

Weil Alert: UK Bribery Act

The UK Bribery Act 2010

The United Kingdom has had laws against corruption for a long time, but until now these laws have failed to reflect the international nature of modern business and have been difficult to enforce in practice. One of the last acts of the outgoing UK parliament was to pass a new Bribery Act, which replaces the old anti-corruption law and provides the UK with one of the toughest regimes for regulating corruption in the world.

The new law is based on the relevant conventions put out by the Organization for Economic Co-operation and Development and takes account of international anti-corruption norms, but in many respects the Bribery Act goes further in seeking to regulate corrupt practices than, for example, the U.S. Foreign Corrupt Practices Act ("FCPA"). Rather than providing a full summary of all the provisions of the Bribery Act, this Alert focuses on three aspects of the law that are likely to be of particular concern to multinational businesses: the definition of bribery, the "corporate" offence, and the territorial scope. We also comment on the prosecution process in the UK in the light of recent judicial statements.

In accordance with the normal procedure in the UK, the new law will come into force on a date yet to be decided. This will be a matter for the new UK government, and the appointed date is unlikely to be before the autumn of this year.

The definition of bribery

The new law makes it an offence for an individual to give or to offer a bribe. It also makes it an offence to receive or solicit a bribe. This second offence goes further than the anti-bribery provisions of the FCPA, which does not target the actual or would-be recipient of a bribe.



Several aspects of the definition of bribery are noteworthy:

- The new offences cover bribes offered or received in almost any business, commercial, governmental or regulatory context, not just bribes of public officials.

It even covers bribes given or received in connection with an activity on behalf of "any body of persons" – for example, bribing a member of the golf club committee with a view to obtaining membership. The scope of prohibited bribes thus exceeds that of the FCPA, which covers only bribes paid to foreign officials.

- Unlike the FCPA, there is no requirement that payments to foreign public officials ("FPOs") be made "corruptly" to establish liability. An intention to influence the FPO in his or her official capacity with an eye toward obtaining/retaining business (or gaining a business advantage) is sufficient to trigger liability.
- Like the FCPA, indirect bribery, such as having a third party pay a bribe on a corporation's behalf, is prohibited.
- There is no exception for so-called "facilitation payments", which are explicitly excluded from the anti-bribery provisions of the FCPA. The UK authorities have indicated that they would not expect to prosecute individuals for small payments given to facilitate the carrying on of a business, but such payments would nevertheless be caught by the new law and would need to be considered in the context of any compliance programme.

The corporate offence

The new law provides that a company is guilty of an offence if any person "associated" with it commits bribery with a view to obtaining or retaining business or an advantage in the conduct of business for that company. This offence applies on a "strict liability" basis – the company is guilty of the offence unless it can show that it has in place "adequate procedures" to prevent bribery.

There is considerable uncertainty as to what is meant by a person "associated" with a company. The Bribery Act states that a person is "associated" with a company if he or she performs services for or on behalf of that company, and indicates that examples of such a person might be the company's employee, agent or subsidiary.

This raises difficult questions in the context of multinational corporate groups with multiple subsidiaries. If, for example, the Nigerian subsidiary of a large group pays a bribe to obtain a contract under which some of the work is to be carried out by the UK subsidiary of the group, is the Nigerian company acting "on behalf of" the UK subsidiary? The Bribery Act states that this will have to be tested by reference to all the relevant circumstances. Until judicial interpretations become available, companies are likely to take a cautious approach to the "associated person" standard.

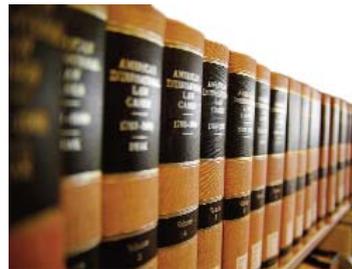
The new UK government will be publishing guidance on what procedures are adequate for this purpose. Just because procedures have been established which meet the requirements of the FCPA and the US sentencing guidelines, this does not mean that those procedures will be seen as "adequate" in the UK context. It will be necessary, for example, for procedures to cover the expanded definition of bribery under the UK legislation. We expect the guidance from the UK government will cover such matters as corporate governance, training, internal and external audits, and whistle-blowing.

We expect the guidance to be published in draft for consultation before the Bribery Act comes into force – we will publish a further Alert when the guidance is available.

The territorial scope

The Bribery Act has considerable extra-territorial reach, exceeding that of the FCPA. There are two alternative jurisdictional tests under the Act:

- First, a test relating to the locus of the offences. If some part of the facts forming the basis of the charge has occurred in the UK, then the Bribery Act will apply. In practice, this is not likely to be difficult to prove.
- Secondly, even if the first test is not satisfied, there may still be a jurisdictional basis for a charge under the Bribery Act if the person charged has a "close connection" with the UK. This includes any British citizen and any company incorporated in the UK.



The combined effect of these tests and the concept of persons “associated” with a company (see above) means that multinationals will need to consider the effect of the Bribery Act across all their operations. Most multinational corporate groups are seeking in any event to develop prudent and consistent worldwide compliance and training procedures. If the group includes any UK businesses, the procedures will need to take account of the UK guidance on a worldwide basis.

Prosecution policy

The Serious Fraud Office (“SFO”) is the UK government body principally involved in prosecuting offences of this nature. Under its current director, the SFO has sought to adopt many of the practices used by the U.S. Department of Justice (“DOJ”) and Securities & Exchange Commission, including encouraging defendants to come forward and confess potential criminal acts, agreeing to plea bargains and financial settlements with potential defendants, offering immunity or less severe sentences to whistle-blowers and those providing useful evidence, agreeing to various monitoring and compliance improvements, and agreeing press statements to be made by defendants who agree to penalties. The SFO has also (notably in the BAE Systems case) adopted a practice of participating in “global settlements” of corruption allegations along with authorities such as the DOJ.

However in a recent case (widely reported as the Innospec case) (brought under the preceding U.K. anti-corruption law) a senior judge cast doubt on these practices. He indicated that it was for the courts, not the prosecuting authorities, to impose sentences, and that it was inappropriate for those accused of corruption to be treated in a different way

from those accused of other serious crimes such as rape or murder. He castigated the SFO for seeking to agree press statements and monitoring arrangements with defendants, and indicated that it is not appropriate for the SFO to be part of “global settlements” which effectively deprive the UK courts of their sentencing discretion.

It remains to be seen what the effect of the judge’s remarks will be in practice. As those who are involved in matters involving allegations of corruption know well, investigations can be extremely complex and establishing guilt in a court involves considerable expense and can be extremely time-consuming. Enforcing the new law in the UK may prove to be a big challenge for the SFO.

This document is only a summary of the relevant provisions of the UK Bribery Act 2010. Specific advice should always be taken.

For further information please contact Peter King (+44 20 7903 1011), Juliet Blanch (+44 20 7903 1233), Steven Tyrrell (+1 202 682 7213 or Graham O’Donoghue (+1 202 682 7046) at Weil, Gotshal & Manges.

Contacts



Peter King
+44 20 7903 1011
peter.king@weil.com



Juliet Blanch
+44 20 7903 1233
juliet.blanch@weil.com



Steven Tyrrell
+1 202 682 7213
steven.tyrrell@weil.com



Graham O’Donoghue
+1 202 682 7046
graham.odonoghue@weil.com

WEIL, GOTSHAL & MANGES

ONE SOUTH PLACE, LONDON EC2M 2WG
TEL: +44 (0) 20 7903 1000 FAX: +44 (0) 20 7903 0990

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