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Bribery Act 2010: a refresh

Is the UK's anti-bribery regime about to be put back in the spotlight? A House of Lords Select Committee has published its long-awaited report on the UK Bribery Act 2010. The report praises the Bribery Act for introducing "clear and all embracing" offences which set a global benchmark in the fight against bribery and corruption, but the report also makes a number of important recommendations which signal an updated approach to Bribery Act enforcement. The key points are outlined below and discussed in more detail over the page.

- The Serious Fraud Office and Crown Prosecution Service should implement measures to speed up bribery investigations, better communicate with those under investigation, and delegate the power to initiate prosecutions to officials.
- The existing Ministry of Justice guidance should be updated to help businesses (particularly SMEs) to implement "adequate procedures" to prevent bribery offences being committed by their employees and agents. In particular, the guidance should:
 - clarify that "adequate" is not intended to mean anything more than whatever is reasonable in the circumstances;
 - require businesses to carry out a bribery risk assessment as part of their adequate procedures, to enable them to tailor their anti-bribery policies rather than rely on a standard template; and
 - provide clearer examples of what would constitute acceptable corporate hospitality.
- The Home Office should press ahead with proposals for a centralised whistle-blowing mechanism.
- The conclusion of a deferred prosecution agreement with a company should not preclude the prosecution of culpable individuals.
- The UK should *not* pursue proposals to legalise facilitation payments (which are permitted under the US anti-bribery regime).
- The report also rules out the introduction of automatic liability on employers for offences committed by employees, a move which would replicate the principle of vicarious liability which also exists in the US anti-bribery regime.
- The Committee hopes that the Government will come to a decision soon on whether to extend the "failure to prevent" offence to other economic crimes.

Comment: These recommendations reflect high-level concern that many businesses' current anti-bribery procedures are inadequate, and serve as a timely reminder of the need to continually review and manage bribery risks. The report suggests that the UK may be facing a tougher and more proactive anti-bribery enforcement regime, so the prospect of clearer guidance will no doubt be welcomed by the business community, particularly since the paucity of Bribery Act case law means there is very little precedent in this area. It is particularly important to carry out and update bribery risk assessments, and to avoid reliance on an untailored, template policy (especially in the light of recent case law – click [here](#) for our earlier briefing on this).

Recommended next steps

We would advise all our clients to take this opportunity to ensure they have up to date and effective anti-bribery policies and procedures, based on a comprehensive assessment of bribery risks which are relevant to their business model and industry sector. Please contact any of the lawyers listed below, or your usual Travers Smith contact, for more information.

THE UK'S BRIBERY ACT REPORT CARD: COULD DO BETTER

The House of Lords Select Committee on the Bribery Act 2010 has spent the last few months taking evidence from businesses, advisers and prosecutors on the effectiveness of the Act in the eight years since it was first introduced. The Committee's conclusions in its recent Report make reasonably happy reading for the architects of the Act, singling out particular praise for the corporate offence of 'failing to prevent' bribery established by the Act, which holds organisations liable for breaches by their employees and agents unless they can show they had established 'adequate procedures' to prevent the offence. This "strict liability" approach to anti-bribery enforcement is held up as a global standard-bearer for other jurisdictions.

However, the Committee makes a series of recommendations to the Government on ways to improve the regime, as summarised below.

SPEED OF INVESTIGATIONS AND ENFORCEMENT

The Serious Fraud Office and the Crown Prosecution Service come in for criticism for the *"slow pace of investigations"* and the *"failure to update businesses and individuals on the progress of cases"*.

Evidence received by the Committee suggests there are excessive delays even in *"the majority of more straightforward domestic bribery investigations"*, leading the Committee to recommend that the SFO and CPS should publish plans detailing how they will speed up investigations and better communicate with those placed under investigation.

In terms of process, the Committee also concluded that the requirement for the consent of the Director of Public Prosecutions, the Director of the SFO or the Director of Revenue and Customs Prosecutions to initiate a prosecution was an unnecessary barrier. The power to launch a prosecution should be vested in officials within the respective bodies, who should receive further training. The report also recommends better communication between enforcement bodies.

The Committee also looked at deferred prosecution agreements and concluded that DPAs should not be considered an alternative to the prosecution of culpable individuals, *"however senior"*.

If implemented, these changes raise the prospect of bribery prosecutions being brought more quickly, efficiently and, ultimately, more frequently in the future.

IMPROVED GUIDANCE ON ADEQUATE PROCEDURES

Shortly after the Act was introduced, the Ministry of Justice published guidance on implementing "adequate procedures" to avoid liability under the Act (the **"MoJ Guidance"**). Since then, the paucity of UK bribery prosecutions means that judicial commentary to supplement the MoJ's statutory guidance is limited. The majority of respondents to the consultation would like to see updated MoJ Guidance to fill this void.

The Report recommends that revised MoJ Guidance should be directed primarily at SMEs, enabling them to devise anti-

bribery procedures which are suitable to their size and type of business. The revised MoJ Guidance should provide more case studies and examples of good practice and procedures.

ANTI-BRIBERY RISK ASSESSMENTS

The MoJ Guidance should make it clear that all businesses must conduct a risk assessment and provide training to staff on relevant procedures, noting that SMEs *"are likely to need procedures tailored to their particular needs."*

We agree that a bribery risk assessment is an important step and some organisations have been tempted to adopt a standard template policy without formally and systematically identifying their key risks and tailoring that policy to those risks.

WHAT DOES "ADEQUATE" MEAN?

The Committee was concerned that 'adequate' could be interpreted too strictly by a court and suggests that the MoJ Guidance should clarify that 'adequate' *"does not mean, and is not intended to mean, anything more stringent than reasonable in all the circumstances."* This clarification would reflect the language used in the Criminal Finances Act 2017 and the HMRC guidance.

CORPORATE HOSPITALITY – WHERE TO DRAW THE LINE?

Corporate hospitality has been a particular concern for the UK business community since the Act came into force, and advice on this issue accounts for a significant proportion of our Bribery Act enquiries. Revised Guidance would be welcome.

So businesses will be pleased to hear that the Report advocates clearer examples of what might constitute acceptable corporate hospitality, recognising that corporate hospitality *"is a necessary and legitimate part of doing business,"* particularly in an international context where business customs and practices may differ between jurisdictions.

EXTENDING FAILURE TO PREVENT

It's been two years since the closure of the MoJ's consultation on the wider issue of reform of the law on corporate liability for economic crime. The Solicitor General suggested in 2018 that there is a *"strong case for a new corporate offence of failure to prevent economic crime,"* which has already been extended to the facilitation of tax evasion.

The Committee urges the Government to press ahead with the proposal to extend "failure to prevent" legislation to other financial crimes such as fraud and money laundering.

ADOPTING THE US APPROACH TO EMPLOYER LIABILITY?

The SFO and others have suggested that UK employers should be subject to vicarious liability for bribery offences (whereby a company may be liable automatically for offences committed by its employees), as is the case in the US.

The Committee dismissed such a move on the grounds that it would require a fundamental change in the law beyond the confines of the Act, since attributing criminal liability to a corporate in this way would depend, in English law, on the identification principle. In the words of the former director of the SFO, *"the identification principle requires the prosecution to identify the controlling mind of the company and prove that that person was complicit in the offence under investigation."* This is in contrast with the US regime where a commercial organisation which has failed to exercise control over its employee or agent is considered automatically liable for their criminal acts, subject to any mitigating circumstances.

The SFO gave evidence that the identification principle makes it *"far easier to fix small, owner-managed companies with the requisite knowledge than large multi-national corporations."* The identification principle, which is at the heart of the issue of corporate criminal liability, has been under scrutiny for many years, going back to the Herald of Free Enterprise, Piper Alpha and other disasters, where no corporate criminal liability could be established.

As far as bribery offences are concerned, whilst the Committee clearly had some sympathy for a change in the law, it concluded that the 'failure to prevent' offence in the Act was an adequate compromise and recommended no change in the law, but this does not necessarily rule out future measures to address the more fundamental issues with corporate criminal liability.

A MOVE TO LEGALISE FACILITATION PAYMENTS?

Whilst expressing admiration for aspects of US anti-bribery and corruption law, the Committee was robust in its assessment that it would be a retrograde step to legalise facilitation payments under the Act. Facilitation payments, although tightly controlled, are permitted under the US Foreign Corrupt Practices Act 1977, but the Report is clear that the trend in international law is moving towards toughening up on facilitation payments, rather than lowering standards. For example, Canada recently removed its facilitation payments exception.

This relatively inflexible approach is unsurprising, as the Act is 'long-arm' legislation which seeks to extend its principles

WHAT ABOUT BREXIT?

As expected, the Report touches on Brexit and concludes that a no-deal Brexit would significantly impede efforts to combat international bribery unless measures with equivalent effect to the European Arrest Warrant, the European Investigation Order and similar EU mechanisms are in force, with even a short lacuna described as a risk by the Committee.

WHERE NOW?

Whilst the Committee's recommendations are non-binding, the Government may take this opportunity to refresh its approach to bribery prevention by means of revised MoJ Guidance and a shake-up of enforcement activity.

Businesses are advised to take note of the recommendations made in the Report, particularly in relation to the conduct of risk assessment, the need for appropriately tailored anti-bribery policies and procedures, and suggestions of an increase in enforcement activity.

WHAT SHOULD YOU DO NEXT?

We would advise all our clients to take this opportunity to ensure they have an up to date and effective anti-bribery policies and procedures, based on a comprehensive assessment of the bribery risks which are relevant to their business model and industry sector. Such a risk assessment should extend to suppliers and other contractors and their anti-bribery compliance mechanisms.

Over the years, we have advised many clients in a wide range of industry sectors on their anti-bribery risk assessments and the implementation of tailored anti-bribery policy and procedures. In some cases, we can provide a self-service "adequate procedures" toolkit if required.

Please contact any of the lawyers listed below, or your usual Travers Smith contact, for more information.

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