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A brave new world

Legal Update Bribery Act Special

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Standing in the dock of the Old Bailey facing trial on an imprisonable offence is an unpleasant place to be any time but imagine if that person is your firm's client. Imagine if he is the CEO of a major US company and he is there not because of any act he did while sitting in his office somewhere stateside, but because of the act of one of his junior employees whose name he has never heard of before or an employee of a subsidiary or maybe that of a supplier. An act done in a far-flung country that your client couldn't even have found on a map. Is this the product of the fevered imagination of the thriller writer? The answer is a resounding no--this is the brave new world of the Bribery Act 2010.

The Bribery Act 2010, which will come into force early next year, promises to shake up the murky side of business both in this country and all over the world where people and corporate entities connected with the UK trade. But how will your clients avoid prosecution and the consequential damage to reputational and financial well being? How will companies do business in countries when "facilitation payments" and lavish entertaining are an integral part of business life? In this guide we will look at:

- the drivers behind the new Act:
- the key provisions of the new Act;
- corporate liability;
- the prosecution authorities;
- lessons to be learnt from the US experience; and

- other areas such as whistle blowing and employment contracts.

Drivers behind the Act

The key driver behind the new Act is the Organisation for Economic Cooperation and Development (OECD) Anti Bribery Convention and its Revised Recommendation produced in 1997 the purpose of which according to the Secretary General of the OECD is to tame "the dark side of globalisation".

In 2009 the OECD produced a Recommendation on Further Combating Foreign Bribery which calls on parties to review the position on small facilitation payments, increase the effectiveness of corporate liability, protect whistleblowers and to encourage the private sector to adopt stringent anti-bribery compliance programmes. The Annex to the Recommendation gives good practice guidance on compliance.

The six principles

The six principles produced by Transparency International, the world's leading non-governmental anticorruption organisation, underpin both the Anti Bribery Convention and the new Act. These are:

- risk assessment;
- top level commitment (a business culture in which bribery is unacceptable);
- due diligence concerning business partners;
- clear policies and procedures;
- effective implementation; and
- monitoring and review of controls and external verification of their effectiveness.

International instruments

Other international instruments include the United Nations Convention against Corruption (2003), European Union measures such as the Convention on the Fight against Corruption involving Officials of the Member States of the EU (1997), and a Framework Decision on Corruption in the Private Sector (2003). The latter requires the criminalisation of both active and passive corruption (giving and receiving a bribe), and stipulates that legal persons may be held accountable.

The Council of Europe Criminal Law Convention on Corruption (1998) and additional Protocol (2005) covers bribery of domestic and foreign officials as well as private sector corruption, trading in influence, money laundering and accounting offences connected with corruption offences. The Convention includes provisions on corporate liability, accounting offences and mutual legal assistance. The Protocol covers bribery of

domestic and foreign arbitrators and jurors.

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The structure of the Act

Legal Update Bribery Act Special

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Using a novel form of drafting (the introduction of "cases" -- samples of statutorily restricted behaviour) the new offences created by the Bribery Act reach directors, managers and secretaries of companies as well as the corporate bodies and partnerships themselves. They have very broad jurisdictional reach which can affect any business, or part of a business, in the UK, even if the underlying behaviour does not have any substantive connection with the UK. Broadly, the Act creates four categories of offence:

(i) bribing a person (s 1);

(ii) being bribed (s 2);

(iii) bribing foreign public officials (s 6); and

(iv) failure by a commercial organisation or partnership to prevent bribery (s 7).

The latter offence is a strict liability offence for companies and extends to "associated persons" which includes employees, agents or subsidiaries, subject to the defence that the company had in place "adequate procedures" to prevent the bribery.

Following submissions at the review stage of the Bill from, among others, the Law Commission, the Secretary of State must publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing. In England and Wales, no prosecutions under the Act may be instituted without the consent of the DPP, the Director of the SFO, or the Director of HMRC Prosecutions.

Penalties range from fines to imprisonment for up to 10 years, or to both and can extend not only to

corporate bodies but also to the senior officers of the corporate bodies if the offences were committed with their consent or connivance. There are defences for certain bribery offences for conduct conducted as part of any function of the intelligence service or any function of the armed forces when engaged on active service.

The different offences

The s 1 offence prohibits a person, which includes a body corporate, from offering, promising, or giving a financial or other advantage:

(i) in order to induce a person improperly to perform a relevant function or duty;

(ii) in order to reward a person for such improper activity; or

(iii) where the person knows or believes that the acceptance of the advantage would itself constitute an improper performance of a function or duty. It does not matter whether the advantage is offered, promised or given by a person directly, or through a third party.

The s 2 offence prohibits a person from requesting, agreeing to receive, or accepting a financial or other advantage ("a bribe") intending that a relevant function should then be performed improperly, either by that person, or by another person at the request of, or with the assent or acquiescence of, the first person. It does not matter whether the bribe is requested, received (or agreed to be received) or accepted directly or through a third party; nor does it matter whether the bribe is, or will be for the first person's benefit, or for the benefit of another person. Furthermore, it does not matter whether the person requesting or accepting the bribe knows or believes that the performance of the relevant function is improper.

A "function or activity" is "relevant" for the purposes of the Act if it fulfils a number of criteria. First, it has to be:

(i) any function of a public nature; or

(ii) any activity connected with a business; or

(iii) any activity performed in the course of a person's employment; or

(iv) any activity performed by or on behalf of a body of persons (whether corporate or incorporate).

The relevant function or activity has also to be performed by a person who is expected to perform it

(i) in good faith; or

(ii) impartially; or

(iii) from a position of trust by virtue of performing the function.

Section 6 provides that it is an offence for a person (which definition also includes a body corporate) to offer, promise, or give any financial or other advantage to a foreign public official, either directly or through any third party, where the person's intention is to influence the official in his capacity as a foreign public official and the person intends to obtain or retain either business or an advantage in the conduct of the business. "Foreign public official" is defined in s 6(5) of the Act.

Section 7 creates a strict liability offence for commercial organisations where a person associated with the commercial organisation bribes another person (where the associated person commits an offence under ss 1 or 6) intending to obtain or retain either business or an advantage in the conduct of business save where the commercial organisation can prove that it had in place adequate procedures designed to prevent bribery. "Associated person" is defined in s 8 of the Act.

Territorial scope

Uncontroversially, s 12 of the Act provides that the offences under ss 1, 2 and 6 are committed if any act or omission which forms part of those offences takes place in the UK. More controversially, the Act also criminalises the acts or omissions abroad by individuals with a close connection with the UK if those acts or omissions would form part of the offences if they had been done or made in the UK. "Close connection with the UK" is defined in s 12(4) of the Act but includes a UK citizen, an individual ordinarily resident in the UK and a body incorporated under the law of any part of the UK. An offence is committed under section 7 of the Act irrespective of where the constituent acts or omissions were made or done.

The new Act applies to any entity that carries on a business, or even part of a business, in the UK whether the acts or omissions, the constituent elements of the relevant offences took place in the UK or otherwise. This far-reaching territorial scope places the UK's anti-bribery legislation on a par with the US Foreign Corrupt Practices Act and with the obligations under the OECD Convention, to which the UK is a signatory.

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The corporate offence & corporate liability

Legal Update Bribery Act Special

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Originally, the Bribery Bill created the offence of *negligently* failing to prevent bribery by a commercial organisation. But the Act, as it finally emerged, dropped the requirement of negligence, thus broadening the offence. Now, it is an offence (s 7) committed by a relevant commercial organisation if a person associated with it bribes another person, intending to obtain or retain business for that organisation or to obtain or retain an advantage in the conduct of business for that organisation.

A "relevant commercial organisation" means, effectively, any partnership or incorporated body set up under UK law which carries on business anywhere in the world, or any partnership or incorporated body set up under any law which carries on a business or part of a business in any part of the UK. By "bribes" is meant, effectively, that the person doing the act complained of would be guilty of an offence under s 1 or s 6 if done in the UK. What is an "associated person"? That means (s 8) someone who (disregarding any bribe under consideration) performs services on behalf of the relevant commercial organisation.

The capacity in which he performs those services is irrelevant, so, for example he can be an employee, agent or subsidiary of the organisation. If he is an employee of the organisation, there is a presumption that he performs services for it. Whether or not he performs services for the organisation is to be decided "by reference to all the relevant circumstances" and not merely the nature of the relationship between the two.

He can, of course, also be a joint venturer. This can lead to a big problem if for example that joint venturer is an American corporation. Under the equivalent American legislation, the Foreign Corrupt Practices Act, it is not an offence to make what are called "facilitation" or "grease" payments ie payments to a foreign government employee to do what you are entitled to have, eg giving a border guard $20 to stamp your passport immediately, instead of waiting a few hours or days. But under the English legislation, that is capable of being an offence, and you have to hope that the prosecuting authorities would consider that it was not in the public interest to prosecute.

Drawing the line

There is also uncertainty over where the line is to be drawn where corporate hospitality and gifts are concerned. In a published letter of 14 January 2010, Lord Tunnicliffe, on behalf of the Government, confirmed that the Bill was targeted only at "lavish corporate hospitality" which was aimed at securing an advantage. The question of what constitutes lavish hospitality will be a matter for the prosecuting authorities.

The person paying the bribe does not have to be prosecuted before the organisation is prosecuted. Thus a UK company may incur liability for the acts of foreign nationals working abroad, even if their acts have no connection with the UK. There is a restricted defence (s 7(2)): the organisation must prove (on the balance of probabilities) that it had in place "adequate procedures" designed to prevent associated persons from undertaking such conduct.

Guidance matters

Section 9 requires the Secretary of State to publish guidance "about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing as mentioned in s 7(1)". Compliance with such guidance is not of itself a defence to a charge, but will doubtless be considered by any

court trying that sort of case. A Consultation Paper on Guidance was published on 14 September. Because the Act is due to come into force in April 2011, the consultation period was only eight weeks instead of the usual 12. The hope is that final guidance will be published early in 2011.

Fundamental to the guidance are the ideas of a risk-based compliance regime and of practical compliance ie the promulgation of an ethical compliance culture.

The six principles set out in the Consultation Paper are:

- Risk assessment
- Top level commitment
- Due diligence
- Clear, practical and accessible policies and procedures
- Effective implementation
- Monitoring and review.

There is no specific guidance on when an organisation will be liable for the acts of its subsidiaries or joint venturers. While we await the official Guidance, businesses and commentators are looking to current resources to elucidate the six principles. During a speech on 14 September 2010 to the World Bribery & Compliance Forum, Robert Amaee of the SFO stated: "What is abundantly clear is the business community need not wait for such guidance.... there is a wealth of detailed and constructive advice from numerous respected sources, including the OECD and Transparency International and others."

Businesses are therefore in the awkward position of being actively encouraged to anticipate the content of the official Guidance. This could lead to duplication of work and cost. Nonetheless, there is much secondary guidance available, and some of it fits easily within the six principles set out above.

Risk assessment

This involves regular and comprehensive assessments of the nature and extent of the risks relating to bribery to which the organisation is exposed. The organisation should consider whether using external professionals may be appropriate in this regard. Transparency International offers a useful "Self Evaluation Tool" on its website, which is intended to assist companies to evaluate their current anti-bribery provisions (see *www.transparency.org*)

Key bribery risks include:

(i) Country risk, eg corruption league tables and absence of anti-bribery legislation and implementation. In October 2010 Transparency International published its latest Corruption Index with Denmark being cited as the least corrupt nation, and Somalia as the most. The UK was placed 20th.

(ii) Transaction risk, eg charitable or political contributions, as allegedly requested by FIFA committee members in the recent *Sunday Times* investigation.

(iii) Partnership risks, eg business partners who are in higher-risk jurisdictions

In his speech to the World Bribery & Compliance Forum, Mr Amaee said: "We also recognise that some companies have in the past chosen not to ask too many questions about how those doors are being opened by those intermediaries. Often either not conducting sufficient due diligence or ignoring clear and cogent warning signs. Under the Bribery Act, that simply won't do."

Top level commitment

This requires the establishment within the organisation of a culture in which there is zero tolerance of bribery. Steps are taken to ensure that the organisation's policy to operate without bribery is clearly communicated both within and outside the organisation.

Due diligence

This should cover all the parties to a business relationship, including the organisation's supply chain, agents and intermediaries, joint venturers and the like, eg so-called "politically exposed persons" where the proposed business relationship involves, or is linked to, a prominent public office holder. It should also extend to all the markets in which the organisation does business.

Clear, practical & accessible policies & procedures

These should include comprehensive and clear policy documentation, eg a clear prohibition on all forms of bribery, and guidance on making political or charitable contributions, and appropriate levels of bona fide hospitality or promotional expenses.

Bribery prevention procedures should be put in place eg modification of sales incentives to give credit for orders refused where bribery is suspected, or whistle-blowing procedures to be implemented.

Procedures might be implemented to deal with any incidents of bribery promptly, consistently and appropriately. Transparency International states in its Guidance that: "To be effective, the Programme should rely on employees and others to raise concerns and violations as early as possible. To this end, the enterprise should provide secure and accessible channels through which employees and others should feel able to raise concerns and report violations ('whistle-blowing') in confidence and without risk of reprisal".

Effective implementation

This would involve an implementation strategy including, eg who is responsible for implementation, how training is done, internal reporting of progress to top management, defined penalties for breaches of agreed policies and procedures.

Bribery prevention training should be considered. External communication should be considered eg information on the organisation's website.

Monitoring & review

The OECD Guidance recommends "periodic reviews of the ethics and compliance programmes or measures, designed to evaluate and improve their effectiveness ... taking into account relevant developments in the field, and evolving international industry standards." This could include financial and auditing controls.

The MOJ suggests that large organisations might consider periodically reporting the result of reviews to the Audit Committee or the Board, who in turn might wish to make an independent assessment of the adequacy of anti-bribery policies, and disclose their findings and recommendations in the company's Annual Report to shareholders.

The guidance does not supersede pre-existing guidance such as the FSA's rules and principles for regulated financial sector firms, which remain in force. The DPP and the SFO are preparing joint guidance, and the Ministry of Justice will publish a circular on the Act.

Only time will tell just how effective the various guidances will be, and the advice to your clients must surely be to take proper professional advice on the steps to be taken so as to minimise the risk of their being the guinea pigs facing trial at the Old Bailey.

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The role of the prosecuting authorities

Legal Update Bribery Act Special

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The Serious Fraud Office (SFO) is currently the lead agency in the UK in prosecuting cases of domestic and overseas corruption. Under s 10 of the Bribery Act the SFO is poised to become the principal enforcer of the new regime and its declared aim in exercising its prosecutorial powers is to generate a cultural change in business so that bribery is no longer acceptable.

The SFO has published a non-exhaustive list of "corruption indicators" to assist employees of companies to detect questionable practices. These 19 indicators give some insight into what the SFO will consider to be evidence of corrupt practices in any investigation it undertakes. Examples selected from the list include abnormal cash payments, pressure exerted for urgent payment, abnormal commission percentages, private meetings with contractors hoping to tender for contracts, lavish gifts being received, agreeing unfavourable contracts, an unexplained preference for certain contractors during tendering, avoidance of independent checks, missing documents or records, company procedures not being followed and the payment of, or making funds available for, high value expenses or school fees.

The SFO has sought to promote the self reporting regime for corporations where bribery is detected on the basis that it may allow a company to receive a civil rather than criminal penalty where the company engages fully with the regulator and may permit the management adverse publicity. The reality of whether these benefits are available to corporations must now be in doubt following the cases of *R v Dougall* and *R v Innospec Limited.*

One benefit of such a negotiated settlement is that the automatic debarment provisions under Art 45 of the EU Public Sector Procurement Directive 2004 will not apply. If a company elects to use the self reporting regime it must consider the global effect as the SFO states it would expect to be notified at the same time as the Department of Justice in the US providing it has jurisdictional reach over the corruption.

Guidance has also been offered to corporations seeking to ensure compliance with the Act regarding the offence of failing to prevent bribery. In determining whether it is in the public interest to prosecute the SFO will look for evidence of procedures designed to reduce risk and encourage a non bribery culture within the business. Examples of this include a clear anti corruption policy which is supported by those in senior positions, principles that apply regardless of geographical location, a policy on gifts, hospitality and facilitation payments, a helpline for employees to report concerns, appropriate and consistent disciplinary procedures and remedial action if corruption has previously arisen.

Plea bargaining & global settlements

The Attorney General's Guidelines on Plea Discussions in Cases of Serious and Complex Fraud have been adopted by the SFO as the framework for negotiating plea bargains in corruption cases. The plea discussions will be confidential save as required for the purposes of the discussion or as required by law. Confidentiality does not permit non disclosure of the plea negotiation to a co-defendant. The fact that plea negotiation has been undertaken and failed should not be relied upon evidentially by a prosecutor in any subsequent prosecution of the defendant for offences which fell within the scope of the negotiation.

However, if an agreement has been reached and signed a prosecutor will be entitled to rely upon it as a confession, can use information given to gather further evidence, rely upon evidence given in the course of the plea negotiation where it gives rise to offences other than those which were the subject of the negotiation such as money laundering. The prosecutor can liaise with other agencies which have an interest in proceedings to see if they wish to take part in plea negotiations with a view to global resolution. Corporations which operate on a global level should note that a party who has not signed the agreement will not be bound by it.

The conduct of the SFO and the OFT in making plea agreements has come under the scrutiny of the court in the cases of *R v Dougall* and *R v Innospec Limited.* The court restated the cardinal principle that sentence is a matter for the judiciary and is not a matter to be negotiated under the plea agreement or a matter to be jointly advocated before the court.

In *R v Innospec* the company entered into an agreement made between the DOJ, the SEC, the OFAC and SFO which specified the division of the sum these bodies had considered Innospec was able to pay. The court was critical of the scope and content of the agreement reached by the SFO and concluded that the director had no power to enter into the arrangements made and no such arrangements should be made again. The sums suggested had not been the subject of judicial determination in either the UK or the US (save that inherent in the Federal District Court's approval of the plea agreement).

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Additional sentencing powers

- In addition to its sentencing powers under the Act, the court also has the power to order

confiscation against a convicted defendant who has benefited from his criminal conduct.

· The SFO also has the power to obtain a civil recovery order in proceedings before the High Court in respect of property obtained through unlawful conduct. The armoury of the SFO extends to Directors' Disqualification Orders and Serious Crime Prevention Orders.

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The court commented that as in *R v Whittle & Others*, it was placed in a position where it had little alternative but to agree to the suggested financial penalties if it was to avoid injustice to the Defendant's legitimate expectations. However, the court warned that the circumstances of Innospec were unique and that it would not consider its powers restricted by future agreements.

The court also addressed the issue of civil penalties being imposed on corporations rather than criminal sanctions and clearly stated it will rarely be appropriate for criminal conduct by a company to be dealt with by means of a civil recovery order as it would be inconsistent with basic principles of justice for the criminality of corporations to be glossed over by a civil as opposed to a criminal sanction. The court also stated that the suggestion that a press notice in a form approved could be issued by Innospec to manage adverse publicity was not acceptable.

In *Dougall* the Court of Appeal addressed the issue of the benefit to be given to defendants who co-operated fully with the authorities under s 73 of SOCPA 2005 agreements. The defendant agreed to provide full co-operation to any foreign competent judicial authority investigating the affairs of the businesses involved and its employees and in particular agreed to assist the US Department of Justice and the Securities and Exchange Commission. The court was addressed on the need for white collar defendants to have some guidance as to likely sentence if they co-operated to the extent of Mr Dougall. The court indicated that where the appropriate sentence for a defendant would be 12 months' imprisonment or less, the argument that the sentence should be suspended is very powerful.

It appears that the SFO's stratagems of encouraging self reporting, pursuing civil agreements and negotiating global settlements have been given only limited support by the courts of the UK to date. Business can derive little certainty from the guidance given by the regulator in cases where systemic corruption has occurred.

Court judgments do, however, make it clear that considerable mitigation can be drawn from full co-operation with the regulator although what sentence is to be imposed remains a matter solely for the judiciary.

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US / UK comparison

Legal Update Bribery Act Special

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The US Foreign Corrupt Practices Act (FCPA) has long been in the vanguard in relation to the compliance and ethical conduct of international businesses. Following investigations by the Securities and Exchange Commission (SEC) in the mid-1970s over 400 companies in the US voluntarily admitted making questionable or illegal payments in excess of $300m in corporate funds to foreign government officials, politicians and political parties.

Following the enactment of the FCPA in 1977 with amendments in 1988 and 1998 the "prohibited foreign trade practices" anti-bribery provisions essentially make it unlawful to bribe (ie to make a corrupt offer, payment, promise to pay or authorisation of payment of any money or anything of value to) a foreign government official or foreign political party or party official (referred to in this article as a "foreign official"), whether directly or indirectly through other persons, in order to obtain or retain business. The 1998 amendments were introduced to implement the 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which was negotiated under the auspices of the Organization for Economic Cooperation and Development (OECD); the expectation was that the then other 32 signatories to the Convention would follow suit with similar legislation.

Depending on the type of conduct, the place where such conduct takes place and the nationality or place of residence of the person concerned, the FCPA potentially applies to individuals, partnerships and other forms of business association or organisations including trusts, companies, officers, directors, employees, or agents of a company and stockholders acting on behalf of a company. The targets of the legislation may also be penalised if they order, authorise, or assist someone else to violate the anti-bribery provisions or if they conspire to violate those provisions.

Jurisdiction

Jurisdiction is not limited to conduct taking place in the US in all cases. The provisions cover:

- conduct outside the US in furtherance of a bribe of a foreign official, as long as it is the conduct of US issuers of securities ("issuers") or "domestic concerns"(a broadly defined category which includes within it US nationals or residents and companies or other business entities located in the US) or of any US person (which includes a US national and a company or other business entity located in the US), who is an officer, director, employee or agent thereof (the so-called "alternative jurisdiction" to the principal jurisdiction which holds such entities or persons liable for such conduct undertaken within the US); and

- conduct within the US in furtherance of a bribe by any person or entity who is not an US

issuer, domestic concern or national, certainly if the person or entity is physically present in the US when undertaking the relevant act but possibly even if not. US parent corporations may also be held liable for the conduct within the US of foreign subsidiaries where the parent corporation authorised, directed, or controlled the activity in question, or can otherwise be as the agent of the foreign subsidiary in relation to the conduct in question. This also applies to domestic concerns, which were employed by or acting on behalf of such foreign-incorporated subsidiaries.

Not all payments to foreign officials give rise to liability under the FCPA (for example, see below under "Defences").

Bribery Act 2010

The UK Bribery Act 2010 (BA) was introduced after the UK was strongly criticized for its failure to bring its anti-bribery laws into line with its international obligations under the OECD Anti-Bribery Convention. The cope of the BA is in some respects wider than that of the FCPA and it may come to be regarded as amounting to tougher anti corruption legislation, providing as it does for wider territorial effect, liability by omission, fewer defences and stiffer penalties. The details of the offences created by the BA are set out elsewhere in this publication. Below we deal, in summary, with some of the principal differences between the two pieces of legislation.

Identity of the bribed individual

The FCPA applies to bribery of non-US government officials, political parties and party officials. The BA is potentially engaged by bribery not only of non-UK public officials, but also of UK officials and private sector individuals, an important factor that will need to be borne in mind by US entities operating in the UK.

Territorial effect & liability by omission

Under the FCPA companies operating in the US that do not issue securities in the US or make securities filings with the SEC and are not domestic concerns can only be liable if the conduct relating to the bribery occurred in the US.

The BA provides extra-territorial jurisdiction to prosecute offences where the corrupt conduct occurred in the UK and where the conduct occurred outside the UK. In relation to the s 6 offence of bribery of foreign public officials, for example, this applies to conduct occurring wholly outside the UK where the conduct would have been an offence if carried out in the UK, provided the defendant has a close connection with the UK, ie essentially if they are a UK national or UK overseas territories national, a UK resident or UK body corporate: BA s 12(4).

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Penalties & enforcement

- The maximum penalties under the BA are more severe than the FCPA--five years' imprisonment under the latter and 10 years under the former.

- The US has adopted a scheme of self-reporting, which it encourages, alongside internal

investigations, in return for negotiation in plea agreements and reduced sanctions. There may be lesser penalties where the management of a company is changed before the misconduct came to light and in some cases no sanctions at all. This practice has been adopted by the SFO in the UK in other contexts.

- The prosecutions in the US have affected companies and individuals in the UK. The US government is currently seeking the extradition of Jeffrey Tesler and Wojciech Chodan, both UK citizens who were indicted for their involvement in the Bonny Island, Nigeria bribery scheme. There have also been prosecutions in the US of UK companies and of companies with a UK connection including Mabey & Johnson in 2009, Aibel Group Ltd in 2008 and York International Corporation in 2007.

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Under s 7, the BA has created a strict liability corporate offence of failure by a commercial organisation to prevent bribery by a person associated with the organisation, that is to say any person performing services for or on behalf of the organisation. This offence applies to corporate bodies or partnerships incorporated in the UK or formed under the law of the UK, who are carrying on business in the UK or elsewhere; or any other corporate body or partnership carrying on business or part of a business in the UK (BA s 7(5)). Provided at least one of these requirements is met, the commercial organisation will be liable even if all of the relevant conduct takes place outside the UK and has no connection with the UK.

Consequently, for a non-UK body that carries on even only a part of its business in the UK, circumstances in which every aspect of the conduct relating to the bribe occurs outside the UK and where the commercial entity has done nothing more than fail to prevent the making of a bribe may still result in prosecution.

There is no similar offence under the FCPA to the BA offence of failing to prevent bribery, although it may be possible for a person to be liable where they have knowledge that a corrupt payment has been made on their behalf.

Defences

The UK legislation provides a defence to the s 7 offence where it can be shown that the organisation had in place "adequate procedures" designed to prevent the bribery (BA s 7(2)). Generally "adequate procedures" will not provide a defence under the US legislation. However, it is one of many factors considered when deciding whether to bring a charge. It is included within the US sentencing guidelines as a mitigating feature.

There are three exceptions or "affirmative defenses" provided for under the FCPA, only one of which is reflected in the BA. These are that:

- the payment was reasonable and bona fide expenditure directly related to the promotion, demonstration or explanation of products or services or the execution or performance of a contract with a foreign government or its agency; or

- the payment was made in order to facilitate or expedite routine governmental action; or

- the payment was authorised by local written law.

Under the BA there is no defence for bona fide expenditure or facilitation expenditure. However, it would be a defence under the BA to the offence of bribing a foreign official if the foreign official were permitted by the

written law applicable to him to be influenced by the offer, promise or gift (BA s 6(3)(b)).

Conclusion

The FCPA was the long time flag bearer for anti-corruption legislation, although it now appears that, through the BA, the UK is seeking a comparable international policing and enforcement role to that previously undertaken by the US. It remains to be seen what the result of this new intervention will be.

However, given the extra-territorial extent of the BA in certain circumstances and in particular its potential application to conduct wholly unconnected with the UK, foreign corporations carrying on even a small part of their business in the UK will need to review carefully their worldwide practices and procedures so as to seek to ensure that, should a bribe be paid by someone performing services on their behalf anywhere in the world, they can rely on the "adequate procedure" defence.

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Employment law overlap

Legal Update Bribery Act Special

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The Bribery Act 2010 gives rise to a number of new criminal offences. However, while its context is principally criminal law, its effects will overlap with other areas, including employment law; the following is a brief discussion of some potential overlap although other points will doubtless arise.

Whistle-blowing

The first topic for discussion is what is often referred to as "whistle-blowing". As a result of amendments to the Employment Rights Act 1996 (ERA) employees have the right not to be dismissed or subjected to any other detriment by their employer on the ground that they have made a "protected disclosure".

For a disclosure to be "protected" for these purposes, the subject matter of the disclosure must fall into one of a number of defined types and it must have been made to one of a number of defined persons or bodies. One of the defined types of subject matter is where an employee discloses information which he reasonably believes tends to show that a criminal offence has been committed, is being committed or is likely to be committed; that would clearly cover offences under the Bribery Act. Another type is information tending to

show that a criminal offence has been or is likely to be deliberately concealed.

There are various persons or bodies to whom a disclosure may be made if it is to amount to a "protected disclosure", but the list includes the Director of the SFO if the disclosure relates to "serious or complex fraud" (see s 43F of the ERA and the Public Interest Disclosure (Prescribed Persons) Order 1999). It also seems likely that a disclosure to the SFO or to the police of a bribery offence may well still be protected even if it does not amount to "serious or complex fraud" if the employee reasonably believes that he would be subjected to a detriment if disclosure were made to his employer (see s 43G of the ERA), ie if he fears reprisals.

The availability of such protection for employees under existing employment law may be of use to the SFO and other prosecuting authorities in encouraging potential whistle-blowers to come forward; it seems likely that a significant number of bribery offences will only come to light as a result of whistle-blowing.

Another potential means of encouragement where the whistle-blower himself has been involved in bribery may be the possibility of a relatively light sentence for the whistle-blower. In May 2010 an employee's sentence for bribery (albeit under the current law) was reduced to a suspended sentence on appeal, largely on the basis of his full co-operation as a whistle-blower. The court indicated that although sentencing was not subject to any formal plea-bargaining process, full co-operation may give rise to a powerful argument in favour of a suspended sentence.

Contracts & procedures

As well as the protection against dismissal and detriment given to whistle-blowers as outlined above, any provision in a contract of employment that seeks to prevent an employee from making a protected disclosure will be void (see s 43J of the ERA).

Rather than seeking to prevent whistle-blowing, many employers will already have in place some form of procedure relating to whistle-blowing. This would typically give guidance to employees as to how they should blow the whistle and what protection they will be given against possible reprisals (eg anonymity). It may also seek to reassure them that their employer will not treat them detrimentally if they raise genuine concerns by way of the whistle-blowing procedure.

Such procedures may be relevant in the context of the "adequate procedures" defence under s 7(2) of the Bribery Act. It will be a defence to a charge under s 7(1) if an employer can show that it had in place adequate procedures designed to prevent persons associated with the employer from committing relevant acts of bribery.

What will amount to "adequate procedures" is not defined. Section 9 of the Act requires the Secretary of State to publish guidance on this matter; the guidance has yet to be published. However, those more familiar with employment law may recognise potential similarities between the s 7(2) defence and what is often referred to as the "employer's defence" in the context of discrimination legislation.

Under s 109 of the Equality Act 2010 it is a defence against an allegation of unlawful discrimination for an employer to show that he took all reasonable steps to prevent the alleged discrimination.

Although clearly both the context and the precise wording of the two defences are different, the sensible employer may wish to consider its approach in a similar manner. For example, to establish the discrimination defence an employer needs to be proactive; it cannot rely on policies and procedures put in place after the event.

Similarly, merely producing a nondiscrimination policy which may sit gathering dust in an office handbook is also unlikely to be enough; the employer needs to take active steps to make employees aware of the policy and, ideally, to provide suitable training to employees. A similar approach may be appropriate in the context of the Bribery Act.

It should also be noted, however, that s 7(1) relates to bribery by persons "associated with" a relevant commercial organisation. "Associated person" is defined in s 8 of the Bribery Act; examples given include not only employees but also agents or subsidiaries.

It seems, therefore, that employers will need to take steps to introduce and publicise suitable procedures not only for their own employees but also on a wider basis if they are to rely on an "adequate procedures" defence.