

Briefing Note | August 2009

## UK takes further steps towards modernising its Anti-bribery Laws

This Briefing Note examines two recent developments concerning UK anti-bribery laws and preventative measures: first a recent select committee report. In addition, the Serious Fraud Office has introduced a system intended to encourage self-reporting of bribery for UK companies in return for cases being dealt with by way of civil penalties instead of criminal prosecution.



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This Briefing Note follows EAPD's Client Advisory update on the Draft Bribery Bill which was published in March 2009. The update can be viewed by [clicking here](#).

### The Draft Bribery Bill - at a glance

- The Bill proposes the following offences:
  - Requesting or receiving a bribe;
  - Offering or giving a bribe;
  - bribery of a foreign public official;
  - a corporate offence of negligently failing to prevent bribery.
- The Bill states that company directors, managers and secretaries should be personally criminally liable if they have consented to or connived at the commission of one of the three general offences (but not the corporate offence).
- The proposed offence of failure to prevent bribery will effectively require companies to implement, maintain and enforce rigorous anti-bribery policies. It remains unclear whether conviction for failure to prevent bribery could lead to exclusion (debarment) from public contracts.
- It is proposed that the offence of failure to prevent bribery will apply not only to companies incorporated in England, Wales or Northern Ireland, but also to companies incorporated anywhere in the world which carry on business in England, Wales or Northern Ireland.
- Consent to a criminal prosecution for offences under the Bill are required from the Director of Public Prosecutions, the Director of the Serious Fraud Office or the Director of Revenue and Customs Prosecutions.

### Update on the Draft Bribery Bill (UK) - Joint Committee Report

On 28 July 2009 the Joint Committee on the draft Bribery Bill, which was formed to undertake pre-legislative scrutiny of the Bill, published its Report. It supported the introduction into law of the draft Bribery Bill (the "Bill"), with a few important proposed amendments.

#### *The corporate offence of negligently failing to prevent bribery*

The Joint Committee supported the proposed new corporate offence of negligently failing to prevent bribery. In the draft bill the corporate offence would be committed where any person performing services for or on behalf of the company or partnership paid a bribe, that bribe was in connection with the company's business and the person with responsibility for preventing bribery within the company negligently failed to prevent the payment.

The Joint Committee was concerned with the corporate offence's focus on the person with responsibility being negligent as opposed to the failure of the company to ensure that adequate procedures were in place. Therefore the Joint Committee recommended that the requirement for negligence be removed so as to make the company strictly liable, subject to the company being able to avail itself of the defence that it had adequate procedures in place intended to prevent bribery.

The Joint Committee considered that a "commercial organisation is well placed to demonstrate the adequacy of its anti-bribery procedures".

The Joint Committee did, however, state that guidance was required on the proper meaning of “adequate procedures”. This is critical: it is not clear how in practice the offence and the defence to it will be interpreted. There is considerable scope for debate as to the circumstances in which a commercial organisation could be liable for having failed to prevent bribery, what compliance procedures will be considered as “adequate”, and the circumstances in which the defence would not apply. This will create uncertainty for businesses, and could result in an offence being committed inadvertently. The need for guidance appears to be recognised by Government and prosecuting authorities.

#### *Offence of bribing a foreign public official*

The Joint Committee endorsed the offence of bribery of a foreign public official. However, it recommended that the defence under this offence, being that the payments were “legitimately due” as permitted or required by local law, required amendment. The Joint Committee was of the view that this should be amended to “written laws” rather than “local laws” as it is under the American Foreign and Corrupt Practices Act 1977 (“FCPA”). This, it believed, would prevent any lacunas by the defendant contending that the bribe was made in accordance with local custom.

The Joint Committee concurred with the UK Government that the Law Commission’s proposal to introduce a defence that individuals held a reasonable but mistaken belief that a payment was “legitimately due” should be omitted from the Bill.

#### *Penalties*

For the Bill to have teeth, the Joint Committee endorsed the imposition of substantial penalties in the form of unlimited fines on companies and a maximum ten years’ imprisonment for individuals. However, the Joint Committee considered that the Government needed to consider the fairness of debarring those companies who committed an offence under Clause 5 of the Bill (corporate offence of negligently failing to prevent bribery) from entering into public contracts in the future.

#### *Facilitation payments and corporate hospitality*

With regard to facilitation payments, the Joint Committee held the view that although such payments were permissible in other jurisdictions they should continue to be criminalised in the UK to reduce the risk of legitimising corruption. The Joint Committee was more understanding in its Report of corporate hospitality which it accepted was permissible provided it remained within appropriate limits.

#### **SFO Issues Guidance to Address Overseas Corruption**

The Serious Fraud Office (“SFO”), the primary agency in the UK for investigating and prosecuting overseas corruption, has recently issued guidance to introduce a system of self reporting for UK companies (“the Guidance”). The Guidance is intended to move towards a system similar to that in the United States where self-reporting is encouraged in return for negotiated settlements.

#### *Self-reporting in the United States*

To tackle corruption, the United States has the FCPA which criminalises corrupt payments being made in order to secure or retain business. The Department of Justice and the Securities and Exchange Commission are responsible for enforcing the FCPA. Under the American regime criminal prosecutions are generally avoided where companies have undertaken internal investigations and have made voluntary disclosures to the US authorities. The majority of FCPA cases are therefore resolved through negotiated settlements and plea bargains.

Such a procedure has not been available in the UK, arguably leading to companies hiding corruption within its business (for fear of prosecution) rather than encouraging reporting the offence.

#### *SFO guidance: Self-reporting in the UK*

The SFO Guidance seeks to move towards the US approach and posits the following advantages of self-reporting:

1. firstly and most importantly, that the company ‘in appropriate cases’ will incur a civil penalty as opposed to facing a criminal prosecution;
2. that the avoidance of a criminal prosecution will mean that the company will not be debarred from public contracts under the provisions of Article 45 of the

EU Public Sector Procurement Directive; and

3. that the publicity surrounding the self-reporting will be managed between the company and the SFO.

A concern arising out of the guidance is that self-reporting in the UK will not be the incentive it is in the United States as the SFO reserves the right to impose criminal sanctions should the circumstances require it. Thus those UK companies who do self-report may nonetheless expose themselves to criminal sanctions. No unconditional guarantees are made by the SFO that a criminal prosecution will not follow self-reporting but they claim that resolving matters by civil means will be adopted “wherever possible”.

The SFO concedes that the decision to approach them will be a difficult one for UK companies to make bearing in mind the possible consequences. Approaches are encouraged to be made following an internal investigation by the company’s professional advisors where it is established that there is a significant issue and that remedial action is necessary. The Guidance proposes that there should be consultation in advance of an internal investigation but appreciate that this will generally be a decision for the company. UK companies are reminded that failure to self-report is viewed negatively and that the consequences will be the risk of criminal prosecution and confiscation order.

#### *Scenarios affecting the SFO’s decision to prosecute*

The Guidance sets out a number of hypothetical situations and alludes to how the SFO would be likely to deal with such matters. It is made clear, for example, that where Board members are personally involved in the corrupt activities and have gained a personal benefit, a criminal investigation is likely to follow any self-reporting. Similarly, the Guidance makes no guarantees that individuals will not be prosecuted; each case will turn on its merits.

The SFO will, however, be more sympathetic in circumstances where corrupt activities are exposed during due diligence for a proposed merger or acquisition. In these circumstances the SFO is prepared to give assurances that there will be no consequences subject to the bidding company taking remedial action to address the corrupt activities.

## Draft Bribery Bill

The Guidance makes reference to the draft Bribery Bill which will be enforced by the SFO should it be passed into law this autumn. The Guidance indicates that the SFO's approach to dealing with the Bill will be to focus on modernising the corporate culture and using enforcement action when it is "necessary and proportionate". To determine whether a company has negligently failed to prevent bribery, the SFO will require evidence that "adequate procedures" are in place. As stated above in this Briefing Note, the Joint Committee on the Draft Bribery Bill in their First Report on the proposed Bill suggested that further guidance will be required to clarify what is meant by "adequate procedures". The SFO in its Guidance indicates the following matters will be taken into account when determining whether a company's compliance procedures are adequate:

- a clear statement of an anti-corruption culture fully and visibly supported at the highest levels in the corporate.
- a Code of Ethics.
- principles that are applicable regardless of local laws or culture.
- individual accountability.
- a policy on gifts and hospitality and facilitation payments.
- a policy on outside advisers/third parties including vetting and due diligence and appropriate risk assessments.
- a policy concerning political contributions and lobbying activities.

- training to ensure dissemination of the anti-corruption culture to all staff at all levels within the corporation.
- regular checks and auditing in a proportionate manner.
- a helpline within the corporation which enables employees to report concerns.
- a commitment to making it explicit that the anti-bribery code applies to business partners.
- appropriate and consistent disciplinary processes.
- whether there have been previous cases of corruption within the corporation and, if so, the effect of any remedial action.

## Conclusion

The Guidance is welcome, but the extent to which it will encourage companies to self-report is questionable given that a criminal prosecution is not discounted. However, the Guidance does encourage feedback from companies and the suggestion is that the document may be amended in the future and any such concerns will be addressed at a later stage.

The Guidance and the Joint Committee Report nevertheless show the UK's commitment to modernising its anti-bribery laws and its desire to ensure companies comply with these rules and to prosecute companies that do not.

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