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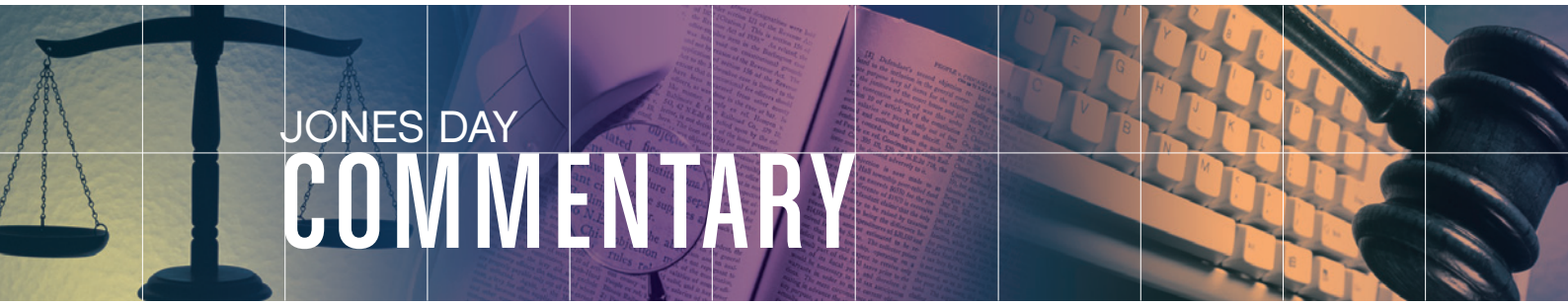

BRIBERY AND CORRUPTION REFORM: PROPOSED MODERN UK LAWS TARGET COMPANIES AND LLPS

After blowing hot and cold for more than 10 years over the need to radically reform and modernise the UK's criminal anti-bribery and corruption laws, the Government finally appears to be moving towards a simplified body of new laws that would include unlimited fines for a new corporate criminal offence of failure to prevent bribery and corruption at home and abroad. In the lead time before the introduction of these new criminal laws, potentially affected businesses should be reducing their risk exposure by beginning to implement anti-bribery and corruption procedures now.

INTRODUCTION

Whilst UK anti-corruption laws have largely evolved to combat abuse of powers by public officials, international anti-corruption initiatives have gained considerable momentum in targeting corporations and corruption in business.

A very recent and high-profile example of the growing global anti-corruption crackdown on corporations by prosecutors and regulators, including fines in two different jurisdictions, involves the case of the German engineering group, Siemens. On 15 December 2008, after a year of negotiations and plea bargaining, the group reached a settlement with the US Department of Justice in the amount of approximately $450 million in relation to charges of bribery and attempts to falsify corporate records. At the same time, the group agreed to pay $350 million to the Securities and Exchange Commission in relation to similar charges under the Foreign Corrupt Practices Act 1977 ("FCPA 1977"). In addition, Siemens agreed to pay a fine of €395 million as part of its settlement with the Munich prosecutor in connection with corruption charges involving the failure of the former board to fulfil its duties of supervision.

Bribery has been described by the English Court as "an evil practice which threatens the foundations

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of any civilised society",[1] and which "corrupts not only the recipient but also the giver of the bribe".[2] Given these judicial sentiments, one would expect to find a modern and efficient set of bribery and corruption laws to combat this "evil". However, UK criminal law has long been out of date; it provides for corruption offences in three statutes dating from the 19th and early 20th centuries, whilst the common law offence of bribery of a person in public office is even older. Current UK criminal law is also fragmented and complex.

SLOW PACE OF UK LAW REFORM

To date the UK has been very slow to catch up in seeking to align itself with international developments. Indeed, it has been sharply criticised by the Organisation for Economic Co-operation and Development ("OECD")[3] for its failure to bring its anti-bribery laws into line with its international obligations under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "Convention"). The OECD has stated that it is "disappointed and seriously concerned" about the UK's continued failure to address deficiencies in its laws on bribery of foreign public officials and on corporate liability for foreign bribery[4], and has continually urged the rapid introduction of new legislation.

Although the UK ratified the Convention in December 1998, which then came into force on 15 February 1999, it has so far failed to prosecute successfully any bribery case against a company. At the time of the Convention's ratification, the Law Commission recommended updating the UK's existing law and consolidating the existing offences in one statute providing for new offences (*Report 248 – Legislating the Criminal Code: Corruption, 1998*), which eventually led to a draft Bill being published in March 2003. However, the Bill was heavily criticised, subjected to a further consultation process, and then quietly withdrawn in early 2007.

US ANTI-CORRUPTION LAWS: TRAILBLAZING

As a result of SEC investigations in the mid-1970s, more than 400 US companies admitted making questionable or illegal payments in excess of $300,000,000 to foreign government officials, politicians and political parties. As a result, Congress enacted FCPA 1977 to bring a halt to the bribery of foreign officials and to restore public confidence in the integrity of the US business system.

In stark contrast to the pace of reform in the UK, Congress commenced negotiations with the OECD in 1988 to obtain the agreement of the US's major trading partners to enact legislation similar to FCPA 1977. Therefore, the Convention was substantially driven by the US in order to establish international measures similar to those contained in FCPA 1977. Congress was motivated by its concern that following the passage of FCPA 1977, US companies were operating at a disadvantage to foreign companies which routinely paid bribes and, in some countries, were permitted to deduct the cost of bribes as business expenses against their taxes. When the US subsequently ratified the Convention in 1998 it made significant amendments to FCPA 1977, including an extension of its jurisdiction to foreign individuals or companies acting in furtherance of corruption whilst in the US. For example, the provisions of FCPA 1977 cover any overseas company that has traded on an exchange or raised capital in the US.

The significant extra-territorial reach of the US authorities is no more evident than in a recent case in which, on 8 January 2009, the US Department of Justice filed a forfeiture action against accounts located in Singapore that allegedly contained the proceeds of a conspiracy to bribe public officials in Bangladesh. According to the US authorities this action "shows the lengths to which US law enforcement will go to recover the proceeds of foreign corruption" and that the US would continue "to use [its] forfeiture laws to recapture the illicit facilitating payments .....".[5]

1 *Att. Gen. 4 Hong Kong v. Reid* [1994] 1 AC 324 at 330-1, per Lord Templeman.
2 *Daraydan Holdings Ltd v. Solland International Ltd* [2005] Ch 119 at paragraph 1, per Collins J.
3 OECD Working Group on Bribery Reports: 17 March 2005 and 16 October 2008.
4 OECD Working Group on Bribery Report: 16 October 2008.
5 Press release, US Department of Justice (9 January 2009): www.usdoj.gov .

THE UK'S LATEST PROPOSALS FOR REFORM

As if stung by the recent OECD criticisms, the Law Commission published its latest recommendations (*Report 313 -Law Com*) for reforming the law of bribery on 20 November 2008. The Law Commission recognised that the effective combating of corrupt practices requires an effective law of bribery, whilst current UK laws are riddled with uncertainty and in need of rationalisation.

At the heart of the Law Commission proposals, is the replacement of the patchwork of offences with the following:

- two general offences of bribery, one concerned with giving bribes and one concerned with taking them;
- a new offence of bribing a foreign public official; and
- a new corporate offence applicable to companies and LLPs of negligently failing to prevent bribery by an employee or agent.

It is also recommended that the law of bribery be extended to cover foreign nationals who reside in the UK or who conduct their business in the UK.

Attached to the Law Commission Report, is a draft Bill; and at the time of its publication the Justice Secretary (the so-called "anti-corruption champion") welcomed the Report and stated that he intended to bring forward a draft Bill for pre-legislative scrutiny in the near future. At present, it is proposed that the Government's draft Bill will be "informed" by the recommendations of the Law Commission.

THE CURRENT LAW

The Common Law Offence. The common law offence of bribery entails "the receiving or offering [of] any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity"[6]. Therefore, one of the parties involved must be the holder of a public office but, the offence will be committed whether or not the intended bribe was actually given. A "public officer" is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public.[7] Finally, the payer of the bribe ("P") must intend to influence the behaviour of the recipient ("R") and incline R to act "contrary to the known rules of honesty and integrity".[8] Although this includes paying R to act in breach of his or her duties of office, this may not be a necessary feature; for example, it would be sufficient that P, charged with attempting to bribe a Justice of the Peace, had intended to produce any effect at all on the Justice's decision.[9]

In practice, the common law offence of bribery is rarely charged by the Public Prosecutor, because there is a significant overlap with the existing statutory criminal offences. The primary statutes are the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916. All of these statutes are considered to be both complex and inadequate to combat the changes in both political and commercial practice that have developed over the many years since their enactment.

The Public Bodies Corrupt Practices Act 1889 (the "1889 Act"). The 1889 Act is restricted to corruption involving local Government officials. Section 1 of the 1889 Act created two complex offences which can be committed by either the giver (P) or the taker (R) of a bribe. In essence, the 1889 Act covers one or more persons who should "corruptly solicit or receive, or agree to receive … any gift, loan, fee, reward, or advantage whatever as an inducement to, or reward for … doing or forbearing to do anything", or "corruptly give, promise, or offer any gift, loan, fee, reward, or advantage whatsoever … as an inducement to or reward for … doing or forbearing to do anything …", connected to the public body in question. However, the terms "gift", "loan", "fee" and "reward" are not defined, nor is the term "corruptly", which has been held not to mean dishonestly but "purposely doing an act which the law forbids as tending to corrupt".[10] It is clear from the definition of "public body" in the 1889 Act,[11] that it is limited to local bodies and does not include the Crown or Government departments.

6 Russell on Crime (12 ed., 1964), 364.
7 *R. v. Whitaker* [1914] 3 KB 1283, at 1296.
8 Russell on Crime (12th ed 1964), supra.
9 See *R. v. Gurney* (1867) 10 Cox CC 550.
10 *Cooper v. Slade* [1858] 6 HL 746; approved in *R. v. Godden-Wood* [2001] Crim LR 810.
11 Section 7 (as amended by the Anti-Terrorism, Crime and Security Act 2001); see also Section 4(2) of the Prevention of Corruption Act 1916, extending the definition to encompass "local and public authorities of all descriptions".

The Prevention of Corruption Act 1906 (the "1906 Act"). The 1906 Act extended the anti-corruption legislation to the private sector by making it an offence for an agent to act corruptly in relation to a principal's affairs.[12] It also extended the law to cover central Government officials.

As with the 1889 Act, the prosecution does not need to establish dishonesty.[13] Recent prosecutions have included a manager receiving approximately £900,000 in return for placing substantial orders on behalf of his company, and a ministry of defence official who received more than £200,000 from a US company for the provision of information pertaining to an arms contract.

The Prevention of Corruption Act 1916 (the "1916 Act"). As well as broadening the definition of "public body" and increasing the maximum sentence for bribery in relation to contracts with the Government or public bodies (to 7 years), the 1916 Act introduced the presumption of corruption.[14] The presumption shifts the burden of proof so that the defence must prove (on a balance of probabilities)[15] that a given payment was not corrupt. It applies only to payments made to employees of the Crown, Government departments or public bodies, and not to agents who are not so classified, such as employees of private companies engaged in contracted-out work or private sector secondees to Government departments. It also only applies to cases involving contracts.

The Anti-Terrorism, Crime and Security Act 2001 (the "ATCSA 2001"). Following the acts of terrorism on 11 September 2001, ATCSA 2001 was introduced, including provisions that criminalized corruption overseas. Since 14 February 2002, UK Courts have had power, under Part 12 of ATCSA 2001, to impose criminal sanctions under UK law in relation to corrupt acts involving UK citizens or companies, even if those acts occurred overseas and even if payments were made to agents of overseas principals.[16]

References to public bodies in the 1889 and 1916 Acts were amended to include "any body which exists in a country or territory outside the United Kingdom".[17] It is also immaterial that R's functions have no connection with the UK and are carried out in another country.[18]

The presumption of corruption does not apply to anything that would not have been an offence prior to Part 12 coming into force.[19]

PROBLEMS WITH THE CURRENT LAW

There are many unsatisfactory features of UK criminal law arising from the general lack of clarity in the midst of a complex body of law. There is not even a consistent definition of "bribe" which is defined as "undue reward" under the common law, "gift, loan, fee, reward or advantage" under the 1889 Act, and "gift or consideration" under the 1906 Act. There is also an imperfect distinction between public and private sector bribery; the 1889 Act is confined to bribery of public officials, whereas the 1906 Act applies to bribery of "agents" regardless of the sector in which they are employed. In the past, this has led to procedural errors in the charging of suspects such as an employee of the Home Office Immigration Department who was wrongly charged under the 1889 Act because, although he was working in the public sector, the 1889 Act does not encompass bribery of Crown employees.[20]

As for those who are capable of being bribed, at common law R must be a public officer, whilst under the 1889 Act R must be a "member, officer, or servant of a public body". Even if the two expressions are interchangeable, they remain in sharp contrast with the "agent" terminology used by the 1906 Act, which applies across both public and private sectors.

12 Section 1(1).
13 See *Cooper v. Slade* (supra), approved in connection with the private sector in *R. v. Harvey* [1999] Crim LR 70.
14 Section 2.
15 *R. v. Carr-Briant* [1943] KB 607.
16 Section 109.
17 Section 7 of the 1889 Act.
18 Section 108 of ATCSA 2001.
19 Section 110.
20 *R. v. Natji* [2002] 1 WLR 2337.

As has already been seen above, both the 1889 and 1906 Acts require the Defendant to have acted "corruptly", but neither provides a definition. It has taken many years for the UK Courts to decide that "corruptly" does not mean "dishonestly" but rather "doing an act which the law forbids as tending to corrupt".

Perhaps most surprisingly of all, although ATCSA 2001 extended the UK Courts' jurisdiction to acts of bribery committed abroad by UK nationals or bodies incorporated under UK law, this extension does not apply to foreign nationals committing bribery offences abroad, even if those nationals are domiciled or habitually resident in the UK. It is considered to be unfair that persons who reside and conduct their business in the UK should not be vulnerable to prosecution when UK nationals would be vulnerable to prosecution for the same behaviour.

PROPOSED NEW OFFENCES

As part of the proposed bribery and corruption law reform, the common law offence of bribery, together with the whole of the 1889, 1906 and 1916 Acts, and Sections 108 to 110 of ATCSA 2001, would be repealed. These offences would essentially be replaced by four new offences: two general offences of bribery relating to the Payer and the Recipient; one specific offence of bribing a foreign public official; and a new corporate offence covering companies and limited liability partnerships.

First General Offence – Payer (P). Under the first general offence P will be guilty if, directly or indirectly, he offers, promises or gives an advantage to another, intending it to induce another person to do something improper, or to reward someone for behaving improperly (see below).

Second General Offence – Recipient (R). Under the second general offence R will be guilty in a number of ways: if he requests or accepts an advantage, intending that he or another should in consequence behave improperly or the request or acceptance itself constitutes improper behaviour (see below); if R asks for a reward for improper behaviour; or R behaves improperly in anticipation or in consequence of requesting or accepting an advantage.

Matters applicable to the General Offences. It is proposed that performance of a function or activity (business, professional or public) will be "improper" if it is carried out in breach of one or more expectations (being "expectations" that a person of moral integrity would have) that someone will perform a function or activity in good faith or impartially; or an expectation created by the fact that someone is in a position of trust.

It is also proposed that the general offences will apply to acts done outside the jurisdiction, if they would have amounted to an offence within the jurisdiction and the person accused is, among other possibilities, a British citizen, an individual ordinarily resident in the UK, or a body incorporated in the UK. An individual director, manager or equivalent person who consents to or connives at the commission of one of these offences will commit the relevant offence. Upon conviction, a sentence of up to ten years imprisonment may be imposed.

Bribery of a Foreign Public Official. There will be a separate offence of bribing a foreign public official ("FPO"), being an individual who holds a legislative, administrative or judicial position of any kind (whether appointed or elected) in a country or territory outside the UK, or exercises a public function for or on behalf of a country or territory outside the UK, or for any public agency or enterprise of that country or territory, or is an official agent of a public international organisation.

The offence will be committed if P offers or gives any advantage not legitimately due to an FPO or to another person with the FPO's assent. P must offer or give the advantage (a) intending to influence the FPO in his or her capacity as an FPO, and (b) intending to obtain or retain business. If the law applicable to the FPO permits or requires the FPO to accept an advantage, that advantage would be "legitimately due" and therefore exonerate P. It will also be a defence for P to show that he or she reasonably believed that the law permitted or required the FPO or another recipient with the FPO's assent to accept the advantage, taking into account any steps taken by P to investigate the true position.

The New Corporate Offence. The second proposed new specific offence is the offence by a company or limited liability partnership whose registered office is in England or Wales, of negligently failing to prevent bribery committed by a person performing services on behalf of the organisation in question.

The reason why it is proposed that traditional criminal liability should be extended only as far as the creation of an offence of negligently "failing to prevent" bribery committed by a person performing services on behalf of the organisation in question, is because the Law Commission believes that where larger organisations operating nationwide and worldwide are concerned, it is such failures that are a key factor in the perpetuation of the practice of bribery. This is especially (but not solely) the case when bribery takes place in environments where there is, or is believed to be, a "culture of bribe taking".

A company or limited liability partnership (C) will be guilty of the proposed new offence, punishable by unlimited fine, if: someone acting on C's behalf commits bribery; the bribe was in connection with C's business; and someone connected with C, whose functions included preventing bribery being committed by the persons acting on C's behalf negligently failed to prevent the bribery. It will be a defence for C to show that there were adequate procedures in place designed to prevent persons committing bribery, but not if the person or persons whose responsibility it was to prevent the bribery was a director, manager or equivalent person within the company.

Punishment for corporate failure to have adequate procedures in place designed to prevent bribery and corruption has recently been highlighted in the civil sector. On 8 January 2009, the Financial Services Authority fined Aon Limited £5.25 million for its failure, in breach of Principle 3 of the FSA's Principles for Businesses, to take reasonable care to establish and maintain effective systems and controls to counter the risks of bribery and corruption associated with making payments to overseas firms and individuals. Between 14 January 2005 and 30 September 2007, the FSA found that Aon had failed to properly assess the risks involved in its dealings with overseas firms and individuals who helped it win business and failed to implement effective controls to mitigate those risks. As a result of a weak control environment, the firm had made various suspicious payments amounting to approximately US$7 million to a number of overseas firms and individuals. This is the largest financial crime related fine imposed by the FSA to date and it sends a clear message to the UK Financial Services industry that it is completely unacceptable for a regulated firm to conduct business overseas without having in place appropriate anti-bribery and corruption systems and controls.

Whether or not the new corporate criminal offence outlined in the Law Commission's Report becomes law in due course, therefore, companies that conduct investment business under the financial services regime will be exposed to substantial fines for failure to install adequate anti-bribery and corruption procedures.

PLANNING FOR THE FUTURE

It should be expected that in light of the momentum in the OECD's efforts to achieve consistent global anti-bribery and corruption measures, the extensive further work carried out by the Law Commission in its latest Report, and the developments in the civil regulatory regime, the proposed new criminal regime will take effect in identical or very similar form to the Law Commission's proposals in the relatively short term.

Whether or not a new Bribery Act comes into force this year or next, it is important for potentially affected companies to make use of the lead time to install adequate procedures. To this end, there will need to be suitable ethics and compliance programmes, structured oversight and scrutiny of all business arrangements including the processing of payments, as well as proper employee training programmes. Jones Day has considerable experience in assisting clients in the establishment and implementation of compliance programmes, both in Europe and the United States.

LAWYER CONTACT

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