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Law. Tax

The Bribery Act's FIRST YEAR

Tougher, more wider, effective?

What impact has it had?

What's in store for the future?

Jargon buster:

The Act
Bribery Act 2010

DD
Due diligence

DoJ
US Department of Justice

DPAs
Deferred Prosecution Agreements

Guidance
The Ministry of Justice guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing, published in March 2011

MoJ
UK Ministry of Justice

OECD
Organisation for Economic Cooperation & Development

OECD Report
The OECD's Phase 3 report on implementing the OECD Anti-bribery Convention in the United Kingdom (March 2012)

FSA
Financial Services Authority

FSA Review
The FSA Review into Anti-bribery and corruption controls in investment banks (March 2012)

SFO
Serious Fraud Office

IN BRIEF

With only one prosecution under the Act has the noise all been for nothing? We don't think so. The Act has already had a significant broader impact on business culture, whistle-blowing and the prosecution landscape.

Some surprising survey results indicate that 72% of middle managers don't know about the Act and 47% of CFOs said they wouldn't rule out potentially performing unethical actions to win business.

Corporates may not be doing enough to assess their bribery risks, particularly those associated with M&A or third party relationships, yet they may find themselves responsible for the target company's or third party's acts.

We can expect continued and closer international co-operation between prosecutors and for the US experience to affect the UK's approach.

We can also expect to see a leaner and more prosecution-focused SFO under its new leadership.

DPAs are likely to become an additional tool available to the SFO to deal with corporate offending, but whether they persuade corporates who discover wrongdoing to self-report will depend on how the tool works in practice.

Regulated firms have to take extra care in developing robust anti-bribery controls as the FSA is clamping down hard on those who don't.

The OECD's Report suggests judges might not regard the Guidance as authoritative, but until we have further judicial clarification, following the Guidance remains the safest approach.

Editorial

reflection:

The Act heralded as *"the toughest anti-corruption law in the world"* may not have lived up to the hype so far. There has been only one prosecution under the Act since it came into force a year ago and that was of an individual who received bribes to alter a motoring offences database – hardly headline-grabbing stuff. There have been no corporate prosecutions. Some may be thinking the Act was just another case of media-hype, like the Y2K virus that never materialised. But reflect a moment longer on the time it takes for prosecutions to reach the courts and the fact that the Act only applies to crimes committed from 1 July 2011 and you would probably agree that a host of prosecutions in year one was unlikely.

Increasing bribery convictions was not the only, or even main, aim when the Act came into force. The primary purpose was said to be culture change – to create a public and business culture where corruption was not tolerated. In that regard, the Act has already had real impact.

Bribery issues have greater profile than ever before, public perceptions have hardened and there are more bribery-related cases going through the courts with sentences getting tougher all the time. There also can't be many organisations that haven't thought about their anti-bribery controls or had conversations on bribery issues with their employees in the last year. But there is more to be done and the Government is now looking at introducing US-style DPAs for corporate economic crime in order to encourage self-reporting and to let corporates work with prosecutors to resolve past wrongs proportionately. This is a positive development.

I can't see any signs to suggest that anti-bribery issues will fall off the corporate agenda. I hope that we will see more businesses carrying out thorough anti-bribery risk assessments and third party due diligence because they see it as good business sense: this is when we will know corporates are really committed to addressing these issues. I also expect to see the first corporate prosecutions under the Act in the next year or so, which will give us all a clearer steer on how the courts will interpret the legislation.

Despite the limited prosecutions under the Act, a lot has happened to the business and prosecution landscape that makes ignoring the Act and its requirements a dangerous approach. We hope you find this review and our thoughts for the future informative and engaging and that they will help you to prepare for what lies ahead.

Omar Qureshi

Timeline of key events

30 March 2011
MoJ publishes Guidance on "adequate procedures"/SFO & CPS publish Joint Prosecution Guidance on the Act

December 2010
Largest criminal penalty imposed on a corporate (£30m) (BAE Systems)

8 April 2010
Act receives Royal Assent

March 2010
1st joint settlement agreed between US and UK authorities (Innospec)

September 2009
1st corporate conviction for overseas corruption (Mabey & Johnson)

January 2009
1st FSA fine imposed on a corporate for failings in anti-bribery systems and controls (Aon)

20 November 2008
Law Commission publishes its final report on bribery (its recommendations were later implemented by the Act)

October 2008
1st corporate civil settlement of corruption charges (Balfour Beatty)

September 2008
1st conviction in the UK of bribing a foreign public official (Tobiasen)

19 July 2011
Largest civil recovery order agreed between the SFO and a corporate (£11.2m) (Macmillan Publishers)

1 July 2011
The offences under the Act come into force

21 July 2011
FSA fines Willis £6.895m for failings in its bribery controls

3 November 2011
4 members of the Pakistan cricket team are sentenced for conspiracy to corrupt offences, for fixing test matches at Lords (Majeed, Butt, Asif and Amir)

18 November 2011
1st prosecution under the Act (Patel)

16 March 2012
OECD Report is published

29 March 2012
FSA Review is published

23 April 2012
David Green QC appointed as the new director of the SFO

17 May 2012
MoJ consultation on DPAs is launched

22 June 2012
3 individuals sentenced for conspiracy to corrupt offences in relation to the supply of potatoes to Sainsburys (Behagg, Baxter and Maylam)

3 July 2012
Civil recovery order is made for £1.89m in relation to improper payments to obtain Tanzanian and Kenyan contracts (Oxford Publishing Limited)

6 July 2012
SFO formally opens an investigation into the LIBOR manipulation allegations after recieving special funding from HM treasury

The Act does not have retrospective effect and it takes the SFO an average of 19 months to investigate a case and bring it to charge.[1]

THE FIRST AND ONLY PROSECUTION UNDER THE ACT (TO DATE)

The first person to be prosecuted under the Act was Munir Patel, a court clerk at Redbridge Magistrates' Court, who pleaded guilty to receiving a payment of £500 to avoid inputting details of a traffic summons on a court database. Only one charge was brought against Mr Patel, following a sting by The Sun newspaper, who filmed him accepting the payment, however, the prosecution believed that Mr Patel committed over 53 offences and made around £20,000 over the course of two years. Mr Patel was sentenced to three years' imprisonment for breach of section 2 of the Act, and six years' imprisonment for misconduct in a public office, to be served concurrently. This was reduced to four years on appeal.

1 SFO, "Year in Review 2011-12".

2 Thomas LJ in *R v Innospec* [2010] Lloyd's Rep. FC 462.

THE CURRENT PROSECUTION LANDSCAPE

Perhaps unsurprisingly, we have witnessed a degree of apathy amongst corporates to implementing all of the elements of the procedures suggested in the Guidance. Many corporates have gone as far as drafting policies on bribery, hospitality and related matters, supported by senior management. These are important developments that probably would not have occurred if it were not for the Act. However, far fewer have based this on a risk assessment of the business and fewer still, in our experience, have implemented due diligence procedures in respect of third party relationships. Why is this? Cost, time, effort, cynicism regarding actual prosecution risk?

Whatever the reason, there is broad agreement that an effective anti-bribery programme requires proper risk assesment and due diligence of contractual relationships. Without effective controls, corporates will have no defence under the Act. Even though there has been only one prosecution under the Act so far, it does not have retrospective effect and investigations take time. The evidence suggests that prosecutions and penalties are already on the increase and the first corporate prosecution under the Act may come soon. It would be unwise for corporates to ignore the opportunity to prove their ethical credentials and ensure they have an "adequate procedures" defence available if required.

The financial penalties imposed on, or accepted by, corporate defendants have significantly increased with each passing case, from £2.25m (Balfour Beatty, 2008) to £30m (BAE Systems, 2010). The judges in these cases have also made ever more ominous pronouncements about appropriate sentencing, none more so than Thomas LJ in Innospec, who noted: *"the level of fines in cartel cases is…measured in tens of millions. It is self-evident that corruption is much more serious".*

He was also critical of the lack of uniformity in financial penalties imposed internationally and the increasing use of civil recovery to resolve corporate corruption cases: *"there is every reason for states to adopt a uniform approach to financial penalties for corruption of foreign government officials so that the penalties in each country do not discriminate… against a company in a particular state"; "It will… rarely be appropriate for criminal conduct by a company to be dealt with by means of a civil recovery order… It would be inconsistent with basic principles of justice for the criminality of corporations to be glossed over by a civil as opposed to a criminal sanction. There may… be a place for a civil order, for example, as a means of compensation in addition to a fine".*[2]

Thomas LJ's comments concerning civil recovery have not deterred the SFO from continuing to use this form of remedy instead of criminal prosecution for some corporates who have sought to make use of its self-reporting regime – e.g. Macmillan and Oxford Publishing Limited. In the latter case, perhaps in response to criticism of the way that the SFO had used civil recovery in the past, this settlement involved far greater transparency of the arrangements entered into, including publication of detailed information about the case, the background facts and improper conduct, the basis and nature of the penalties imposed and publication of the claim form and consent order.

In any event, as the recent cases have shown, corporates need to be aware that corrupt behaviour may not just lead to liability under the Act, but could be punished through a number of alternative enforcement routes, including offences under the Companies Act 2006 (for accounting/reporting offences) or money laundering offences under the Proceeds of Crime Act 2002, as benefits obtained through bribery will be "criminal property". Over the last two years, a number of clients have come to us with bribery concerns regarding transactions, particularly overseas transactions. However, sometimes these "bribery" issue are more issues of fraud or money laundering, which are no less serious and which may not have been picked up if it were not for increased awareness resulting from the Act.

A comprehensive and up to date summary of UK prosecutions and settlements for bribery-related offences since 2008 can be found on CMS' Anti-corruption Zone at www.law-now.com/anticorruptionzone.

PROSECUTION FIRSTS

Since the legislative proposals were published, more than 20 bribery-related cases have passed through the courts, including some notable firsts:

- first self-reported case, resulting in a non-criminal sanction (i.e. civil recovery) (Balfour Beatty, 2008);
- first UK conviction for bribery of a foreign public official (Tobiasen, 2008);
- first conviction of a corporate for overseas corruption (Mabey and Johnson, 2009);
- first joint settlement with US and UK authorities (Innospec, 2010);
- first conviction of a UK national for overseas corruption (Dougall, 2010); and
- first civil recovery order against a parent company for dividends representing unlawful gains (Mabey Engineering, 2012).

PROSECUTION CONCLUSIONS

Judicial attitudes to bribery have hardened over the last few years as more cases have been brought to court.

The financial penalties for corporate defendants have significantly increased with each passing case.

Decisions to deal with corporate cases through civil recovery have received criticism from judges, but civil recovery continues to be used in the absence of an attractive alternative.

The review

There have been a number of surveys over the past twelve months assessing public and corporate perceptions of bribery. We summarise below some of the key points of interest.

A survey of 1,200 professionals across a range of industries,[3] revealed that only 53% expected their anti-corruption policies to have been changed to comply with the Act by July 2012. A survey of 100 UK middle managers in April 2012 found that 72% were not aware of the Act at all and of those who were, only 55% felt they had received adequate training on it.[4]

Another survey of 1,700 heads of legal, Chief Financial Officers (CFOs) and compliance and internal audit executives across a sample of major companies in 43 countries found that:[5]

- 47% of CFOs said they would not rule out performing potentially unethical actions, such as giving cash payments (15%), personal gifts (20%) and mis-stating the company's financial performance (4%) in order to retain business.
- Of the UK executives surveyed, 14% said they would provide personal gifts to retain business and 42% agreed management was more likely to cut corners when it comes to appropriate business behaviours in the current economic climate.

While these responses are disappointing, what the surveys do not tell us is the extent to which the Act has already worked to reduce the numbers willing to use inappropriate means to win business.

THE SURVEY SAYS...

47% of CFOs said they would not rule out performing potentially unethical actions.

3 Deloitte LLP webcast, "The Changing Global Anticorruption Legal Landscape", May 2012.

4 Research conducted by Ernst & Young, the results of which were published on their website on 12 April 2012: http://www.ey.com/UK/en/Newsroom/News-releases/12-04-12---72-per-cent-of-middle-managers-still-unaware-of-Bribery-Act.

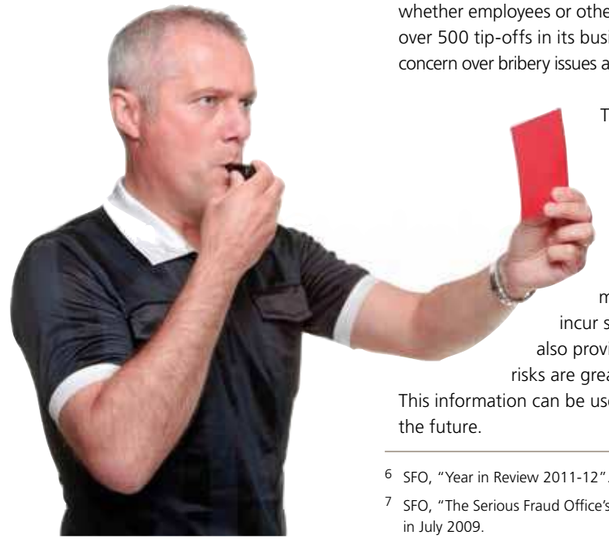
5 Ernst & Young, "Growing Beyond: a place for integrity – 12th Global Fraud Survey", July 2012 (the "**E&Y Survey**").

WHAT ABOUT...

WHISTLE-BLOWING?

The E&Y Survey found that 90% of companies questioned had a confidential whistle-blower hotline for reporting wrongdoing.

The SFO set-up its own whistle-blower hotline in November 2011 to enable individuals, whether employees or otherwise, to report concerns confidentially. That hotline received over 500 tip-offs in its busiest month so far, suggesting significant awareness and concern over bribery issues and a willingness to speak up against wrongdoing. [6]



The SFO's statistic is consistent with our own experience advising clients who receive internal whistle-blower complaints. There has been a dramatic increase in reporting, particularly within multinationals. As public awareness increases and improved corporate policies encourage reporting, companies (particularly those with poor or fledgling anti-bribery controls) are receiving more and more internal reports and face the prospect of having to incur substantial time and cost investigating them. But this is also providing companies with useful data on where their bribery risks are greatest and where weaknesses in their procedures exist. This information can be used to improve controls and prevent issues arising in the future.

6 SFO, "Year in Review 2011-12".

7 SFO, "The Serious Fraud Office's Approach to Dealing with Overseas Corruption", originally published in July 2009.

BUY **NOW,** PAY **LATER**

The SFO has indicated that corporates who acquire businesses with historical bribery issues could face responsibility for them post-acquisition. It recommends that purchaser corporates engage with the SFO when issues are discovered on due diligence ("**DD**") so that an approach to dealing with them can be agreed before acquisition.[7]

Pre-acquisition DD on bribery issues is more important than ever, particularly where the target is involved in riskier jurisdictions, business sectors or with public bodies. This includes DD on the target's anti-bribery procedures to assess its ethical culture and the complexity and cost of integrating the target (and its people) into the buyer's culture and controls environment.

Our experience suggests that some buyers are using anti-bribery DD to their advantage, even using potential bribery-related issues discovered on DD as inappropriate leverage for negotiation, through the threat of reporting the issues to the authorities.

The SFO indicates that if you acquire a company with historical bribery issues, responsibility for those issues could pass to you as the new owner.

Yet the E&Y Survey suggests that almost a third of those questioned never or do not frequently conduct pre-acquisition DD. More generally, the FSA Review found that firms often fail to follow DD procedures and, in particular, most firms do not conduct DD on third parties or consider the bribery risks they pose before contracting with them.

This is particularly concerning in light of recent SFO statements (from former director, Richard Alderman) that it is "very important" that institutional investors and other major shareholders satisfy themselves with the business practices of their investee companies. The SFO has indicated that it will target shareholders with the power to monitor and influence their investee companies' procedures. The recent civil recovery order made against Mabey Engineering (Holdings) Ltd to recover dividends which represented benefits obtained by its subsidiary's criminal conduct is an example of the SFO putting this policy into practice. Whether the new director of the SFO (David Green QC) will take the same approach remains to be seen.

In May 2012, Transparency International UK published guidance on transaction DD, which can serve as a helpful aid to those corporates looking to increase their level of pre-acquisition DD on bribery risks.

The review

Enhanced international co-operation – but is the US DoJ's approach impeding UK efforts to punish wrongdoing?

Over the last two years, there have been a number of joint settlements by defendants with the US and UK authorities. Often, these settlements followed multi-jurisdictional investigations with high levels of information sharing and co-operation between the different investigating bodies. This is an increasingly common feature as bribery issues are often cross-jurisdictional. In some cases, the wrongdoing first came to the attention of the US authorities who passed on information to the SFO to enable an investigation to commence in the UK as well.

First come, first served – UK "double jeopardy" principle may encourage forum shopping and result in the UK authorities getting a smaller slice of the wrongdoing to deal with.

However, often the US authorities appeared to take custody of the bulk of the offending acts and then to extract the largest financial settlement from the defendant corporate. Concerns have been raised in the media, but also by UK judges dealing with the cases in point, that the matters put before them for sentencing and the proposed sentences either did not appear to reflect the full extent of the wrongdoing in the UK, or encouraged forum shopping because of the manner in which the different jurisdictions dealt with the wrongdoing.

This is perhaps linked to the way that the two jurisdictions approach "double jeopardy" – i.e. the rule that a person cannot be tried twice for the same crime. With very limited exceptions, the UK recognises this principle, including in relation to overseas prosecutions relating to the same conduct. The US only recognises the concept in relation to prosecutions in the US. So a person tried and convicted in the UK could still separately be prosecuted for the same conduct in the US, but not *vice versa*.

As a result, the US is willing to – and does – investigate and prosecute conduct that often appears more closely connected with (and would perhaps more appropriately be dealt with) in the UK or other countries. Because the UK system would not allow a separate prosecution here once the criminality had been tried in the US, some defendants favour being dealt with by the US authorities in order to ensure finality, while others don't have any choice. Add to this the DoJ's ability to negotiate and guarantee settlement terms, which the SFO cannot offer, and one can see why some corporates approach the US authorities first, notwithstanding the tough penalties that are often imposed.

The DoJ's forceful prosecution strategy is also aided by better resources and a quicker judicial process, all of which mean that the DoJ can take the lion's share of the penalties because they are able to advance investigations and negotiate settlements more quickly than their UK counterparts.

If this continues in relation to prosecutions under the Act, it could hinder the UK's efforts to punish corruption by perpetuating the perception that the UK is "light touch" in the way it handles such cases.

DOUBLE JEOPARDY

CAN THE SFO BITE AS WELL AS BARK?

Over the past few months, the leadership and attitude of the SFO have changed significantly. Since being appointed its director in April 2012, David Green QC has promised to pursue a more aggressive crime-fighting strategy. In particular, he wants the SFO to focus more closely on prosecuting offences as a stronger deterrent to offending. He recently acknowledged that *"the perception has emerged…that perhaps there is more willingness to compromise than to prosecute. We are primarily a crime-fighting agency, and we've got to remember that".*[8] Corporates need to be aware of this changed attitude.

In the meantime, the SFO's budget has been cut from £51 million in 2008-2009 to £36.8 million this year and is set to fall to £29 million by 2014-15.[9] With the cost of each investigation averaging £669,000,[10] such budgetary constraints may explain the lack of "big ticket" prosecutions and increase in the use of civil recovery orders over recent years. It may also explain the SFO's increasing reliance on investigations conducted by external advisers to the corporates under investigation.

However, it would be a mistake to focus only on the SFO's limited budget. In appropriate cases, the SFO may obtain additional funds from the Treasury for major investigations. They have recently done so in connection with the LIBOR manipulation allegations. In addition, the SFO benefits financially from any criminal proceeds confiscated following a successful conviction. Where it is both the investigating and prosecuting authority, the SFO is able to retain 37.5% of any confiscation amount.[11] It is incentivised to obtain convictions and confiscation of criminal property.

Talk of its demise may have been premature…

There are rumours that Mr Green QC has been appointed to wind down the SFO, having presided over the subsuming of the Revenue & Customs prosecution office into the Crown Prosecution Service. Recent criticism of its decision-making and expertise (most notably in connection with its investigation of Vincent Tchenguiz, where the judge described the SFO's use of flawed search warrants as "sheer incompetence") significantly damaged the SFO's reputation. This followed the departures of a significant number of key staff amid reports of low morale at the agency.

However, those rumours seem premature in light of the recent notable appointments made to its senior staff, particularly the former judge Geoffrey Rivlin QC, to advise it on bringing cases to the court. With an adviser of that pedigree on board, it is hard to imagine similar issues to those which arose in the Tchenguiz investigation occurring again. It is also difficult to see the SFO making a wrong call on when to prosecute or offer a DPA/civil recovery to a co-operating corporate (see further below). Its prosecution and settlement decisions may in fact carry greater weight with, and command the respect of, the judiciary than ever before.

8 David Green QC made these comments during an interview with the Financial Times on 26 April 2012.

9 SFO, "Year in Review 2011-12".

10 *Ibid.*

11 As discussed by Thomas LJ in *R v Innospec* [2010] Lloyd's Rep. FC 462.

SFO director: "We are primarily a crime-fighting agency, and we've got to remember that".

The review

In May 2012, the MoJ launched a consultation on DPAs, with a view to their introduction in 2014 – 2015.[12] DPAs would allow a corporate to reach a court-approved agreement with the prosecuting authorities in relation to "economic crime" (i.e. fraud, bribery or money laundering offences). The corporate would avoid criminal conviction and receive a lower financial penalty than might otherwise have been imposed. The concept is similar to that already established in the US but would involve more judicial oversight.

By enabling prosecutors and the courts to use DPAs where it is "in the interests of justice", it is hoped that this alternative remedy will incentivise corporates to report wrongdoing early, including wrongdoing that might not otherwise ever be discovered. At the same time, it would allow cases to be dealt with more efficiently and effectively and help to avoid lengthy and costly investigations and trials with uncertain outcomes. This could, in turn, free up precious resources for the prosecuting authorities to investigate other matters.

INTRODUCTION OF DEFERRED PROSECUTION AGREEMENTS

DPAs promise a pragmatic solution but the detail needs to be ironed out.

The implementation of DPAs will not be straightforward. Factors such as when a DPA would be an appropriate remedy, whether the need for judicial approval will discourage corporates to engage, what reduction in penalty should be available under the DPA scheme to incentivise engagement and self-reporting, who would be responsible for monitoring compliance, who would resolve any disputes, the confidentiality afforded to the negotiation process, the publication of reasons for allowing the DPA and the public's perception of the agreements are all details that will need to be ironed out.

But if these issues can be resolved, they could offer a genuinely attractive incentive for corporates to engage with prosecutors to resolve problems, when discovered.

[12] MoJ Consultation Paper CP9/2012, "Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements", May 2012.

FSA: ADDITIONAL RISK FOR REGULATED FIRMS

Since 2008, the FSA has imposed increasing fines on companies that fail to implement adequate anti-bribery controls, regardless of whether any bribery offence has occurred.

Those in the financial services industry will be aware that the FSA is increasingly focused on monitoring the response of regulated firms to bribery risks.

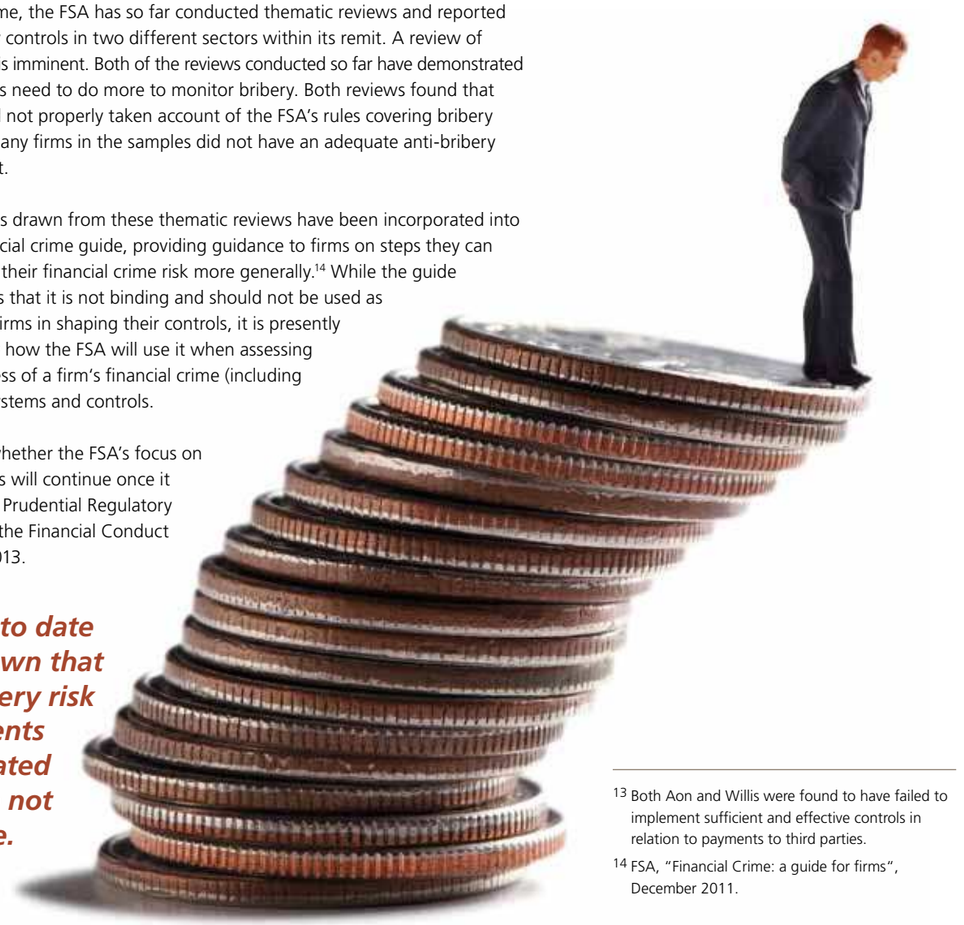
Since 2008, the FSA has imposed increasing fines on companies that fail to implement adequate anti-bribery controls, regardless of whether any bribery offence has occurred. In January 2009, the regulator fined Aon Ltd £5.25m and, in July 2011, Willis Limited was fined £6.895m, both for failings in implementing appropriate controls.[13]

At the same time, the FSA has so far conducted thematic reviews and reported on anti-bribery controls in two different sectors within its remit. A review of another sector is imminent. Both of the reviews conducted so far have demonstrated that many firms need to do more to monitor bribery. Both reviews found that most firms had not properly taken account of the FSA's rules covering bribery controls and many firms in the samples did not have an adequate anti-bribery risk assessment.

The conclusions drawn from these thematic reviews have been incorporated into the FSA's financial crime guide, providing guidance to firms on steps they can take to reduce their financial crime risk more generally.[14] While the guide expressly states that it is not binding and should not be used as a checklist by firms in shaping their controls, it is presently unclear exactly how the FSA will use it when assessing the effectiveness of a firm's financial crime (including anti-bribery) systems and controls.

Time will tell whether the FSA's focus on bribery controls will continue once it is split into the Prudential Regulatory Authority and the Financial Conduct Authority in 2013.

Reviews to date have shown that anti-bribery risk assessments by regulated firms are not adequate.



[13] Both Aon and Willis were found to have failed to implement sufficient and effective controls in relation to payments to third parties.

[14] FSA, "Financial Crime: a guide for firms", December 2011.

The review

THE OECD REPORT SHEDS LIGHT ON HOW JUDGES REGARD THE GUIDANCE

We've all been waiting to see how the courts might interpret the corporate offence under section 7 of the Act. But as there haven't been any corporate prosecutions, it is difficult to know what approach the courts will take. The waters have been muddied further by recent comments from the UK judiciary.

In March this year, the OECD published its 'Phase 3' report, which reviewed the effectiveness of the UK's framework for enforcing its international obligations (the OECD Report).[15]

The OECD Report followed a visit of a review panel to the UK, who conducted interviews and discussions with senior politicians, bureaucrats, judges and practitioners about the UK's implementation of its international obligations in relation to combating bribery of foreign public officials.

The OECD Report raised a number of interesting points.

Hospitality

In relation to the gifts and hospitality commentary in the Guidance, the OECD Report criticised the lack of clarification of the term, "reasonable and proportionate" hospitality and promotional expenditure, including the reference to industry norms. The OECD Report raised concerns that the illustrations and explanations in the Guidance may lead businesses inadequately to address the risk of corruption until court judgments provide more concrete guidance. Not surprisingly the Report was critical of an example used in the Guidance, which suggests that it may be acceptable for a corporate to cover the cost of a foreign public official's flight, accommodation, fine dining and entertainment in New York (including for the official's partner). There was almost unanimous agreement between those involved in the on-site visit that the scenario presented an inadvisable, high-risk activity notwithstanding the Guidance. We also caution our clients against relying on this example as indicative of how the courts may view such conduct.

The Guidance

The sentence, however, that particularly jumps out is the reflection of a number of judges that *"a company could be convicted under the Act even if it acts in accordance with the [Guidance]"*.[16]

The OECD Report noted that judges would likely make limited use of the Guidance at trial. In the view of the judges involved in the discussions, the Guidance was not issued by Parliament and it was of comparable authority to an academic text. Therefore, until clarification is provided by the courts, the full extent of the defence to the corporate offence under the Act will remain unclear. Until such clarification is given, we recommend corporates continue to act at least in accordance with the Guidance.

UK judges commented that: "a company could be convicted under the Act even if it acts in accordance with the [Guidance]", but until further clarification is given, we recommend corporates continue to follow it.

[15] OECD Working Group, "Phase 3 Report Implementing the OECD Anti-Bribery Convention in the United Kingdom".

[16] OECD Report, paragraph 13, page 9.

THE FUTURE: OUR PREDICTIONS

Corporate prosecutions under the Act will reach the courts in the next year and the judgments will help other organisations and their advisors to identify the scope and limitations of the Act and the "adequate procedures" defence.

We foresaw the likely introduction of DPAs two years ago and we expect them to become available in the next two years. However, we also expect that their final form may be rather different to the proposals currently under consultation. In particular, we anticipate that the financial benefits offered under the scheme (in terms of reduced penalties compared to a criminal conviction) may be widened to encourage organisations to self-report.

In recent years the SFO has included the appointment of external monitors as part of the sanction for bribery-related cases – e.g. Balfour Beatty, Mabey & Johnson, Macmillan and, most recently, Oxford Publishing Limited. Given the aggressive stance promised by the SFO in favour of prosecution, the expectations in the DPA consultation that any agreement will include monitoring arrangements and the potential incentive that DPAs could give organisations to self-report, we predict that the use of external monitors is likely to increase in future.

There are rumours that the UK may introduce a bounty to reward whistle-blowers whose information leads to a successful prosecution; whether this will really happen and whether it will be modelled on the US Dodd-Frank regime is far from certain. However, if history is to be repeated, it may not be so surprising if the UK were to watch how the bounty scheme operates in the US over the next few years and, if successful, introduce a modified version here.

There is little doubt that the Act gives UK prosecutors a greater ability to prosecute wrongdoing. Combined with the SFO's and FSA's increasing activity, this may focus the spotlight on the "inequality of arms" between the US and UK authorities as a result of the differing criminal justice systems and approaches to double jeopardy. This has the potential to hamper the UK's efforts to prove its effectiveness in dealing with bribery, particularly where a relevant case has any element which touches the US.

In light of the above and given the increasingly international nature of business and criminality, it is possible that we will see discussions and agreements being reached at an international level to deal with overlapping jurisdiction issues. This will pave the way for greater co-operation between US and UK (and other) prosecutors where there is concurrent jurisdiction. This may provide a means of avoiding the unfairness of prosecutions for the same wrongdoing in multiple jurisdictions and the risk of unequal treatment across jurisdictions.

However, in order for this to be acceptable to US prosecutors, there may have to be a change (i.e. hardening) of attitude towards the level of fines and penalties imposed elsewhere, more closely to reflect the levels seen in the US. A case in point is the recent LIBOR settlement and penalties which saw an FSA fine (before reduction for co-operation) of £89.5m in relation to misconduct encompassing a number of issues of the *"utmost seriousness"*,[17] involving a significant number of employees and occurring over a number of years. This compares to fines and penalties imposed by US prosecutors and regulators of approximately £231.5m, even though the bulk of the conduct in question is understood to have occurred in the UK. A solution to the "inequality of arms" between the US and UK prosecutors, although perhaps inevitable in the long term, will require significant changes to the prosecutorial culture on both sides of the Atlantic.

[17] FSA Final Notice to Barclays Bank Plc dated 27 June 2012.

WHAT NEXT?

If anti-bribery responsibility sits with you, then there are some key themes/findings from this review to act on:

1. Undertake robust risk-assessments within your own organisation and ensure your anti-bribery procedures mitigate those risks.
2. Don't become a statistic: make sure your middle managers (and employees across your organisation) don't operate in ignorance.

CMS can help your management team take proactive steps to establish or evolve your policy and procedural architecture effectively to manage your company's bribery risk profile. Under the Act, should a potential corruption incident occur, your only defence is to demonstrate that your organisation has put in place "adequate procedures" to prevent bribery. CMS can help you do this through our four step programme.

A four-step programme that strengthens "adequate procedures":

1 STEP ONE: RISK ASSESSMENT

- Review your geographic and sectoral footprint and assess the risks that exist.
- Classify employee risk profiles and understand their specific risk issues.
- Review existing policies and procedures to test whether they are "fit for purpose" in light of your unique risk profile.

2 STEP TWO: CREATE OR IMPROVE POLICIES AND PROCEDURES

- Adapt/create policies and procedures to address all likely risks.
- Create multi-year activity roadmap tying together communication and training practices and identifying required internal or external resources, all kept within pre-agreed budgets and timelines.

3 STEP THREE: COMMUNICATION AND TRAINING

- Design communication strategies from your organisation's leaders to ensure messages are compelling and regularly repeated and promoted. Find opportunities to engage with your employees in discussions on these issues.
- Provide targeted and high-impact live or e-learning training solutions that address your specific risk profiles across your business, be it at Board level or middle management e.g. sales representatives or procurement specialists.

4 STEP FOUR: AUDIT

- Review and update policies regularly to align with any changes in law, as well as your company's shifting risk profile.
- Review and update contract terms and clauses with suppliers and customers to mitigate bribery risks.
- Create a detailed overview of the steps taken against the risk of bribery (as evidence to be relied on if necessary), as well as an outline of suggested medium/long-term improvements.

HOW CAN WE HELP?

Our lawyers advise on all aspects of bribery law and related risks issues, including money laundering and fraud. We have specialist, in-depth experience of advising on and conducting complex internal and external investigations and in dealing with regulators and prosecutors where problems are identified, across a range of industries. We assist clients in developing procedures to meet the requirements of the Bribery Act, as well as other legal and regulatory obligations, and can help implement improvements to systems in any areas where risks have been identified. We work with our clients to understand and manage risk, protect reputation, and put robust procedures in place.

As our team regularly advises clients in connection with internal and external investigations, they see first hand where client processes have failed or fallen down, or where gaps in those processes have enabled rogue staff and others to exploit them for improper ends. This experience informs our advice to clients in developing robust anti-bribery controls and procedures.

We also assist clients in developing and delivering training programmes and seminars, including bespoke training programmes to form part of an "adequate procedures" model. This also includes developing e-learning training solutions for global clients with large international workforces.

KEY CONTACTS

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Anti-CorruptionZone

www.law-now.com/anticorruptionzone

The Anti-Corruption Zone offers you a "one-stop shop" for useful legal resources, information on training, the new UK Bribery Act and the latest news on UK corruption issues.

Law-Now is our free email alert service. It gives you expert commentary and analysis on key legal developments affecting your business. Choose from a selection of topic areas for your email alerts and access the full Law-Now archive on our website at www.law-now.com.

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