Bribery Act 2010: The implications for M&A, joint venture and finance transactions

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Much has been written about the impact of the United Kingdom's forthcoming anti-corruption legislation, the Bribery Act 2010. Organisations which do business in the UK have been exhorted to prepare well in advance of the Bribery Act coming into force by making sure their internal anti-bribery and anti-corruption policies are compliant with the Act. The UK legislation was originally scheduled to come into effect in April 2011, but this has recently been delayed until "three months after" updated UK government guidance on the Bribery Act has been published (there is currently no confirmed date for the guidance, although we still expect it to be published in the first half of 2011).

Businesses should also be aware, however, of the far-reaching implications of the Bribery Act on mergers and acquisitions, joint ventures and finance transactions. The Bribery Act has a broad, extra-territorial application and may be relevant even where the transaction and/or the parties have no obvious connection to the UK.

Bribery Act 2010 — a summary

The UK legislation is noteworthy in a number of respects. First, it criminalises bribery which takes place in a private, commercial context as well as bribery in the public sector or to government officials. Second, it becomes a criminal offence to take, as well as to offer, a bribe. Third, the legislation introduces a strict liability criminal offence for businesses which fail to prevent acts of bribery made on their behalf.

Offences under the UK Bribery Act

The general offences

There are three "general offences" which can be committed by individuals with a close connection to the UK (i.e., UK nationals or residents) or organisations incorporated in the UK:

- Offering, promising or giving a bribe.
- Requesting, accepting or agreeing to receive a bribe.
- Bribing a foreign public official.

Individuals and organisations based outside the UK can still be liable for prosecution under the general offences if any part of the bribe takes place within the UK. This is a potentially wide-ranging jurisdiction — for example, if a telephone call offering or accepting a bribe originates from the UK or if the payment is paid into or via a bank account in the UK.

The corporate offence

There is also a "corporate offence" which, as the name suggests, can only be committed by commercial organisations. The corporate offence will be committed where a business fails to prevent bribery by an "associated person" for the benefit of the business. This offence is particularly far-reaching. An organisation which carries on a part of its business in the UK can be automatically liable under this offence if anyone who performs services for the organisation (e.g., employees, agents, consultants, subsidiaries or suppliers) makes a bribe anywhere in the world for the organisation's benefit. It does not matter if the part of the business operating in the UK is entirely unconnected to the bribery. There is a single, statutory defence to the corporate offence, whereby an organisation can escape liability by showing that it had "adequate procedures" in place to prevent such bribery.

The implications for M&A, joint venture and finance transactions

The possibility that a target company or counterparty could be subject to a significant corruption investigation has business, as well as reputational, implications. The levels of fines under the Bribery

Act are expected to be substantial. In addition, there is a potential requirement to disgorge any benefit derived from a bribe which may have a significant impact on short-term financial stability. The impact of the Bribery Act is not limited to corporate transactions. Providers of deal finance should take an interest, as ABAC issues affect both the value and risk profile of any proposed transaction. For lenders, there are issues around adequacy of security and/or rights to accelerate loans in the event of a major ABAC issue. Put simply, there is a significant commercial risk which needs to be assessed when acquiring, partnering with or financing a party subject to the Bribery Act.

Managing commercial risk

To manage that risk, businesses need to ensure they have a full pre-completion understanding of a potential counterparty's approach to ABAC issues. Enhanced anti-corruption due diligence should go well beyond establishing whether the counterparty has ABAC policies in place. Questions should focus on how such policies are implemented, monitored and audited in practice. One potential marker of effectiveness is the number of matters that have been referred to management under an ABAC policy, over a period of at least three years (and the consequent approach of management to such matters so as to ensure ABAC compliance). Although accepting levels of corruption vary between industries and not all countries have implemented legislation such as the Foreign Corrupt Practices Act or UK Bribery Act, if few or no matters have been referred, this may suggest that the policy is simply not effective in practice. Likewise, if a business has no records to demonstrate the matters referred under its ABAC policies, the conclusion may be that its procedures are ineffective.

Where limited due diligence information is made available, or "red-flag" information comes to light pre-acquisition, businesses should consider whether to continue in the light of the risk of future prosecution under the Bribery Act. Another approach is to make completion conditional on the target or counterparty implementing a full ABAC compliance programme, including training for all staff and investigation of and/or dismissal of persons associated with any egregious conduct identified, or aligning any seller earn-out remuneration with successful completion of a more detailed ABAC review.

Post-transaction issues

If it is not possible to complete or carry out substantial due diligence (e.g., in a takeover situation), a detailed ABAC review must immediately commence post-acquisition. Where issues are identified, businesses should be aware of the different approaches of the Department of Justice (the primary enforcing agency of the FCPA) and the Serious Fraud Office (equivalent under the Bribery Act). Both the DoJ and SFO have made public statements to the effect that where a business identifies ABAC issues post-acquisition, self-reports them and has a remedial plan in place, there is a strong presumption that the company should be given a period of time to sort out the problems without fear of prosecution. In the US, this is achieved by use of the DoJ opinion procedure, which creates a binding commitment by the DoJ not to prosecute in certain circumstances. In the UK, there is no such process and the ability to obtain official and binding comfort is very limited. Although an informal indication from the SFO that it will not prosecute post-acquisition is obviously of great assistance, there remains an unavoidable risk of prosecution under the Bribery Act.

Special considerations for joint venture partners

Joint venture partners should also consider their positions carefully (where the joint venture is subject to the Bribery Act). As in the US, there is a clear potential liability for joint venture partners who have operational control of the joint venture. Recent (unattributed) comments by the SFO, however, suggest that corrupt conduct by anyone providing services to the joint venture entity will make all partners to the joint venture potentially liable under the corporate offence, irrespective of their role in the joint venture.

Whistle-blowers

Finally, even where a transaction does not proceed, there are ABAC considerations. In extreme cases, businesses may have a legal obligation to report corrupt conduct identified to the UK authorities under the Proceeds of Crime Act 2002. In addition, both the DoJ and SFO have emphasised that whistle-blowers are an important resource which help to level the commercial playing field for companies which have strong cultures of ABAC compliance. The role of whistle-blowers certainly looks set to increase in the US, with the introduction of a significant bounty for whistle-blowers under the FCPA. Where a business withdraws from a transaction due to clear ABAC concerns and the authorities subsequently become aware of this, the business may well be contacted by the authorities for information and/or explanations. It is important to keep a full and careful audit trail of any decisions relating to these issues and the information those decisions were based on, for this reason.

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