses have struggled to understand its implications. The new law certainly has made bold changes to the previous legislation.² Legal advisers have been stressing the new challenges that will be faced both by individuals and companies as a result of the wider jurisdictional scope of the Act, the changes to liability for third-party acts, and the requirements for businesses to ensure they have adequate anti-bribery procedures in place.

While the new law was being debated and finally approved, the SFO was taking forward steps of its own, bringing more cases under the existing UK anti-corruption laws and promoting self-reporting of offences.³ The last two years have seen the SFO resolve a number of high-profile corruption cases (*Balfour Beatty*, *Mabey & Johnson*, *Dougall, Innospec*⁴ and *BAE*⁵ to name a few). It has therefore been no great surprise that an increasing threat of

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enforcement action has caused companies affected by the UK Bribery Act to improve their compliance regimes.

Law Enforcement Challenges

Not everyone has been positive about these developments. Trade associations and industry have pushed hard against the new law, demanding better and more practical guidance on its application (and revised guidance was published in March 2011).⁶ There also have been suggestions that the prosecution of corruption should not be a priority at this time of cost-cutting by the coalition government. It is certainly the case that there have been discussions to reorganise the investigation and prosecution of serious crime in the UK, including economic crime such as fraud and corruption. Such a reorganisation might lead to different bodies taking over particular SFO responsibilities, with its role in prosecutions being taken over by the CPS. Various recent press reports even have suggested that the SFO may either cease to exist or be left without the resources to prosecute corruption effectively. Critics of the SFO also point to the recent *Innospec* and *BAE* cases, where the SFO's approaches to a plea bargain and settlement were criticised by the courts, as indicators that the organisation would not last.

Is It Safe?

The critics' viewpoint was clear—with a judiciary that was doing its best to curtail the SFO's first steps to plea bargaining and a government that no longer wanted to pay for prosecution, the writing was surely on the wall for the Bribery Act. A company focused too closely on recent reports might well be forgiven for thinking that the new law would no longer have any real practical impact and that the expensive compliance procedures they had put in place were no longer necessary.

Would they be right to think that this signaled the end of greater anti-corruption enforcement activity

in the UK? Or to put it bluntly: is it safe to ignore the Bribery Act?

In a Word, No

While there will be some challenges ahead, they by no means mark the end of the road for the UK Bribery Act or its enforcement. From all indications, the City of London Police, the CPS, and the SFO will continue to work closely with all their law enforcement partners, both domestic and international, to ensure possible offences in relation to economic crime are properly pursued. The increased level of international co-operation—particularly between the UK authorities and the U.S. Department of Justice (DOJ) and Securities & Exchange Commission (SEC)—will help guarantee a high level of UK enforcement. Moreover, the recent press reports of the demise of the SFO now appear too hasty. A recent report⁷ suggesting the SFO would have only 12 months to prove itself before being disbanded and merged into the newly formed NCA was dismissed by Theresa May, the Home Secretary. She stated that there was:

No suggestion that the SFO has been put 'on 12 months' notice. What we have said has been absolutely clear. The SFO is continuing to exist and to operate as it has done. We will set up an economic crime command in the NCA. . . . In due course, we will consider what is the appropriate relationship between the NCA, the SFO and other agencies that deal with economic crime.⁸

While the long-term future of the SFO is not yet certain, companies and individuals looking at the new law coming into force in July 2011 should not be banking on the disappearance of the SFO. It is clear that economic crime enforcement—either by the SFO or a law enforcement agency with a different name—is here to stay. The OECD voiced concerns when the UK Bribery Act was delayed,⁹ but there is a strong political will for the new law to be enforced. HM Government has made it clear that

it is fully committed to tackling economic crime and recognises the potential links it can have to organised crime. Even if the SFO were to be reorganised, it is now clear that the wind is blowing in the direction of higher levels of enforcement activity.

The SFO also will continue to develop its relationship with U.S. law enforcement authorities to ensure there is a co-ordinated response to any allegations of corruption. Richard Alderman, Director of the SFO, has already made clear that they expect a company reporting to the DOJ or SEC also to report to the SFO at the same time,¹⁰ and the trend towards global settlements is likely to continue.

Companies discounting the vigour of UK Bribery Act enforcement should also pay close attention to other UK laws already in place. The current UK anti-money laundering regime (which has been in place since 2007) provides a powerful mechanism to compel the reporting of proceeds of illegal activity, including corruption. The Fraud Act, which also has extraterritorial reach, will be another tool that law enforcement uses. Companies and individuals need to be aware that this can have an impact on any transaction they may be planning, especially when looking at mergers or acquisitions. Evidence of potential bribery or money laundering offences may be uncovered during any due diligence or audit process. While companies may rightly be concerned about a disclosure leading to the transaction stalling or becoming substantially less valuable, they should also be aware of the risks of non-disclosure. In such circumstances, advisors of both parties are likely to be under positive obligations under the anti-money laundering regime to make disclosures to the supervising agencies. All these agencies work together and, when taken together with the self-reporting procedures implemented by the SFO in 2009, there now are clearer routes for information to lead the SFO and other law enforcement authorities into opening an investigation.

Self-reporting and co-operation with the SFO are likely to continue to grow in importance. Following the publication of the Ministry of Justice guidance on the Bribery Act, the prosecutorial guidelines for bribery offences were also published. They stress that one of the factors to be taken into consideration when deciding whether to prosecute the corporate offence will be whether there was:

[A] . . . genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice, involving self-reporting and remedial actions, including the compensation of victims.¹¹

Prosecutors will consider the extent of the information supplied and whether sufficient information has been provided to assess proactive compliance, such as making witnesses available and disclosing details of any internal investigation.

The importance of co-operation in the decision to prosecute also weakens the argument of those who suggest that reductions in the investigatory budget of the SFO will lead to a lack of enforcement. For the new corporate offence, a company looking to rely on the adequate procedures' defence is likely to face a substantially greater workload than the prosecution. If a company would have to go to the effort of demonstrating adequate procedures for any trial, why would it not try to do this at an earlier stage if it could avoid prosecution? With this strong incentive, more corporate investigations are likely to result from self-reporting, and any reduction in the SFO's resources may therefore have a limited effect on enforcement.

For any cases that do proceed, co-operation will continue to be important. While the SFO has faced difficulties in its approach to the plea bargaining guidelines to date, this is surely an area of future development as the principles behind it are those that form one of the clearest principles of the criminal justice system: plead early and you are likely to receive a reduced penalty.

What Should a Prudent Company Be Doing?

On the back of recent developments, companies should be taking the UK Bribery Act seriously and carrying on with their compliance updates, if they had put them on hold. While there will be challenges for UK law enforcement, not least in the limited resources available to it, trends in enforcement are going only one way. The greater use of self-reporting and shared investigations with the US and all international law enforcement authorities will only make it easier to investigate and prosecute wrongdoing.

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¹ See OECD to Conduct a Further Examination of UK Efforts Against Bribery, OECD.org (Mar. 14, 2007), available at http://www.oecd.org/document/12/0,3746,en_33873108_33873870_38251148_1_1_1_1,00.html.

² See Financial Fraud Law Report, *The New U.K. Bribery Act: An In-Depth Analysis* (July/Aug. 2010), available at http://www.arnoldporter.com/resources/documents/ArnoldPorterLLP_FinancialFraudLawReport_082010.pdf, and Arnold & Porter LLP, *Advisory: UK Government Issues Guidance on the Bribery Act* (Mar. 2011), available at:

http://www.arnoldporter.com/public_document.cfm?id=17392&key=10C0.

³ UK Serious Fraud Office, Bribery & Corruption - The SFO's Response (June 2011) available at <http://www.sfo.gov.uk/bribery--corruption/the-sfo%27s-response.aspx> and Arnold & Porter LLP, *Advisory: New UK Bribery Bill Becomes Law and SFO Receives Judicial Guidance on Settlement Powers* (April 2010) available at http://www.arnoldporter.com/public_document.cfm?id=15626&key=28G2.

⁴ *R v. Innospec Limited*, (2010) Crim LR 665. For the relevant sentencing remarks see: <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-thomas-lj-innospec.pdf>.

⁵ *R v. BAE Systems Plc*, 21 December 2010, Case No: S2010565 before the Crown Court at Southwark. For the relevant sentencing remarks see: <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/r-v-bae-sentencing-remarks.pdf>.

⁶ See Ministry of Justice, "Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)," available at:

<http://www.justice.gov.uk/downloads/guidance/making-reviewing-law/bribery-act-2010-guidance.pdf> and Arnold & Porter LLP, "Advisory: UK Government Issues Guidance on the Bribery Act," (March 2011) available at: http://www.arnoldporter.com/public_document.cfm?id=17392&key=10C0.

⁷ The Times, Wednesday 8 June 2011, Frances Gibb: *Serious Fraud Office given 12 months to save itself*.

⁸ House of Commons Hansard Debates, PARLIAMENT.UK, (June 8 2011) (pt 3), available at <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110608/debtext/110608-0003.htm#11060855000006>.

⁹ UK: Chair of OECD Working Group on Bribery Concerned Over Delay of New Bribery Act, OECD.Org (Feb. 1, 2011), available at http://www.oecd.org/document/59/0,3746,en_21571361_44315115_47020557_1_1_1_1,00.html.

¹⁰ SFO Guidance, *Approach of the Serious Fraud Office to Dealing with Overseas Corruption*, available at: <http://www.sfo.gov.uk/media/28313/approach%20of%20the%20sfo%20to%20dealing%20with%20overseas%20corruption.pdf>.

¹¹ See Joint Guidance for Prosecutors on the Bribery Act 2010, available at: <http://www.sfo.gov.uk/media/167348/bribery%20act%20joint%20prosecution%20guidance.pdf>, and the

Guidance for Corporate Prosecutions, *available at*:

<http://www.sfo.gov.uk/media/65228/com1%20joint%20guidance%20on%20corporate%20prosecutions%20for%20publication%20v1.pdf>.