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The Bribery Act in 2013

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OVERVIEW

The Bribery Act caused great controversy when put before Parliament in 2010. Many argued that the 'criminality' defined by the Act was so wide ranging that it would be impossible for any corporate to comply, or for the state to enforce. The key elements of the Act which caused such concern were the definition of Bribery, the Extra-territoriality of its application and the range of individuals for whose actions a company could be found liable.

In summary; the Act could render any company doing business in the United Kingdom liable to criminal prosecution here for any inducement, by any employees, agents or subsidiaries, if that inducement is either improper in itself or related to improper conduct, whether as incentive or reward. It would be immaterial where the company is registered, where most of its business is done, or in which jurisdiction the improper act or inducement occurs.

The level of concern provoked by the Act's scope was such that its implementation was delayed from late 2010 to the summer of 2011 as various organisations lobbied for the terms of the Act to be restricted and more closely defined. The new Coalition Government recognised the concerns raised and a review was conducted. The result of this was that the Act came into force in its current form, but rather than narrow the definitions, the state met these concerns by issuing guidance as to how the Act would be enforced and what was expected from corporates in order to avoid liability.

Whilst the wording of the Act is still capable of covering all such actions as detailed above, the concerns raised as to enforcement and compliance, have been met in the following ways:

Firstly, in relation to enforcement, the Government department tasked with enforcing the Act, the Serious Fraud Office (SFO), has placed the emphasis on self-reporting.

Secondly, in relation to compliance and liability the emphasis is entirely upon the proportionality of any action and the due diligence of the company in respect of the Act. If the particulars of a charge are made out, the only defense to any charge under the Act is precisely that – that the company had taken all reasonable steps.

In this article we set out:

- **A short analysis of the SFO's current approach and the indicators of future policy,**
- **The steps that must be taken to avoid liability,**
- **Response to misconduct. Negotiated settlement and internal procedures,**
- **The consequences of prosecution.**

At every stage, the response to the Bribery Act requires a holistic legal strategy and expert response to avoid liability, to prevent prosecution or to mitigate the consequences of any such transgressions, whether on the part of individuals or the corporate organisations.

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THE SFO'S ROLE AND ENFORCEMENT

Whilst the new Director has affirmed the SFO's role in policing bribery and the outgoing Director, Richard Alderman, has asserted that he had *'made anti-bribery enforcement one of the SFO's key objectives'*, from a practical perspective it is clear that the organisation currently lacks the resources to enforce the Act in any far reaching sense. The approach to date has been pragmatic and the lack of prosecutions reflects the emphasis on self-reporting and settlement, as addressed in detail below. However there are grounds for speculating that the approach taken to date may be reviewed imminently.

On one hand, the SFO has been the subject of considerable public criticism in 2012 following the failure of a very high profile, and high cost, fraud prosecution in April. In May the former Attorney General, Lord Goldsmith challenged the legality of a further high profile investigation and it appears the SFO have been obliged to conduct an internal review of their procedures. Furthermore the costs of mounting prosecutions of complex fraud can be very great and the current condition of public finances will be a clear constraint.

In contrast, and despite these difficulties, it is clear the Bribery Act will remain a high profile area of Government policy. In 2012 the Organisation for Economic Co-operation and Development (OECD) has published a review of the UK anti-corruption policy and listed its recommendations. They have called for the Serious Fraud Office's role to be maintained and further resources to be made available in order to facilitate criminal bribery investigations and prosecutions.

In addition the OECD's report has complained at the 'lack of transparency' and the confidentiality agreements that 'prevent disclosure of key information about settled cases.' (The report is available at **www.oecd.org/daf/nocorruption**). In contrast to the approach of the past year the OECD is clearly arguing for a more confrontational implementation of the Act, as was expressly acknowledged by the SFO's outgoing director:

"Whereas confidentiality has often been the key that unlocks resistance, if settlements could be more open, the public would have more confidence in the process leading to them. So I fully understand the OECD's concerns and it is my hope that improvements can be made. I believe…that if implemented, proposals to allow the SFO to enter into deferred prosecution arrangements with companies, with appropriate judicial involvement, will be a positive development."

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PROTECTION FROM LIABILITY AND DUE DILIGENCE

a) Hospitality

The Justice Secretary, Ken Clarke, has firmly stated that the central principle is "proportionality". He emphasised that the Act was designed to be good for business whilst tackling corruption and advised businesses to 'rest assured' that the Act was not designed to prevent corporate hospitality. Issuing the Guidance Mr Clarke said: "I have listened carefully to business representatives to ensure the Bribery Act is implemented fully and in a workable, common sense way".

b) Corporate Liability

It is well established now that it is vital for every corporate to have a thorough anti-bribery policy in place. Whilst it is clear that the SFO will take a practical approach to bribery prosecutions, any corporate without such a system would be in danger of prosecution and conviction should any improper action be detected.

A recent case arising from misfeasance by a former Morgan Stanley Director in China is illustrative of the state's approach, both in the United States and United Kingdom. The individual responsible pleaded guilty to a substantive offence, but in relation to corporate responsibility, the Assistant Attorney General of America's Department of Justice, Lanny A. Breuer, issued the following statement (emphasis added);

"Morgan Stanley ***maintained a system*** of internal controls meant to ensure accountability for its assets and to prevent employees from offering, promising or paying anything of value to foreign Government officials. Morgan Stanley's internal policies, which were ***updated regularly*** to reflect regulatory developments and specific risks, prohibited bribery and addressed corruption risks associated with the giving of gifts, business entertainment, travel, lodging, meals, charitable contributions and employment. Morgan Stanley ***frequently trained its employees*** on its internal policies, the FCPA and other anti-corruption laws. Between 2002 and 2008, Morgan Stanley trained various groups of Asia-based personnel on anti-corruption policies 54 times. During the same period, Morgan Stanley trained Peterson on the FCPA seven times and reminded him to comply with the FCPA at least 35 times. Morgan Stanley's compliance personnel ***regularly monitored*** transactions, randomly audited particular employees, transactions and business units, and tested to identify illicit payments. Moreover, Morgan Stanley conducted ***extensive due diligence*** on all new business partners and imposed stringent controls on payments made to business partners."

In order to ensure protection from prosecution it is vital that a full policy is implemented. Any corporate that is able to demonstrate it has satisfied due diligence and has devised and maintained a policy should be able to rely upon this in rebuttal of any investigation and, should a case be brought, the corporate and its officers can rely upon such policy as a defence. The requirements of such a system are dependent upon the size and nature of any organisation but it will never be sufficient for a system to be simply put in place.

As reflected by the Attorney General's review of Morgan Stanley, any such anti-bribery measures must be thorough and on-going. Expert legal advice should be obtained by any corporate that has any doubt as to the validity of its own procedures and these must be tailored to its requirements. In overview such policies should include:

i) Prevention Protocols

There must be clear publicised policies, procedures and Codes of Conduct incorporating the legal requirements and spelling out the consequences for any breach. All relevant individuals should be properly trained as to these requirements. The company and all individuals should conduct due diligence to ensure this is the case for all its operatives and those they do business with.

ii) Internal Policing

Self-assessment and reporting are at the heart of the SFO's approach to the enforcement of the Act and the assessment of any such policy can be broken down into three parts.

Firstly, the corporate must have established and well publicised reporting procedures for any suspected contravention. As with the corporate itself, an emphasis must be placed on self-reporting and the consequence for a failure to do so made clear to its officers.

Secondly, systematic reviews of the anti-bribery procedures must be conducted to ensure they meet the changing nature of a business and personnel.

Thirdly, the corporate must identify corruption indicators and check for any such breach. The SFO has provided the following, non-exhaustive list of such indicators:

- Abnormal cash payments
- Pressure exerted for payments to be made urgently or ahead of schedule
- Payments being made through 3rd party country, eg. goods or services supplied to country 'A' but payment is being made, usually to shell company in country 'B'
- Abnormally high commission percentage being paid to a particular agency. This may be split into two accounts for the same agent, often in different jurisdictions
- Private meetings with public contractors or companies hoping to tender for contracts
- Lavish gifts being received
- Individual never takes time off even if ill, or holidays, or insists on dealing with specific contractors him/herself
- Making unexpected or illogical decisions accepting projects or contracts
- Unusually smooth process of cases where individual does not have the expected level of knowledge or expertise
- Abusing decision process or delegated powers in specific cases
- Agreeing contracts not favourable to the organisation either with terms or time period
- Unexplained preference for certain contractors during tendering period
- Avoidance of independent checks on tendering or contracting processes
- Raising barriers around specific roles or departments which are key in the tendering/contracting process
- Bypassing normal tendering/contractors procedure
- Invoices being agreed in excess of contract without reasonable cause
- Missing documents or records regarding meetings or decisions
- Company procedures or guidelines not being followed
- The payment of, or making funds available for high value expenses or school fees etc. on behalf of others.

This is clearly a generic and often obvious list, and it must be emphasised that any defence will depend upon a system tailored to the particular nature of the organisation involved.

RESPONSE TO BREACHES

i) Negotiated Response

The anti-bribery policy should incorporate a clear protocol on the response to any detected contravention. Typically this will incorporate appropriate discipline of relevant individuals and cancellation of orders with those engaged in such activities. Any serious incident must be reported to the SFO.

It is at this stage that the organisation's immediate response will be of crucial importance. This will almost invariably include demonstrating the effectiveness of the anti-corruption procedures set out previously, identifying how the breach occurred, taking appropriate disciplinary action, and putting forward and implementing procedures to prevent any further breach. If the organisation's representatives are able to satisfy the SFO of all such prompt and effective action, and if necessary, to negotiate a settlement then, under the current SFO approach, such a response may well prevent further prosecution.

ii) Civil Recovery Orders

Where the SFO does not, or cannot, pursue a criminal charge, it is still able to pursue a civil action against any individual or body. This is entirely distinct from criminal proceedings in that it will result in a purely financial penalty rather than any criminal conviction. Furthermore such actions are open to out of court negotiation which, if conducted successfully, will prevent any contested hearings and lead to confidential settlements.

CONSEQUENCES OF CRIMINAL PROSECUTION: CRIMINAL PENALTIES AND ANCILLARY ORDERS

The Act clearly intends that actions which may previously have been dealt with under civil proceedings can now lead to criminal charges. The criminal system is governed by distinct rules and regulations requiring a separate expertise. From the perspective of any party accused of such malfeasance the two most crucial factors of this shift from the civil to criminal arena are that, on one hand, the criminal system requires a higher standard of proof than any civil action, in that the prosecuting body must prove its allegation beyond all reasonable doubt rather than on the balance of probabilities. The defendant need prove nothing and must be acquitted unless the prosecution can provide evidence to prove his guilt to this standard. On the other hand, where guilt is proven, the range of punishments open to the criminal court is clearly far more severe than in the civil courts.

i) Criminal Sentencing

Beyond the potential for imprisonment of the individuals involved under Section 11, and the potentially unlimited fines that can be imposed on any corporate under Section 7, a conviction under the Bribery Act carries far reaching consequences.

Dependent upon the nature of any offence the court has further powers to make ancillary orders which may have equal or indeed more severe consequences than any such fine. In terms of future business there are four areas of risk; any such conviction will clearly result in considerable harm to the corporate's reputation, A Financial Reporting Order may require regular disclosure of all activity, and Serious Crime Prevention Orders may be imposed prohibiting any such activity as the court deems appropriate for the prevention of crime, under The Public Contracts Regulations 2006 there is the potential for debarment from public contracts and the disqualification of directors under the Company Directors Disqualification Act 1986.

These are clearly wide ranging and extreme powers and we set them out here only to reflect how wide the potential harm may be were any conviction to occur. In practice the imposition and ambit of any such orders would be open to challenge and limited by proportionality to the nature of any offending.

ii) Confiscation Orders

The law in relation to Confiscation under the Proceeds of Crime Act 2002 is unabashedly draconian, as has been expressly recognised and endorsed by the Lord Chief Justice, Lord Judge, in recent case law. As with the remit of the Bribery Act itself, it would be hard to overstate the powers conveyed by this Act.

Whilst the imposition and remit of such orders is governed by both statute and a complex body of criminal precedent, the SFO will almost inevitably apply for such an order. The merits of any such application can only be assessed on a case by case basis but, whilst the law is more nuanced that might appear at first glance, the potential range of consequences can be seen from the following points:

- This system operates *in addition* to any criminal penalties imposed, not as an alternative.
- In the event of conviction the court may have *no discretion* but to make such an order.
- The Act is designed to deprive the guilty party of *all benefit* from criminal conduct and this may be defined as all monies received through a tainted transaction, not simply any direct gain resulting from the misconduct.
- The order may be made against *any assets* of the convicted party, not only those directly resulting from misconduct.
- The fact that the convicted party has paid a fine, even if equivalent to their full benefit, will not prevent an order being made for the full amount.

In summary, the statutory regime conveys powers which can lead to the imposition of custodial sentences, reputational harm, limitation of future business, and financial penalties and orders which may lead to a financial penalty far exceeding any benefit accrued. In all these areas the level of any such penalty or order may be contested and must be determined according to the existing statute and case law.

In the first instance this will be determined by out of court negotiation and then, if necessary, legal argument before the Judge. In the event of any unjust order there will be recourse to appeal and/or review of the decisions by the Higher Courts. It is in these areas that legal expertise and experience will again be paramount in determining the outcome.

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CONCLUSION

As can be seen by this analysis, the crucial nature of an integrated legal strategy, and the role of the legal professional, is threefold. Firstly in advising on and maintaining the procedures required to avoid liability. Secondly, on detection of any contravention, advising on procedure and negotiating any settlement with the SFO. Finally, in the event of a criminal prosecution, defending the corporate and its officers and mitigating the consequences of any such action.

To find out more about how we can help you, please contact:

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