

INTERNATIONAL GOVERNMENT CONTRACTOR

WEST®

News and Analysis on International Public Procurement and Export Controls

Vol. 6, No. 10

October 2009

Analysis

¶ 78

UK Modernizing Anti-Bribery Laws And Gearing Up Enforcement Efforts

The United Kingdom has been a focus of attention concerning the status of its anti-bribery laws. The English law governing the bribery of public officials, as well as bribery of commercial parties, presently comprises an enigmatic web of common law and statutory measures, some of which are over one century old. Until recently, the enforcement of foreign bribery prohibitions in the UK has been essentially nonexistent. In contrast to the U.S.—which has enforced the Foreign Corrupt Practices Act (FCPA) rigorously over the last decade against both domestic and foreign entities—the UK government failed to bring a single successful prosecution for overseas bribery until 2008. Concern about the absence of effective enforcement came to a crescendo in 2007, after the government terminated an investigation of UK defense contractor BAE Systems and its executives regarding evidence of improper payments in sales in Saudi Arabia, allegedly following pressure from Saudi officials.

The outlook in the UK is, however, showing signs of change. Over the last 18 months, authorities in the UK have augmented their enforcement resources and have brought four successful criminal and administrative enforcement actions against companies for foreign bribery and related infractions. Those cases—which have drawn on a variety of statutes and regulations—have generated multi-million dollar fines in parallel with some of the large penalties administered by U.S. authorities under the FCPA. Moreover, the UK Parliament is expected to enact, within the next several months, a comprehensive revision to the UK anti-bribery laws, including establishing a new crime applicable to corporations for failing to prevent bribes made or offered in connection with company business. Moreover, the anti-bribery prohibitions set forth in the proposed legislation apply broadly to acts by

UK-based persons both domestically and overseas, and by foreign companies that conduct business in the UK.

Companies with business in the UK should be aware of these developments, and should redouble efforts to promote internal compliance. There are many concepts, particularly in the bribery reform bill, that will be familiar to practitioners of the FCPA, but the UK approach is distinct in many ways. U.S. companies operating in the UK therefore would be well-advised to be cognizant of the scope and nature of the UK laws. This article presents an overview of the existing UK regime, recent enforcement actions and the bribery reform bill.

Current Laws—As the UK anti-bribery laws are likely to be revised on a comprehensive basis in the near term with passage of the reform bill, this article presents only a high-level summary of the existing legal standards.

The core English laws prohibiting bribery stem originally from the common law, which in leading cases defines bribery as “[t]he receiving or offering [of] any undue reward by or to any person whatsoever, in a public office, in order to influence his behavior in office, and incline him to act contrary to the known rules of honesty and integrity.” The common law prohibition was expanded in the late 19th and early 20th centuries through three separate statutory measures, which remain the core criminal anti-bribery offenses in the UK: the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906, and the Prevention of Corruption Act 1916. The scope of those statutory measures—which have not been updated substantially since their enactment roughly a century ago—has been a source of considerable confusion.

For example, the 1889 and 1916 Acts (the latter of which amended and supplemented the 1889 statute) apply to the bribery of certain, although not all, types of public officials, whereas the 1906 Act applies generally to both public and private bribery. Moreover, the statutes maintain inconsistent terminology on the definition of what constitutes an unlawful “bribe.” The 1889 Act defines as bribery the giving or offering of any “gift, loan, fee, reward, or advantage ... corruptly” (terms that are left undefined in the statute) to certain categories of public officials “as an inducement or reward” for the public official doing or forbearing to do “anything in respect of any matter or transaction ... in which such

public body as aforesaid is concerned.” In contrast, the 1906 Act defines bribery as the provision or offering of a “gift or consideration ... corruptly” to an “agent” as an inducement or reward for doing, or failing to do, “any act in relation to his principal’s affairs or business.” Those differences in terminology present complex questions concerning the scope of either statute.

The English law bribery offenses were amended in 2001—as part of the Anti-Terrorism, Crime and Security Act 2001—to expand their jurisdictional reach. The amendment maintained the core definitions of bribery in the earlier laws. However, it extended those offenses to cover bribes carried out entirely outside the territory of the UK, and bribes to foreign persons who have no connection to the UK by UK persons or companies incorporated under the laws of any part of the UK.

Notably, corporate liability under all of the existing English law bribery offenses is limited by what is known as the “identification” doctrine. For most criminal offenses in the UK, a company can be convicted on corporate liability principles only if a senior officer of the company who has substantial control over the affairs of the organization—such that she or he is considered the “controlling mind” of the company—is responsible for key elements of the criminal offense. That makes it, in practice, difficult to prosecute corporations for anti-bribery offenses in the UK if there is no knowledge of or involvement in the underlying misconduct by senior managers.

Enforcement in the UK—The Serious Fraud Office (SFO) is responsible for investigating and enforcing the anti-bribery, fraud and other corruption-related laws of England, Wales and Northern Ireland (a separate prosecution authority is responsible for enforcing anti-bribery restrictions in Scotland). The SFO is an independent government department, though at present it is required to obtain the consent of the UK attorney general before commencing prosecutions for bribery under statute. That consent requirement is likely to be removed with passage of the bribery reform bill.

Though the SFO has investigated a number of domestic and foreign bribery offenses over the years, it did not bring a single successful prosecution for foreign bribery in the first seven years following passage of the 2001 Act. However, in recent years the SFO’s director, Richard Alderman, has emphasized the agency’s focus on bribery—and particularly foreign bribery—enforcement, and the government has expanded the SFO’s enforcement resources in several respects.

The SFO recently implemented, for example, a reorganization that resulted in a new work area, termed

the “Anti-Corruption Domain,” with a specific focus on anti-bribery issues. The Anti-Corruption Domain is expected to reach a staff strength of over 100 persons who will be trained specifically on anti-corruption cases. The SFO also has, over the last several years, expanded its working relationship with the London police, further increasing the SFO’s investigatory resources both for foreign and domestic bribery cases. The SFO has indicated an intent to utilize, more thoroughly than in the past, other UK government resources, including for example, reviewing suspicious activity reports (SARs) for evidence of foreign bribery offenses. Large volumes of SARs are filed each year under the UK Proceeds of Crime Act 2002 (POCA). The reports are filed with a separate agency, the Serious Organised Crime Agency, but may contain information on foreign bribery activity that is of interest to the SFO.

The SFO reportedly is investigating dozens of foreign bribery cases at present, and it has, over the last year, brought its first two successful foreign bribery prosecutions. The first was against an individual—a former managing director of UK security company CBRN Team, Ltd.—who received a suspended sentence in September 2008 in connection with improper payments to officials in Uganda. More recently, in September 2009, the SFO concluded its first successful prosecution of a corporation for foreign bribery offenses, when UK bridge-building company Mabey & Johnson Ltd. pled guilty to bribery offenses relating to payments made, through local agents, to officials in Jamaica and Ghana. Mabey & Johnson received a £6.6 million (approximately \$11 million) fine as part of the plea agreement with the SFO. The prosecution followed, notably, a detailed internal investigation by Mabey & Johnson and a self-disclosure of infractions to the SFO. Pursuant to the plea agreement, Mabey & Johnson is required to implement a corporate compliance program, which will be subject to independent monitoring. Those features have been common in FCPA enforcement actions in the U.S. over the last several years, and the SFO has acknowledged that it has looked to its U.S. counterparts in defining many aspects of its enforcement approach.

The Mabey & Johnson case represents one of the first plea agreements under “Guidelines on Plea Discussions in Cases of Serious or Complex Fraud,” implemented in March 2009 by the attorney general. Plea agreements have been far less common in the UK than in the U.S., and the March 2009 guidelines define, for the first time in the UK, a clear set of procedures for prosecutors who wish to enter into settlement negotia-

tions with defendants. Shortly following publication of the plea discussion guidelines, the SFO also published, in July 2009, a paper titled “Approach of the Serious Fraud Office to Dealing with Overseas Corruption,” which details the SFO’s policy of encouraging companies to self-report evidence of overseas corruption violations. Consistent with the approach taken in the Mabe & Johnson case, the SFO’s self-disclosure guidelines signal an expectation that parties coming forward with disclosures should conduct thorough internal investigations, and must be prepared to implement a range of anti-corruption compliance safeguards moving forward (including many measures that will be familiar to FCPA practitioners, such as a clear code of ethics prohibiting bribery, specific policies relating to high-risk areas such as the hiring of agents, expenditures for gifts and entertainment of customers, employee training, and an effective disciplinary process in the event of noncompliance).

In return for companies’ filing of self-disclosures, the SFO has stated a willingness to consider foreign bribery offenses for civil recovery under the POCA, rather than criminal enforcement. Under the POCA, the SFO has the authority to seek civil penalties for proceeds obtained by unlawful conduct. The SFO obtained that authority under legislation enacted in early 2008, and used POCA as the basis of a significant enforcement action later that year, in October 2008, against UK engineering company Balfour Beatty plc. The SFO agreed in that case, which resulted from a self-disclosure by Balfour Beatty, to a fine of £2.25 million (approximately \$3.7 million) in connection with certain payment irregularities arising from the company’s business in Egypt. As part of that settlement, similar to Mabe & Johnson, Balfour Beatty agreed to internal compliance reforms, subject to external monitoring.

Finally, apart from the SFO, other regulatory risks arising from overseas bribery have emerged in the last year. Most notably, in January 2009 the UK Financial Services Authority (FSA)—the UK agency responsible for regulating the UK financial services industry—fined Aon Limited £5.25 million (approximately \$8.6 million) for failing to implement effective anti-bribery systems and controls. The FSA did not find specifically that Aon had engaged in acts of bribery, but noted a number of suspicious payments to third-party representatives who assisted Aon in obtaining business in various countries presenting high bribery risks. It also found that Aon had failed to implement adequate compliance controls to protect against those risks. The FSA concluded, in particular, that Aon’s practices violated Principle 3 of the FSA’s Principles for Businesses, which requires an

FSA-regulated entity to “take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.” The FSA currently is engaged in a broader review of anti-bribery and corruption systems and controls in commercial insurance broker firms, and is expected to issue a final report on its findings within the next several months.

Anti-Bribery Reform Bill—Late last year, the Organisation for Economic Co-operation and Development Working Group on Bribery stated, in the latest in a series of OECD reviews of the UK anti-bribery laws, that it remained “disappointed and seriously concerned with the unsatisfactory implementation of the [OECD Anti-Bribery] Convention by the UK.” It called on the UK government to, among other things, enact “modern bribery legislation and establish effective corporate liability for bribery as a matter of high priority.” Industry and non-governmental organizations in the UK have echoed calls for revised standards that offer a clear baseline for companies to implement in their corporate compliance regimes.

In March 2009, the UK Ministry of Justice submitted draft legislation on bribery reform to Parliament. The reform bill, which is the product of a long consultative process dating back to 2003, currently is proceeding through Parliament with general support from the major political parties in the UK. Expectations are that the bill will be implemented before the next general parliamentary election, which will occur in mid-2010.

The bill contains the following principal features (certain nuances in the bill may change in the course of Parliament’s legislative process, but it is unlikely that the core concepts will shift substantially):

New bribery offenses:

- The bill would create separate offenses prohibiting the offering or giving of bribes, and the solicitation of bribes. Abandoning earlier criminal standards in the 1889 and 1906 Acts, the core elements of the new offenses would, in keeping with similar laws in other OECD countries, prohibit payments or offers thereof that are intended to induce “improper” conduct.
- The bill would create a third, stand-alone offense for bribing a foreign public official. This offense draws on terminology from the OECD Anti-Bribery Convention, and would enable the UK foreign bribery law to share the same interpretive framework as similar legislation among other OECD state parties.
- Consistent with existing UK laws, the above offenses do *not* contain an exception for small

payments intended to solicit routine and non-discretionary government action (i.e., so-called “facilitating payments”), or hospitality expenditures. However, the SFO has noted that small facilitating payments are unlikely to be prosecuted unless they are part of a larger pattern and practice, and that travel, gift and entertainment expenditures should not be viewed as “improper” payments (and, therefore, not as violations) provided they remain within appropriate limits.

- The above offenses would apply to England, Wales and Northern Ireland. The bill extends extraterritorial jurisdiction to prosecute bribery committed abroad by UK nationals and UK corporate bodies, as well as by natural persons with a “close connection” to the UK. The latter category can include, notably, persons “ordinarily resident” in the UK who are not UK nationals, as well as nationals of UK Crown Dependencies and Overseas Territories.

Corporate offense for failure to prevent bribery:

- Perhaps most notably, the bill would create a new crime, applicable directly to commercial organizations, for failing to prevent bribery. Under this offense, a crime would be committed if (a) a person performing services for the commercial organization bribes another person, (b) the bribe is connected to the commercial organization’s business, and (c) another person connected with the organization, who has the responsibility of preventing bribery, fails to do so. (The draft bill includes language requiring that the failure constitute “negligence” on the part of the responsible person, but the negligence standard has been proposed to be removed from the final bill.) The bill contains an affirmative defense if the company had “adequate procedures” in place to prevent bribery from being committed on its behalf, although that defense would not apply if the failure to prevent bribery resulted from a failure by a senior officer of the company to perform her or his compliance role. Senior officer is defined broadly to include a “director, manager, secretary or other similar officer.”
- The new corporate offense would apply to any company incorporated in England and Wales, and any *foreign* company that “carries on a business, or part of a business, in England, Wales or Northern Ireland.” That could, potentially, capture a large body of companies that are incorporated in the U.S. or other countries, but that conduct business in the UK. It also could extend to subsidiaries,

joint ventures or consortia of UK companies based abroad (depending upon how closely related their operations are to the UK entity). Those issues remain very much unclear and are a source of continued discussion among interested government agencies, NGOs and industry.

The various offenses set forth in the bill would carry financial penalties (including an unspecified fine for violations of the new corporate offense for failure to prevent bribery), and/or 10 years imprisonment.

Conclusion—The recent developments in the reform and enforcement of the UK anti-bribery laws signify an increased risk for UK companies, their overseas operations and foreign companies that do business in or with the UK. With passage of the reform bill, there should be a somewhat clearer set of baseline prohibitions for affected companies than existing laws provide, but the new rules will require time before their practical impact will be felt. Moreover, some aspects of the new rules—including the offense focusing on the failure by companies to prevent bribery—present novel approaches to the UK criminal laws that, although eliminating the ambiguities of the old statutory regime, may present new questions for companies and government enforcement authorities. That process of redefining the substantive offenses will occur in an atmosphere in which the SFO and other agencies appear more focused on enforcement than they have in the past.

Companies that may be affected by these developments should, therefore, begin studying their UK operations and developing internal compliance controls and employee training programs that account for the UK laws, to the extent such controls are not implemented already. This is an area in which the ground is shifting—the full scope of the UK anti-bribery prohibitions will not be known until after the reform bill is passed—but the overall picture is sufficiently clear that companies with UK operations would be well-advised to be a step ahead in ensuring compliance with the existing and emerging UK anti-corruption framework.



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