QEB HOLLIS WHITEMAN

'ADEQUATE PROCEDURES' TO ENSURE COMPLIANCE WITH BRIBERY ACT 2010?

Should the draft guidance provide more assistance?
Should the SFO have more civil powers?

Sean Larkin QC
Rachna Gokani

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Executive Summary

The Bribery Act 2010 has radically extended corporate criminal liability: it is easier to prove, it covers more entities, it covers activities worldwide. The new corporate offence of failing to prevent bribery means if anyone, acting for a corporate entity that does some business in the UK, bribes anyone, anywhere in the world, the corporate entity is criminally liable in the UK unless it can show it had 'adequate procedures' to prevent bribery. The Act will potentially criminalise a large number of companies, particularly those who do business abroad. There is no definition of what 'adequate procedures' are. Accordingly, companies are extremely concerned at the risk of becoming criminally liable and the cost and uncertainty of implementing anti-bribery policies. The British Chamber of Commerce has estimated that the cost to UK businesses of implementing and conforming to new legislation has been some £55 billion since 1998.[1] In the course of this article we explore whether the Government, through the Serious Fraud Office (SFO), have provided sufficient guidance to responsible companies who will bear the burden of implementation.

We also consider that this Act has been brought into force against a background of wholesale changes of the criminal/regulatory regime in this country – a review which is ongoing[2] - suggesting a more flexible civil/criminal approach to regulation. The SFO have sought to broaden their approach to companies. In this article, we also consider whether additional powers should be provided to prosecutors so as to enable non-conviction resolution where appropriate.

[1] www. Chamberonline.co.uk/policy/pdf/burdens_barometer_2007.pdf [2007]
[2] Law Commission CP No 195 *Criminal Liability in Regulatory Contexts*

The final guidance on 'adequate procedures' will be published in January 2011 [in advance of implementation of the Act in April 2011]. The Ministry of Justice (MOJ) produced draft guidance on adequate procedures as part of a consultation process due to finish on 8 November 2010.
We are of the view that an extension of criminal liability to such an extent should be matched by:

- Clear guidance;
- Clear enforcement policies; and
- A wider range of options available to prosecuting bodies.

QEB Hollis Whiteman Chambers will respond to that consultation process and encourage others affected to respond in kind. A review will not be likely for some years.

The new offence

The corporate offence is committed where:

- a person (A) who is associated with the commercial organisation (C) [meaning he performs services for, or on behalf of C],
- bribes another person [relates to offences contrary to sections 1 [bribery] or 6 [bribery of a foreign public official],
- With the intention of obtaining or retaining business or an advantage in the conduct of business for C.

The offence is one of strict liability, i.e. if an employee of the company or a third party acting at the behest of the company, whether in UK or abroad, bribes someone, the company is automatically guilty unless they can prove the statutory defence. The sentence is an unlimited fine. The consequences may be severe as conviction will lead to an order for costs, confiscation, and, potentially, debarment from applying for public contracts.

The Bribery Act corporate offence is likely to follow the health and safety model. In such circumstances, it is likely that the prosecution will simply have to prove the fact of the bribe and the circumstances connecting it to the company[3]. The prosecution will not have to prove mistakes that were made, actions that ought to have been taken or remediable steps. In those circumstances there will be a considerable burden upon the corporate entity to show the steps taken. The issue of whether there were 'adequate procedures' will be for a jury to decide; a jury who may be unfamiliar with corporate structures, operations abroad and the risk that a rogue employee/agent may embark upon 'a frolic of his own' contrary to corporate guidance. The issues to be resolved will include:

- The company's written policies, implementation, training, monitoring and review;
- Advice and monitoring from external advisers;
- Comparisons to similar businesses operating in similar regions;
- A comparison of the policies to the Guidance and any other guidance provided, such as that by the Financial Services Authority (FSA). Transparency International (TI), and the GC100;
- Reference to the lengthy discussions in Parliament as the bribery legislation was discussed;
- Reference to whether the policies were compliant with other jurisdictions such as the US Foreign Corrupt Practices Act (FCPA).

The draft Guidance

The draft guidance produced by the Ministry of Justice has identified six key principles of good compliance:

[3] R v Chargot Ltd [2009] 1 WLR 1

1. Risk assessment – knowing and keeping up to date with the bribery risks in your sector and market.
2. Top level commitment – establishing a culture across your organisation in which bribery is unacceptable.
3. Due diligence – knowing who you do business with; knowing why, when and to whom you are releasing funds and seeking reciprocal anti-bribery agreements.
4. Clear, practical and accessible policies and procedures – applying them to everyone you employ and business partners under your effective control and covering all relevant risks.
5. Effective implementation – going beyond 'paper compliance' to embed anti-bribery in the organisation.
6. Monitoring and review – auditing and financial controls, how regularly you need to review your policies and procedures, and whether external verification would help.

The draft guidance also touches on the effect of written local law under section 6, hospitality and promotional expenditure, facilitation payments and prosecutorial discretion. Illustrative scenarios, not intended to form part of the Guidance, are a welcome, and unexpected, addition. They will go some way in concentrating minds, both on the "thorny issues" that are likely to trouble organisations establishing their own compliance procedures, and on the areas of real deficiency in the guidance that should form part of any response to the consultation.

The Government has adopted a broad, principles-based, as opposed to risk-based, approach. This is not surprising to those who have charted the Act's progress. However, it is still disappointing as many had hoped for a definitive and clear statement of intent.

By way of contrast, the Money Laundering Regulations 2007 provide that, for an offence under its provisions, a court "must consider" whether relevant treasury approved guidance was followed. The Government is at pains to point out that Bribery Act Guidance does not have that sort of muscle – adherence to this guidance is by no means a defence but non-adherence is likely to be relied upon by any prosecutor as further evidence of failure to prevent bribery. What is noticeable is that there are no particular procedures to be followed; there is no check list for compliance; there is no threshold to indicate what is permissible and what is not. We are told that its role is to "support businesses;" it is "not prescriptive;" is not "a one-size-fits-all" document; it is no more than a "flexible guide;" and so the caveats continue. The message is essentially that business must do its best and that the landscape will be clearer once the matter has been considered judicially,

This has created uncertainty. In preparation for the implementation of the Act, many companies are already putting into place compliance procedures. Practitioners are unanimous in reporting an increase in work in this area. This draft Guidance will give them little more assistance than the now oft-repeated ministerial pronouncements on thorny issues, such as hospitality and facilitation payments.

Issues raised by guidance

In considering the draft Guidance, which will no doubt with the source of intense debate and discussion over the coming weeks, interested parties may wish to consider the extent to which it addresses the questions posed in the House of Lords by Lord Henley (italicised):

- *Who is to judge what is adequate and what is not?*

  The draft guidance does no more than confirm an alarming reliance on the "good sense of prosecutors" in the exercise of their discretion;

- *If a company has stringent rules in place, checks on its employees, has transparent accounting and so on, but a determined associate of that company still manages to bribe another, were those procedures adequate? They did not, after all, prevent the offence of bribery taking place.*

  Unlike the Money Laundering Regulations, the burden on Courts to consider compliance is not mandatory and there is no scope for industry-specific guidance to acquire treasury approval;

- *What about a company with weak procedures in place which nevertheless managed, perhaps more by chance than anything else, to stop an embryonic plan to commit bribery? Which of those cases should be prosecuted?*

  The Government has been quick to champion "prosecutorial discretion" as an appropriate "safety valve," that will prevent unmeritorious cases from progressing to a costly and lengthy trial – but what of section 10 of the Act, which envisages at least three routes by which a prosecution can be launched? The obvious danger is of different thresholds of prosecution; three people fulfilling a role that has previously been occupied by only one – the Attorney-General – comes with the potential for conflicting prosecution policies to develop. Even with set criteria for prosecution, interpretations can vary greatly. Concerns expressed throughout the Act's passage centred on what level of consistency in prosecution decisions can be expected and whether a difference of policy could creep in.

- *What about the commercial organisations themselves? How will they know if they have put in place adequate procedures?*

  The SFO has consistently encouraged liaison – but with the limits to its remedial arsenal, absent any power to impose administrative fines and defer prosecution like its American cousin, and with the spectre of debarment for a company prosecuted under the Act, which for some may mean the death of the company, any little enthusiasm that might previously have existed for cooperation with the SFO is likely to have waned with the publication of the draft guidance.

This note is intended to do no more that highlight the authors' initial concerns about the draft guidance and focus minds on the issues likely to be the subject of debate and discussion. We would urge all interested parties to give the draft guidance their urgent attention. It is unlikely to be reviewed until 2014, and it is essential that businesses and their legal advisers play a key role in framing the Government's approach to adequate procedures. Whatever the Government's intention in legislating in the way that it has, it seems inevitable that companies, particularly small and medium–sized organisations unable from a resource perspective to employ the services of a legal team to analyse and advise on its compliance procedures, will defer, perhaps prescriptively, to the Government's guidance.

Corporate criminal liability

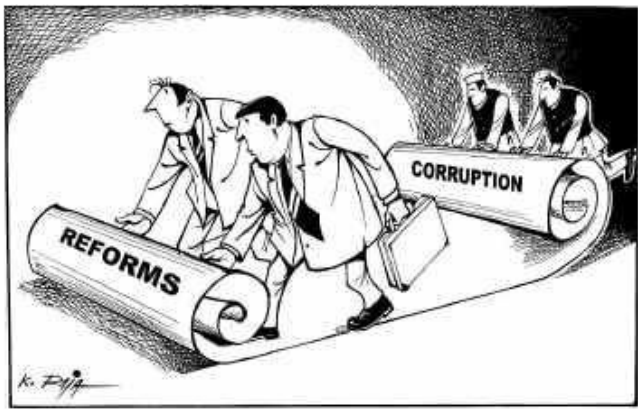
Historically, there have been three ways in which a corporate entity might be guilty of an offence:

i) Where the corporate entity itself has a legal duty or obligation. For example, in health and safety legislation, it is the duty of an employer to ensure a safe place at work. If the workplace is unsafe, even if due to the actions of an employee, the liability is that of the employer as the law has imposed the duty upon the employer. This applies to a narrow band of cases;

ii) Where a 'directing mind' of a company was guilty of offence i.e. somebody who is so senior in the organisation that they effectively were the company. Although the courts have widened the scope of people who may render the company liable, as a rule of thumb it will only be the most senior. This principle can apply to a wider range of offences. The difficulty that faced prosecutors of large companies encountered was the gap between the person who was guilty of the offence and the 'directing mind'. A number of high profile trials for gross negligence manslaughter foundered because persons who have been grossly negligent were not sufficiently senior in the organisation to be considered 'directing minds',

iii) Systemic failure of an organisation leading to death will be an offence contrary to the corporate manslaughter legislation[4] [this Act was created following the failures of gross negligence manslaughter cases.]

By way of example, if an accountant in a company committed fraud to the benefit of the company, the company itself would not be guilty unless the accountant was a 'directing mind'. In an era of large and complex organisations where the main board may have delegated day-to-day running to a regional branch, it is very difficult to prove a company's guilt. The situation is different in the US where corporate liability is easier to prove for a variety of offences. This is of some importance as bribery in a third country may be prosecutable in both US and UK and liability may be accepted on a lower basis leading to actions in both jurisdictions. In some recent cases in which plea agreements have been entered, it is not always easy to identify who was the 'directing mind' through whom the company, who had admitted the offence, was liable.



The limitations of the prosecutor's power

It is our view that the police and SFO lack sufficient flexibility when dealing with these offences. We will explore how their efforts to apply a more flexible approach to reducing offending have foundered at first instance. We commend their ambitious programme of speeches, articles and dialogue to inform and encourage compliance amongst the business community and their advisers. However, the main weapon in the armoury is a rather blunt one: whether to prosecute or not. Their efforts to encourage self-reporting by companies will face difficulties in the absence of flexibility. This is in contrast to the powers available to the FSA (due to become part of a new Economic Crime Agency), the powers available to the US authorities and the radical overhaul of regulatory powers in the UK over the past few years (see more below).

[4] Corporate Manslaughter and Corporate Homicide Act 2007

We are of the firm view that it would be of benefit for the SFO and similar prosecutors to have:

- A wider range of powers; and
- Clear criteria to be applied for charging decisions – we are aware that the various Directors are producing a joint protocol and hope that this may deal with that topic.

The Code for Crown Prosecutors provides that, prior to charging an offence, a prosecutor must consider whether there is a realistic prospect of conviction and that such a prosecution is in the public interest. The decision is that of an individual prosecution lawyer (sometimes acting in the capacity of the Director). The prosecution authorities sometimes set out criteria to be applied when considering whether an incident should be prosecuted. A decision not to prosecute may be judicially reviewed, for example, the decision by Corner House and CAAT to seek judicial review of the 'non-prosecution' of BAE for offences of corruption. It is more difficult to challenge the decision to prosecute on public interest grounds unless there is an abuse of the process of the courts. The concern that companies have is the lack of clarity as to when an incident may be prosecuted.

In recent years, the SFO have sought to informally exercise flexibility and creativity in their approach. From a practical point of view this was entirely sensible. Prosecutions tend to be lengthy, expensive and have an uncertain outcome. Companies may be liable for offences committed by persons long since disciplined and gone; boards may have changed; the company due to be sentenced may be a completely different animal to that at the time of the offending. Further, a more flexible approach will encourage responsible companies to behave responsibly. If a company suspected an offence, it was encouraged to carry out internal investigations and use external advisers used to dealing with the SFO to liaise with the SFO. The advantage to the SFO was the company would have a better idea of what it was looking for and would bear the cost of conducting an investigation. The advantage to the company was that disruption would be avoided, wrongdoing could be remedied and it put the company in a better light when negotiating with the SFO. The approach was very much "carrot and stick." 'Rotten' companies would be put out of business. Responsible companies would effectively be given a 'yellow' card. This approach is similar to that of the US Department of Justice in its dealings with offences contrary to the Foreign Corrupt Practices Act [FCPA].

One example of the approach is the prosecution of Balfour Beatty. The SFO proceeded on a parallel basis of criminal prosecution [the stick] and civil recovery [the carrot]. Balfour Beatty had self-reported, put is house in order and consented to:

- a Civil recovery Order of £2.25m,
- a voluntary agreement to introduce certain compliance systems, and to submit these systems to a form of external monitoring for an agreed period,
- the decision, and therefore the wrongdoing, was published.

A Civil Recovery Order is a power available to recover the proceeds of crime via action in the High Court as opposed to the criminal court. There is no conviction. The civil, as opposed to the criminal, standard of proof applies. The power is available under the Proceeds of Crime Act 2002, albeit the guidance supplied confirmed that it should not be used in lieu of prosecutions. The SFO has no power to require compliance or monitoring. It has no power to require publicity. Nonetheless, Balfour Beatty is an example of the SFO trying to apply flexibility. The SFO confirmed this approach in their July 2009 document, '*Approach of the Serious Fraud Office to Dealing with Overseas Corruption'*. In that document, the SFO stated that they would seek to resolve self-referred cases civilly by a mixture of:

- Restitution
- Monitoring
- Culture change and training

- Dealing, where appropriate with individuals
- Publicity

[We have appended details extracts of the document at the foot of the article]. In truth, the SFO has none of these powers as far as a company is concerned, save to seek Civil Recovery of the proceeds of crime. A further inducement was the prospect of global settlements which arise where a company's offending would be prosecutable in different jurisdictions and agreement between prosecutors to deal with the matter comprehensively.

This approach was criticised by Lord Justice Thomas in the case of *R v Innospec*. With regards to the global settlement made he stated: *"I have concluded that the Director of the SFO has no power to enter into the arrangements made and no such arrangements should be made again."* The rationale for his decision was that sentencing was a matter for judges and not for private deals between prosecutors. That is now accepted in conviction cases. In passing, Lord Justice Thomas also said that '*it would rarely be appropriate for criminal conduct by a company to be dealt with by way of a civil recovery order'* and that *'it was of the greatest public interest that the serious criminality of any who engage in the corruption of foreign governments is made patent for all to see by the imposition of criminal and not civil sanctions.'* The corruption in *Innospec* was serious and clearly merited criminal prosecution and sanction. The issue arises as to whether prosecutors would feel that offending on a smaller scale could be dealt by way of civil rather than criminal proceedings. The UK Attorney General has recently stated that the public interest in bringing a prosecution for bribery is considerable: '*As far as I am concerned there is a UK government determination that national and international bribery should be prosecuted.*'[5]

We identify some powers and facilities available in the US that would allow prosecutors greater flexibility to resolve matters civilly:

- Civil action for a fine;
- Debarment from doing business with the federal government;
- Deferred prosecution – a prosecutor agrees not to prosecute in exchange for the defendant agreeing to requirements which may include fines, corporate reforms, co-operation with any investigation, directors being barred;
- Opinion procedure – a company may request a statement from the Attorney General as to whether proposed conduct conforms with enforcement intentions *i.e.* whether they would be prosecuted if they pursued a particular course of action.

An enforcement policy

We are of the view that prosecutors should publish a clear enforcement policy. This will improve transparency and accountability by identifying to business and society the standards expected. Although the SFO guide on self-reporting is of some assistance, in our view it is not sufficiently detailed.

The changing face of regulation

The flexibility of the US approach is consistent with the changing face of regulation in UK. In the past few years there have been extensive reviews of the powers and discharge of duties of a variety of regulators. [6] We are of the view that the lessons of these reviews could and should be imported into the investigation, prosecution and disposal of bribery offences. We hope we do not do injustice to the Hampton and Macrory reports when we summarise them as follows:

- Risk assessment – which businesses are more likely to offend;

[5] World Bribery & Corruption Seminar 14th September 2010

[6] *Reducing Administrative Burdens: Effective Inspection and Enforcement (Hampton report); Regulatory Justice: Making Sanctions Effective (Macrory Report)*,

- A sliding scale of penalties that were quick and easy to apply with tougher penalties for rogue businesses that repeatedly break rules;
- Advice to improve compliance rather than unnecessary inspection/enforcement;
- Prosecutions should be reserved for serious breaches;
- Administrative penalties imposed by the regulator in lieu of prosecution. This would be appropriate in cases of negligence or carelessness which require a sanction;
- The greater use of undertakings, warnings, advice or statutory notices.

The principles that would underpin the use of sanctions would be to:

- Change the offender's behaviour;
- Deter any future non-compliance;
- Eliminate any financial benefit;
- Be proportionate to the nature of the offence and the harm caused; and
- Aim to restore the harm caused by regulatory non-compliance, where appropriate.

As a result of the reports, the government passed the Legislative and Regulatory Reform Act 2006 to ensure that regulatory functions comply with the principles of good regulation (i.e. transparent, accountable, proportionate and consistent) and that regulatory activities should be targeted only at cases in which action is needed.

The Regulatory Enforcement and Sanctions Act 2008 gave additional powers to regulators including:

- Fixed monetary penalty notices – low level fines
- Discretionary requirements - a package of sanctions including one or more of the following:

  - a variable monetary penalty (VMP) determined by the regulator (uncapped in amount);
  - a compliance notice i.e. requirement to take specified steps within a stated period; and
  - a restoration notice, i.e. a requirement to take specified steps within a stated period to secure that the position is restored, so far as possible, to what it would have been if no offence had been committed.

- Stop notices – which will prevent a business from carrying on an activity described in the notice until it has taken steps to come back into compliance;

- Enforcement undertakings – which will enable a business, which a regulator reasonably suspects of having committed an offence, to give an undertaking to a regulator to take one or more corrective actions set out in the undertaking.

Conclusion

Enforcement of the Bribery Act 2010 will follow over a decade of attempts to reform the law in this area. It has survived the calling of a general election in the midst of its legislative passage. Its impetus was strong and it unexpectedly received royal assent in the dying days of the Labour Government. Its enactment was seen globally as a statement of intent; no more will the UK be vilified as an OECD defaulter. No more will prosecutors suffer under the burden of the identification principle. The burden on businesses to positively prevent bribery is enshrined in the Act's provisions and the consequences of default, particularly when the applicability of debarment provisions remains uncertain, is too great to be ignored.
Unlike its US counterparts, the SFO lacks the prosecutorial apparatus to give companies considering the Act much comfort. Judgments

in *R v Innospec* and *R v Dougall* have undermined the agency's attempts to be flexible, welcoming and creative in avoiding prosecution. Ensuring that procedures in place to prevent bribery are adequate, not by any defined or certain standard, but rather by an indefinable, case and circumstance specific standard, will be crucial. However unsatisfactory, it is unlikely that the term's parameters will be properly identified before judicial consideration of section 7. For those companies wishing to avoid becoming a corporate "guinea pig," compliance with the broad requirements of the guidance with be essential, as will engaging in the consultation process at this early stage.

QEB Hollis Whiteman intends to contribute to the consultation process, wherein its contents affect the procedures to be put in place by our corporate clients. We have considerable experience in advising, representing and presenting cases of bribery and corruption. Members of chambers have also been called upon to comment on the advent of new legislation and we have also provided a contributing author to the recently published Blackstone's Guide to the Bribery Act 2010.

Sean Larkin QC

Rachna Gokani

APPENDIX A:

Extracts from 'Approach of the Serious Fraud Office to Dealing with Overseas Corruption'

2. A key question for the corporate and its advisers will be the timing of an approach to us. We appreciate that a corporate will not want to approach us unless it had decided, following advice and a degree of investigation by its professional advisers, that there is a real issue and that remedial action is necessary. There may also be earlier engagement between the advisers and us in order to obtain an early indication where appropriate (and subject to a detailed review of the facts) of our approach. We would find that helpful but we appreciate that this is for the corporate and its advisers to consider. We would also take the view that the timing of an approach to the US Department of Justice is also relevant. If the case is also within our jurisdiction we would expect to be notified at the same time as the Department of Justice……

4. Very soon after the self report and the acknowledgement of a problem we will want to establish the following:
• is the Board of the corporate genuinely committed to resolving the issue and moving to a better corporate culture?
• is the corporate prepared to work with us on the scope and handling of any additional investigation we consider to be necessary?
• at the end of the investigation (and assuming acknowledgement of a problem) will the corporate be prepared to discuss resolution of the issue on the basis, for example, of restitution through civil recovery, a programme of training and culture change, appropriate action where necessary against individuals and at least in some cases external monitoring in a proportionate manner?
• does the corporate understand that any resolution must satisfy the public interest and must be transparent? This will almost invariably involve a public statement although the terms of this will be discussed and agreed by the corporate and us.
• will the corporate want us, where possible, to work with regulators and criminal enforcement authorities, both in the UK and abroad, in order to reach a global settlement?.....

5. A very important issue for the corporate will be whether the SFO would be looking for a criminal or a civil outcome. Without knowing the facts, no prosecutor can ever give an unconditional guarantee that there will not be a prosecution of the corporate. Nevertheless, we want to settle self referral cases that satisfy paragraph 4 civilly wherever possible. An exception to this would be if Board members of the corporate had engaged personally in the corrupt activities, particularly if they had derived personal benefit from this. In those cases we would, in fact, be likely to commence our own criminal investigation. Professional advisers will have a key role here because of their knowledge of our approach. We shall look at the public interest in each case. We would in those circumstances be looking for co-operation from the corporate and would be prepared to enter into plea negotiation discussions within the context of the Attorney General's Framework for Plea Negotiations

…

14. We will expect to discuss the results of the investigation with the corporate and its professional advisers. In discussing settlement terms, once we are satisfied with the conclusion of the investigation, we shall be looking at the following:

• restitution by way of civil recovery to include the amount of the unlawful property, interest and our costs
• in some cases monitoring by an independent, well qualified individual nominated by the corporate and accepted by us. The scope of the monitoring will be agreed with us. We undertake that if monitoring is going to be needed, it will be proportionate to the issues involved.
• a programme of culture change and training agreed with us.
• discussion, where necessary, and to the extent appropriate, about individuals.

15. In addition, a public statement agreed by the corporate and the SFO will be needed so as to provide transparency so far as possible for the public.

Sean Larkin QC
Rachna Gokani
QEB Hollis Whiteman Chambers