

## **The UK Bribery Act: Incentivising Co-Operation**

Author: Neil Marshall

The new UK Bribery Act has been covered extensively since it received Royal Assent in April 2010; including a brief outline by Nick Burkill in the [May AFN newsletter](#). Forward-looking companies are now evaluating their systems and procedures to ensure they are in a position to comply once the Act comes fully into effect later in the year. But will it prompt more companies to self-disclose to regulators where corruption is uncovered within their operations? While the Act itself and other recent developments make it likely that anti-corruption enforcements will continue to rise, there are also developments that may cause companies to be more cautious about admitting guilt too swiftly.

### **A Powerful Weapon Against Corruption**

The new Act certainly makes it easier for UK regulators to prosecute corruption than the old regime did:

- The Act applies very broadly; any corporate entity or partnership is affected if it conducts any business, or any part of its business, in the United Kingdom.
- The activities of affected businesses and individuals fall under the Act regardless of where in the world they occur.
- It criminalises both the offering and accepting of a bribe.
- It goes further than merely punishing bribery, as it applies also to the failure to prevent bribery.
- Companies can potentially be held liable for the corrupt actions of not only employees, but also contractors, vendors, agents or any person who "performs services" on their behalf.
- The Act bans facilitation payments (payments made to encourage an official to perform his duty), which are allowed by the US Foreign Corrupt Practices Act (FCPA).
- In assessing whether an act is corrupt or not, local customs of a foreign market are ignored and acceptable practice in the United Kingdom is applied as the test.
- The Act applies also to private sector bribery.
- Penalties are harsh: individuals face up to 10 years in prison and individuals and companies may face unlimited fines.

Many company executives are rightly alarmed at the new corporate offence of failing to prevent bribery. The only defence against this charge will be to prove that the company had adequate procedures in place to prevent bribery. Guidance on what is likely to constitute adequate procedures is expected within the next few months but many companies are acting now to apply early guidance from the Serious Fraud Office (SFO).

## **Motivated Regulators**

The SFO, tasked with enforcing the Act, has set up a dedicated Anti-Corruption Domain and is adding staff for the anticipated increase in work. It has also offered clear guidance as to its likely approach to enforcement, following its US counterparts by encouraging companies to self-report corruption and pledging to work with companies to manage plea negotiations and obtain more favourable settlements.

This approach was seen in the 2009 prosecution of Mabey and Johnson, where the SFO did not pursue further corruption disclosures in Angola, Mozambique, Bangladesh and Madagascar as a reward for co-operation, although the final penalty still totalled £6.6m.

The US Department of Justice (DOJ) and the Securities and Exchange Commission (SEC), which enforce the FCPA, have led the way internationally in aggressively pursuing corruption as signalled by an upswing in the number and value of prosecutions and a focus on increasing staff numbers and skills. Collaboration between regulators from different countries is also increasing.

## **More Whistleblowers**

The likelihood of corruption within a company coming to light is increasing with the ease of information flow around the world. On top of this, the US Congress is currently considering legislation which will reward whistleblowing to the Securities and Exchange Commission (SEC) with up to 30% of the final settlement achieved. Incentivised whistleblowers could mean that companies may well hear from the SEC before their internal procedures pick up cases of corruption. Having said this, indications from the United Kingdom suggest that whistleblowing here may go unrewarded for some time. In *R v Dougall*, whistleblower Robert Dougall was given a 12 months prison sentence despite both prosecution and defence recommending a suspended sentence, although this was overturned on appeal. With multinationals now operating under overlapping international anti-corruption legislation and their local operations subject to local equivalent regulation, they may be exposed on many fronts.

But even with a bigger stick brandished in the form of the new Act, regulators across the globe showing their teeth and the possibility of external whistleblowing being incentivised ahead of internal, companies may still think twice about rushing to self-disclose for a number of reasons.

- **Cost**

While it is obvious that non-disclosure, if discovered, is bad for a company's reputation (and therefore business), the direct financial choice is not quite so obvious. The ongoing expense of funding a prolonged internal investigation in fees for lawyers, forensic accountants, compliance

monitors and other associated costs has exceeded the quantum of fines levied in several recent high profile global corruption cases.

- **A New Regulator**

In June 2010, the UK government announced the creation of the Economic Crime Agency (ECA) to lead the fight against white collar crime. It seems likely that the activities of the SFO will be folded into the ECA and while there is no indication that there will be a radically different approach by the new entity, companies may be tempted to sit tight until there is more certainty.

- **Benefits of Co-operation**

Quite how much leeway the SFO and any prosecuting authority that succeeds it will have in offering effective leniency for cooperation is not certain. In the sentencing remarks of *R v Innospec*, Lord Justice Thomas was extremely critical of the global settlement deal negotiated between the SFO and the DOJ. He pointed out that the SFO has no power to enter into such deals and strongly suggested that it should not do so again, reiterating that sentencing is a matter for the courts, not the SFO. He also criticised the relatively small fine imposed. The SFO's ability to follow through on offers of lighter sentences as reward for co-operation is unclear and future fines imposed will likely be significantly higher than those seen up to now.

- **Lack of Clarity**

Crucial areas of the new Act remain unclear and companies committed to the global fight against corruption could find themselves inadvertently falling foul of it. For example: what degree of corporate hospitality will be considered appropriate and how much will be seen as "lavish" or "intended to influence"? How far will the definition of "associated person" stretch and what category of associates will be included? These and other grey areas will only become clear when and if challenged in court. While legislators may be happy to leave such potential pitfalls to prosecutorial discretion, senior corporate executives may be less happy to do so.

But despite these uncertainties, it would be foolhardy for a company to risk non-disclosure. Once the UK Bribery Act is fully commissioned, there is likely to be vigorous enforcement by whichever agency is mandated to do so. In an ideal world, management could be confident that the motivations and actions of their employees and "associated persons" were aligned with the ethical approach led from the top of the company. In the real world, companies must know as much as possible about those that represent them, have demonstrable best practice anti-corruption controls in place and be prepared for increased regulatory scrutiny.

---



**Neil Marshall** is World-Check Lead Consultant for UK Government, regulatory, enforcement and intelligence agencies. World-Check is a product of Global Objectives Ltd, a UK registered company. Neil has been closely involved in the development of World-Check across the government sector. World-Check is now the benchmark in "know your customer" and assists over 200 government agencies and 3,800 institutions in 163 countries.