BRIEFING

TWO SIDES OF THE SAME COIN? THE BRIBERY ACT AND THE FOREIGN AND CORRUPT PRACTICES ACT

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INTRODUCTION

The US Foreign and Corrupt Practices Act 1977 ("FCPA") has served as the foundation for international efforts to confront bribery. It influenced the far-reaching scope of the UK's recent Bribery Act 2010 ("BA"), and in particular its approach to foreign corruption. In key respects, however, the BA goes further than the FCPA. It addresses domestic as well as international bribery. It criminalises facilitation payments. Most importantly, it broadens corporate criminal liability by creating a separate offence of failing to prevent bribery. Consequently, it is possible for a multi-national company to avoid liability under the FCPA but still be caught by the BA.

JURISDICTION

The BA creates four offences:

- Giving a bribe;
- Receiving a bribe;
- Bribing a foreign official; and
- A corporate entity's failure to prevent bribery.

In the first three instances the UK court will have jurisdiction if any part of the offence took place in the UK. In addition, jurisdiction also extends to an act committed outside the UK where the perpetrator has a "close connection" to the UK. This requires that a person was a British citizen at the material time, or was ordinarily resident in the UK, or that a body was incorporated in any part of the UK.

In respect of the corporate offence of failing to prevent bribery, the BA applies to bodies or partnerships either incorporated in the UK, or which carry on part of their business in the UK, irrespective of where the offence was committed.

According to government guidance, the term "part of a business" applies to organisations with a demonstrable business presence in the UK. The fact a company's securities are admitted to the UK Listing Authority's Official List so that it can trade on the London Stock Exchange does not in itself bring that company within the reach of the Act. Equally, the existence of a UK subsidiary would not bring a parent company within the scope of the Act. It is important to note, however, that this guidance does not bind the courts and ultimately the meaning of this term will be for them to decide.

The FCPA's ambit is narrower than the BA's since it only deals specifically with the bribery of a foreign official. The jurisdictional reach of this offence is complex. The FCPA distinguishes between three types of persons or companies:

(i) "issuers" – any company with a class of securities listed on a national securities exchange in the US. Officers, directors, employers, agents and stockholders acting on behalf of the "issuers" will be caught by the Act.

(ii) "domestic concerns" – a citizen, national or resident of the US, and any corporation organised under US law, or with its principal place of business in the US. Again, officers, directors, employers, agents, stockholders are covered.

(iii) The FCPA anti-bribery offence applies to both "issuers" and "domestic concerns" if they make use of US mail or any form of "interstate commerce" in furtherance of an offence. "Interstate commerce" includes any trade, transport or communication between States or between a foreign country and any State. Consequently, a single telephone call in furtherance of a bribe which goes to, from or through the US will bring the offence within the jurisdiction of the FCPA.

(iv) Other foreign nationals or entities will also be caught if they engage in any act in furtherance of an offence while in US territory. Again, their officers, directors, employers, agents, and stockholders may be subject to the FCPA.

In addition to this framework, following an amendment to the FCPA, all US companies and persons are now liable even if they act entirely outside the US.

Moreover, anyone who aids and abets or conspires in the commission of such an offence is also liable even if they would not otherwise fall within the scope of the FCPA. For example, the US will have jurisdiction to prosecute *all* conspirators if just one of them is an issuer.

In light of the broad jurisdictional ambits of both Acts, the jurisdictions of the US and UK will frequently overlap. This has clear significance. An offender may prefer to seek an accommodation with one authority in preference to the other. As we shall see, the flexibility enjoyed by the US Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC") in plea bargaining may well influence this decision. Then any subsequent prosecution brought by the UK could well find itself barred under double jeopardy principle.

OFFENCES UNDER THE BA

Giving and receiving bribes

The BA makes it an offence to offer someone an advantage (financial or otherwise) intending to induce them to perform a particular function improperly, or to reward them for doing so.

It is a separate offence to request or accept an advantage intending that a function should be performed improperly, or as a reward for improper performance. It is also illegal to perform some

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function improperly in anticipation of being offered such a bribe.

These offences only apply to the following functions:

(i) A function of a public nature;

(ii) A business activity or employment;

(iii) An activity on behalf of a body of persons, whether corporate or unincorporated – e.g. a private sports club.

A function which falls into one of these categories will only be caught by the Act if there is an expectation that it be performed in good faith, or with impartiality, or that the person performing it will act in accordance with a position of trust. These terms will frequently overlap but are nonetheless distinct. For example, whilst a judge must act impartially, a referee on a CV would only be expected to act in good faith.

Bribing a foreign official

The BA makes it a separate offence to offer an advantage to a foreign official, or someone else at his request, intending to influence him in his capacity as a foreign official. The person must intend by so doing to obtain or retain a business advantage. No offence, however, is committed if the payment is permitted under local law.

A foreign official is broadly defined and includes legislative, administrative and judicial personnel who exercise public functions. It also applies to officials or agents of public international organisations. The Act makes no reference to foreign party officials, although of course in some countries public functions may be exercised by political functionaries.

Corporate liability

An incorporated body will be liable for any of the above offences if they are committed with the "consent or connivance" of a senior officer or a person acting in that capacity. In such a case both the company and the senior officer in question may be personally liable for the offence.

In addition, the BA criminalises a company which fails to prevent someone associated with it from committing bribery. The offence requires that the associated person bribes another person intending thereby to obtain a business advantage for the company. If this is established, the company will be guilty unless it can show it had "adequate procedures" in place designed to prevent such conduct.

A person is associated with the company if he performs services for the company – it does not matter if he does so as an employee, an agent or a subsidiary. In the case of an employee, however, the Act presumes he is associated with the company unless the contrary is proved.

OFFENCES UNDER THE FCPA

The FCPA creates a specific offence of bribing a foreign official. It also contains separate accounting offences. Although these are not specific to bribery, they aim to prevent off-the-books accounting which may disguise corrupt payments. As such they constitute an important weapon in the DOJ and SEC's efforts to combat corruption.

The specific anti-bribery offence prohibits corruptly offering, promising or authorising payment to a foreign official in order to influence his official acts or to secure any improper advantage, so as thereby to obtain or retain business. This "business purpose test" has been broadly interpreted. It includes indirect means by which an individual might obtain a business advantage over his competitors. For example, payments made to obtain favourable tax treatment or to reduce customs duties have been held to satisfy this test.

In order to show a payment was made "corruptly" the prosecution must show it was intended to induce the recipient to misuse his official position. As is the case in relation to the BA, the term "foreign official" is widely drawn. It includes officers or employees of any department, agency or "instrumentality" of a foreign government or a public international organisation. By this means the offence covers officials in state owned or controlled entities. Unlike the BA, however, it also specifically includes political party officials, and candidates for political office.

The anti-bribery offence can be committed by both individuals and corporate entities. In the case of the former, however, the prosecution must prove the person acted "wilfully" – i.e. that the defendant acted with the knowledge that his conduct was unlawful. It does not matter if the defendant knew specifically that his conduct violated the FCPA itself.

The FCPA creates two defences. The burden for each rests on the defendant. Firstly, no offence will be committed if the payment made was lawful under the written laws or regulations of the foreign official's country. Secondly, the "bona fide expenditure" defence applies to reasonable expenses paid to a foreign official, which directly relate to the promotion, demonstration or explanation of a company's services or its performance of an existing contract.

As well as influencing the BA's approach to combating foreign official bribery, the New Zealand Crimes Act 1961 as amended, the Australian Criminal Code Act 1995, and the Canadian Corruption of Foreign Public Officials Act 1998 also draw heavily on the FCPA approach. It is anticipated that the shape and scope of the BA offence will draw significantly on this body of international case law.

THE BA AND FCPA APPROACHES TO FACILITATION PAYMENTS

The FCPA defines facilitation payments as payments made in order to expedite routine, non-discretionary governmental acts – e.g. processing visas, providing police protection, supplying utilities. Such payments do not breach the FCPA anti-bribery provisions. They are also permitted by Canada, Australia and New Zealand.

The BA, however, does not make any such distinction. As a consequence it imposes significant additional restrictions on companies and individuals over and above their obligations under the FCPA. Of course, it may often not be

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in the public interest to pursue individuals or organisations which make such small payments. In the course of the Act's passage through Parliament Lord Bach, the Under Secretary of State for Justice, placed reliance on prosecutorial discretion:

> *"it is important that prosecutions are brought proportionately and not unnecessarily. We can rely on the code and the way in which prosecutors carry it out in being fairly confident that on the whole sensible decisions will be made"*

Recent guidance issued by the Serious Fraud Office ("SFO") in October 2012 offers little further clarification. Each case will be decided on its own facts, applying the two-stage prosecutorial test. The guidance reiterates that in appropriate cases the prosecution may use civil recovery powers as an alternative to a criminal trial. It remains to be seen how zealous the SFO will be in prosecuting such conduct. Clearly, however, a company must have in place a policy of zero tolerance to facilitation payments if it does not wish to be caught by potential corporate liability.

THE BA AND FCPA APPROACH TO CORPORATE HOSPITALITY

Guidance issued by the US and UK separately address the issue of corporate hospitality. Both recognise the important place hospitality and gifts have in the business world. Equally, both highlight the fact they can be abused and used as a means of bribery.

Under the BA, the prosecution must show that hospitality was intended to induce the improper performance of a particular function in order to prove that it constitutes a bribe. This is judged in accordance with what a reasonable person would think. Proportionate and reasonable entertainment is unlikely to provide evidence of such an intention. However, the more lavish the hospitality the greater the inference that it was intended to influence the recipient. In judging the level of hospitality offered the standard practices in a particular sector may also be relevant but they are not decisive.

The guidance places emphasis on common sense. Where a mining company provides reasonable travel and accommodation to allow officials to visit its mining operations in order to be satisfied they are being conducted safely, that is unlikely to constitute a bribe. However, a five star holiday for an official, which is unrelated to a demonstration of the organisation's services, may well constitute a bribe.

The recent FCPA guidance, which postdates guidance issued under the BA, echoes this approach. The more extravagant the gift, the more likely it was given for an improper purpose. The guidance emphasises the importance of transparency – gifts should be given openly and then properly recorded. A company should have clear and accessible guidelines in place to cover these processes and larger companies may benefit from gift-giving clearance procedures.

THE BA AND FCPA APPROACH TO PREVENTING CORPORATE BRIBERY

The UK government issued guidance on what constitutes "adequate procedures" for combating bribery in order to avoid potential corporate liability. This guidance does not provide a prescriptive model of anti-bribery measures; rather, it highlights six key principles an organisation may consider when addressing the issue of bribery:

- Proportionality;
- Top-level commitment to preventing bribery;
- Risk assessment;
- Due Diligence;
- Communication and training;
- Monitoring and review.

Although the FCPA has no direct equivalent of the BA's corporate offence of failing to prevent bribery, its guidance also addresses the steps which companies should take to prevent foreign bribery. Indeed, the adequacy of compliance procedures is a specific factor the DOJ will consider when deciding if and how to prosecute a company. Such a programme should include:

- A top-down ethical culture;
- A code of conduct;
- Proper internal controls, auditing practices, documentation policies and disciplinary procedures;
- A proportionate risk assessment;
- Employee training and access to advice;
- Incentives for compliant behaviour and disciplinary action for violations;
- Due diligence prior to using third parties;
- Periodically testing and reviewing of these compliance procedures.

Therefore, both Acts essentially endorse the same approach. This should be proportionate, focused to each particular situation and subject to periodic review. There is no one-size-fits-all model.

GUIDING PRINCIPLES OF ENFORCEMENT

The US authorities have considerable flexibility in deciding how to deal with potential instances of bribery. The DOJ may decide to proceed with a civil remedy, rather than a criminal prosecution. It may agree to enter a deferred prosecution agreement ("DPA"), or a non-prosecution agreement ("NPA"). Even if it embarks on a criminal prosecution, it may offer or accept a plea bargain which limits the ambit of the individual's liability.

In deciding how to proceed against a corporate defendant both the DOJ and SEC place great reliance on self-reporting. In addition, they will assess if there is a corporate compliance procedure in place, and if suitable remedial steps have been taken. Therefore, the advantages of full cooperation are significant and there are tangible incentives.

The position in the UK is not so clear cut. Self-reporting had been encouraged by the SFO. Its guidance had promised to deal with such cases by means of civil recovery where possible as an

alternative to criminal prosecution. Recently, however, the SFO received considerable criticism for this overuse of civil recovery orders. The new director, David Green QC, has signalled a shift back to criminal prosecutions. As a consequence, this guidance on self-reporting has been replaced. It now states that the fact a company self-reports in a timely manner and takes remedial action is relevant to the issue of whether it is in the public interest to prosecute. It offers no guarantee or indication of the course the SFO will adopt. Each case falls to be considered on its merits.

In addition to this limitation, as yet the SFO does not have any power to enter into DPAs or NPAs. It also has limited scope to undertake anything akin to plea bargaining. In the case of *Innospec* [2010] Lloyd's Rep. F.C. 462, Lord Justice Thomas heavily criticised the SFO for coming to an agreement with both the DOJ and the corporate defendant on the appropriate level of fine. By so doing it was usurping the court's prerogative to decide the issue of punishment. Consequently, the attractiveness of seeking an accommodation in the UK instead of the US is limited.

PENALTIES

The maximum punishment available under the BA is a term of ten years' imprisonment and an unlimited fine. There are no sentencing guidelines in place and as yet no body of case law setting down the court's approach. Guidelines for fining companies for corporate manslaughter may illustrate the likely approach:

- Turnover and profit should be considered but a fixed correlation between them and the level of a fine is not appropriate;
- The court should take into account turnover, profit and assets when determining the defendant's resources;
- The fine is intended to be punitive but the defendant should be capable of paying it, if necessary over an appropriate number of years.
- Where the offence has allowed the defendant to make a broadly quantifiable saving or profit, the fine should remove this.

Breach of the FCPA carries a maximum of five years' imprisonment and a fine of $100,000. The US Sentencing guidelines provide a predictable structure for calculating the level of any such penalty. However, under the Alternative Fines Act the courts may impose a higher fine, up to twice the benefit the defendant sought to obtain, as long as the facts supporting the increased fine are included on the indictment and found proved.

WHICH SHOULD I BE MORE WORRIED ABOUT?

In several key respects, the BA goes further and has a longer reach than the FCPA. It remains to be seen whether the UK authorities will have the means and inclination to take advantage of it. If they do the SFO may find itself severely hindered by the limited incentives it can offer to encourage corporate cooperation.

Whilst the degree to which offences under the BA will be prosecuted remains largely an unknown, the FCPA is rigorously enforced. Between 2004 and 2010 the number of FCPA prosecutions rose dramatically year on year. The relative decline in prosecutions between 2011 and 2012 certainly does not mark any change in approach or attitude. The DOJ and SEC's fundamental commitment to tackling international bribery remains unchanged. As Mr Lanny Breuer, the Assistant Attorney General for DOJ's Criminal Division, commented: "robust FCPA enforcement has become part of the fabric of the Justice Department."