

## The UK's Bribery Bill: Will It Happen, and What Does It Mean for Multinationals?

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It is well-known that UK's anti-corruption law is outdated. Many have also written about the new Bribery Bill, currently being considered by a Parliamentary Committee. This alert reviews these matters and discusses whether much-needed reform will actually take place. If it does, should multinational companies be concerned?

### The Current State of Affairs

Bribery has been unlawful in the UK since at least the Magna Carta, so it is perhaps surprising that the legislature has struggled to implement anti-corruption legislation suitable for modern business, and has been criticized (perhaps unfairly) by the OECD for failing to adequately implement the provisions of the Anti-Bribery Convention. Many have questioned the UK's commitment to the issue and felt vindicated after the government halted the SFO's investigation into BAE's Al-Yamamah deals.

The UK's principal anti-corruption legislation is over a century old, namely the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1906. In addition to this, there is the common law offence of bribery, which is understood to be when a bribe is given or offered to induce a public official to fail to act in accordance with his duty<sup>1</sup>.

The Public Bodies Corrupt Practices Act makes it an offence for any person to "corruptly" solicit or receive any advantage as an inducement to any officer of a public body, doing or omitting to do any matter or transaction. There is a similar offence for the giving of the advantage.

The Prevention of Corruption Act 1906 made it an offence:

"If any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do, or for having ... done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favor or disfavor to any person in relation to his principal's affairs or business..."

There are similar provisions for paying a bribe.

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<sup>1</sup> R v. Whitaker [1914] 3 K.B. 1283.

The Act was mainly limited to domestic bribery. At the time it was enacted, international corruption was less widespread; the world's first airline had yet to be formed, and the transatlantic telegraph was only a few years old. Despite the rapid increase in the speed and ease of travel and communications throughout the 20th century, it was not until 2001 that the Act was expressly extended to include bribery carried out overseas – in the Anti-Terrorism, Crime and Security Act 2001 (“ATCSA”). Even so, the amendment has resulted in only one single successful prosecution for bribery overseas to date.

### **The Need for Reform**

The foremost problem with the current law is the use of the word “corruptly” in the Acts, which has resulted in the development through case law ever since, the most recent case being in 2001<sup>2</sup>. In addition, there are different regimes for the private and public sectors. An example of the confusion caused by this was in *R v Natji*, in 2002, in which the defendant was charged under the wrong act, before being acquitted on appeal. The prosecutors, attorney general and the trial judge had all failed to apply the anti-corruption legislation correctly.

The confused state of affairs is also blamed by some for the relatively low number of prosecutions. It has led to an almost universal acceptance of the need for reform.

### **Will the Bill Become Law?**

The last attempt at comprehensive reform, the draft Corruption Bill, was abandoned in 2003 after heavy criticism by a Parliamentary Joint Committee. The current draft follows a government consultation paper and a further Law Commission report. During this time, a separate bill, introduced by Lord Chidgey, also met a premature end.<sup>3</sup>

This time it should be different. The new Joint Committee has a very tight timetable; it must report by July 21, 2009. Allowing for the Parliamentary summer recess, which lasts from that day until October 12, this does not leave much time before the next General Election, which must take place by May 10, 2010. Whilst this does not bode well for its chances of becoming law, the bill has all-party support. Indeed, the legislative

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<sup>2</sup> *R v Godden-Wood* [2001] EWCA Crim 1586.

<sup>3</sup> Baroness Scotland, speaking for the government when Lord Chidley's bill was presented, stated: “I must emphasize that our existing corruption law is fully compliant with our obligations ... including the OECD Convention”. Only a few months later, the Lord Chancellor and Secretary of State for Justice, Jack Straw, took a different stance, saying: when introducing the new bill: “We have acted on their [the OECD's] particular criticism because it was true that our bribery legislation is to be found in a number of separate Acts of Parliament and in common law. Most of these statutes go back a hundred years or so and they're incoherent.”

calendar is likely to be much lighter before rather than after the next election, meaning it is possible for the bill to become law before May 2010. If it does not, expect delays. With the recent Parliamentary expenses controversy having caused the speaker's resignation and possibly making a change of government more likely, it is interesting to note that it was bribery that caused the last speaker to be removed from Parliament – in 1695! Governments may change, but international pressure, particularly from the US, will not. That pressure is not only to change the law, but to enforce it. We have been told to expect that there will indeed be prosecutions. Under the current law, they have been few and far between. Watch this space.

### **Key Provisions**

The draft bill does not define “bribe” or “bribery” even though it does use those words. Instead, it sets out three cases<sup>4</sup>, two in relating to offering a bribe and one to receiving one. Notwithstanding that these ought to encompass all forms bribery, there is also a separate offence of bribing a foreign public official<sup>5</sup>. Presumably those who bribe domestic officials will be dealt with under the previous sections.

In short, an offence is committed if a person offers or accepts a “financial or other advantage” where the intention is to induce the other to act (or reward the other for acting) improperly. Acting “improperly” means that the person was expected to perform the act in good faith, impartially, or that it is being performed by someone in a position of trust.

Offering a financial advantage where the acceptance of the advantage itself would be improper is also an offence. This is so even if the recipient has not (and was not intended to) behave improperly. The offence covers a very wide range of activities including “any function of a public nature” and “any activity connected with a business trade or profession,” provided that the function should have been performed impartially and in good faith by a person “in a position of trust,” this term being undefined.

There is also a new offence of corporate liability. Section 5 criminalizes negligent failure by a “responsible person” to prevent a bribe by or on behalf of a corporation (it is the corporation rather than the responsible person who is liable). A “responsible person” is the person at the organization tasked with preventing bribes, failing which it is a “senior officer” of the organization (also defined).

It is a defense, however, if “adequate procedures” were in place designed to prevent bribery offences being committed. The notes to the bill

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<sup>4</sup> Sections 1 to 3

<sup>5</sup> Section 4

deliberately reject providing guidance on what amounts to “adequate procedures” on the basis that the offence is not regulatory and there is no “one size fits all approach” to encourage companies to implement proper measures.<sup>6</sup>

The penalty for corporate liability is an unlimited fine. Individuals convicted of bribery offences face a maximum sentence of ten years in prison and/or an unlimited fine.

### **Effect on Multinationals**

The fact of corporate liability should not be a concern to most multinationals. The United States’ anti-corruption legislation, the Foreign Corrupt Practices Act (“FCPA”), already contemplates corporate liability – as is commonly the case under US criminal law. Although the FCPA is an intent-based statute and does not attribute liability for negligence in this area, according to the United States Attorney’s Manual<sup>7</sup> (produced by the Department of Justice (“DOJ”)), the existence and effectiveness of compliance procedures will play a role in the DOJ’s decision whether to prosecute a corporation. The manual acknowledges that no compliance program can ever prevent all criminal activity by employees, but provides that the program will be evaluated to check whether it was properly designed and whether it is being enforced, or whether management is tacitly encouraging employees to behave corruptly.

The FCPA does not just apply to US companies. It is well-known that the DOJ and other US enforcement authorities will assume jurisdiction on the basis of what other nations might characterize as tenuous connections with the US. It was enough in the US investigation of BAE, for example, that some of the alleged bribes had apparently passed through US bank accounts. As such, most compliance officers at multinational corporations have had anti-bribery policies in place for some time. In 2006, a survey by consultancy Control Risks found that such policies were in place in statements of business principle for 90 per cent of surveyed British, German, Dutch and US companies. Those who did not follow this up by ensuring their systems were adequate would have had a wakeup call in January, when a leading US insurance broker was fined £5.25 million by the UK’s Financial Services Authority for failing to do just that.

The bigger issue for compliance officers is now regulatory overlap. The anti-bribery program may need to satisfy the DOJ, the FSA (for financial services firms) and now possibly a UK jury. This is to say nothing of other countries’ regulators, who may also be keen to show they are being tough on corruption. It would simplify matters for all if the bill expressly stated

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<sup>6</sup> (Explanatory Note 98).

<sup>7</sup> s. 9-28.300(A)(5).

This memorandum is intended only as a general discussion of these issues. It is not considered to be legal advice. We would be pleased to provide additional details or advice about specific situations. For additional information on this important topic, please feel free to call upon your Dewey & LeBoeuf relationship partner.

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that approval of a corporation's procedures by an appropriate regulator or prosecuting authority should be a defense. Clarity is also needed as to who has the burden of showing that procedures were adequate or not.

While in most cases, an FCPA-compliant system should not require much amendment to comply with the provisions of the new bill (if it becomes law) there is one issue which, as drafted, could trip the unwary – "facilitation payments." These are relatively small payments made to officials for routine matters, to ensure that they carry out the role they should be playing anyway. Under limited circumstances facilitation payments can be made without violating the FCPA. Although they are currently unlawful under UK law, the new wording of the prohibition is stricter than before. If it would be unlawful (under local laws) for the official to take the payment, then the paying party commits a crime. It is up to the paying party to satisfy itself that the payment is lawful. Given the opaque nature of the laws of many countries, this is an impossible task. A blind eye is often turned to such payments, according to guidance from UK Trade & Investment, a government sub-department. This is an unsatisfactory situation for the purpose of advising a board. Guidance from the government department is not a defense in court.

These issues have been brought to the attention of the appropriate Members of Parliament with the suggestion that it would be better to require that the paying party knew (or should reasonably have known) that they were making an unlawful payment. There are enough challenges facing local employees, without them also having to be experts in local laws.

More information on the Bribery Bill can be found at [www.parliament.uk/parliamentary\\_committees/joint\\_committee\\_on\\_the\\_draft\\_bribery\\_bill.cfm](http://www.parliament.uk/parliamentary_committees/joint_committee_on_the_draft_bribery_bill.cfm) or by contacting [briberybill@parliament.uk](mailto:briberybill@parliament.uk) or 020 7219 8383.

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