

CRACKING DOWN ON CORRUPTION



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LOOKS AT HOW CHANGES TO ANTI-
CORRUPTION LAWS CAN HELP COMPANIES
PREVENT CRIMES SUCH AS BRIBERY AMONG
PUBLIC FOREIGN OFFICIALS.

Organisations worldwide now recognise the need to change previously accepted practices concerning the corruption of foreign public officials. This sea of change is a reaction to the growing belief that corruption, far from stimulating international commerce, frustrates local economies and distorts competition. Hitherto there was a shoulder-shrugging attitude of resignation that corruption was endemic in many parts of the world and nothing could be done to alter it. This was certainly the position when, at the end of the 1980s, the OECD embarked on an initiative to try to win the support of the major industrial/commercial nations in creating an international instrument to stamp out this particular conduct.

Progress was slow until the mid-1990s when, with active encouragement from the US, the OECD moved towards a two-pronged attack on the bribery of foreign public officials. The result in 1997 was the creation of the Convention against the Corruption of Foreign Public Official (hard law), together with a large number of recommendations (soft law).

A WAKE UP CALL. The UK was one of the first signatories to the Convention, notwithstanding that during many years of talks, national delegates to the drafting conferences and organisations such as Transparency International had pointed out that the UK legislation was woefully deficient. At that stage, the UK government was still maintaining that its laws, which by then were almost a 100 years old, were sufficient to both investigate and prosecute companies and individuals for this offence.

Following ratification and following peer review by the OECD, it became clear that the UK legislation was still deficient in a number of areas. Progress was slow because the UK, at that stage, was carrying out a reform of its own domestic corruption laws, which were themselves enshrined in legislation going back to 1889, and for which no parliamentary time could be found.

Along with so many other criminal justice initiatives, it took the tragedy of 11 September 2001 to finally kick-start reform. Tacked onto the Anti-Terrorism, Crime and Security Act 2001 were a number of sections extending the reach of the UK Court to investigate and prosecute the corruption of foreign public officials,

wherever it occurred in the world. Until that time, English law enforcement was shackled by the traditional constraints of UK jurisdictional law, which provided that in the large preponderates of cases, no prosecution could be brought in the UK unless the activity complained of had taken place here.

This new legislation came into force on 14 February 2002 and, as at the date of this paper, no prosecutions have yet been brought. This is perhaps not so surprising when one realises that under the earlier legislation only one prosecution for bribery of a foreign public official is recorded in a period of 96 years.

This statistic is particularly stark when set against the fact that at the Earth Summit in Johannesburg in September 2002, 70 UK companies were identified as having indulged in corrupt practices.

INTERNATIONAL AFFAIRS. It should be noted that legislation is not the only weapon being used in these new drives to outlaw the all too common practice of 'greasing palms' in the developing world. In the last decade, international trade bodies like the International Chamber of Commerce, and international financial institutions such as the World Bank and the International Monetary Fund (IMF) have all pursued policies both of exhortation and sanctioning to try and bring some ethical advances in international commerce. Ratification of the OECD Convention by itself is no guarantee that the country in question is serious in supporting this initiative, and will not of itself, ensure that companies based in that country will be compliant. One still hears the phrases "well, our competitors are doing it, so we must do it", "you can't get anything done unless you grease palms", or "the government is a dictatorship and you have to have a domestic partner who is more often than not related to the ruling family".

Against these somewhat entrenched and age-old attitudes progress is necessarily slow. Even disallowing the tax deductibility of bribes has presented all manner of difficulties.

The hand maiden of successful law enforcement is information. The new legislation recognises this by placing on Crown servants and British Embassy employees a positive obligation to report any information that comes to them relating to bribery committed by UK nationals or UK national companies. A clear directive has been

sent to all of HM Embassies worldwide. Even though the legislation is only 12 months old, I believe that a number of valuable reports have already been received. To encourage homogeneous compliance, Article 5 of the OECD Convention provides "that the prosecutors shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved".

CRIME WATCH. Corruption, whether domestic or of foreign public officials, is a predicate offence for money laundering. This triggered the full panoply of anti-money laundering powers in the investigation and prosecution of corruption offences. These include extensive mutual assistance, the power to search and seize documents, the powers to interview suspects and the power to seize and confiscate the proceeds of corruption. It will be some time before the anti-corruption laws, domestic and international, mature and become totally effective. In passing, though, it should be noted that the United Nations itself is formulating an anti-corruption Convention following the lead given by other international organisations such as the Council of Europe and the Organisation of American States. The following are recommended as good housekeeping red flags for firms that wish to avoid problems in this area:

- Company policy should expressly prohibit bribery in any form, whether direct or indirect and treat it as serious misconduct resulting in dismissal.
- Bribery may take many guises and the routing of it may not be direct. There is a need to identify potential targets such as customers, agents, contractors, suppliers, employees and their family, friends, associates and acquaintances and ensure that the company has adequate checks in place.
- Contributions by employees or agents to political parties can be interpreted as attempting to obtain advantage and should be prohibited. It should be noted that the OECD Convention does not actually outlaw political donations. The UK law has its own provisions relating to the funding of political parties, but the OECD recommendations contemplate that this is something that ought to be considered. The Council of Europe Criminal Convention deals with contribution to political parties and it is possible that the UN Convention will follow suit.
- Charitable contributions or sponsorships should not be used as a subterfuge for bribery and should be publicly disclosed.
- Recognise that facilitation payments are a form of bribery, and should be minimised and discouraged. The UK government took the view that there was no point in damaging its moral stance by permitting payments of what the US has called "grease payments". These are the sort of payments that are made to customs officials to get goods cleared from the dockside, to public officials to have a telephone line or facsimile line or a computer link installed in less than three months and so on. The UK government's view appears sensible, as it cannot be contemplated that law enforcement would consider it in the public interest to prosecute the payments of small amounts.
- Prohibit the offer or receipt of gifts, hospitality or expenses whenever such arrangements could affect the outcome of business transactions and are not reasonable and bona fide expenses.
- Apply the same principles set out above to dealings with subsidiaries, joint venture partners, agents, contractors and other third parties with which the company has business relationships.

'IT TOOK 11 SEPTEMBER TO KICK-START REFORM. UNTIL THEN, ENGLISH LAW ENFORCEMENT WAS SHACKLED BY THE TRADITIONAL CONSTRAINTS OF UK JURISDICTIONAL LAW'

- Proper due diligence exercises should be carried out before entering into any joint venture. The joint venturer should adopt the same principles. The company should use its best efforts to monitor that the conduct of the joint venturer is consistent with the company's principles.
- Carry out due diligence exercises before appointing agents. All agency relationships should be properly documented and the agent should contractually agree to be bound by the company's anti-corruption principles. The contract should include a right for the company to terminate the contract should the agent be found to have offered or accepted bribes. Any payments made to agents should be appropriate and justifiable remuneration for legitimate services rendered.
- Similar requirements for agents also apply to contractors and suppliers. The company should avoid dealing with contractors and suppliers which are known to bribe. Proper due diligence exercises should be carried out and the anti-bribery policies should be made well known to the prospective contractors and suppliers.
- Any recruitment, promotion, training, evaluation and recognition should reflect the enterprises' commitment to the principles. Make it clear that no employee will suffer demotion, penalty or other consequence for refusing to pay bribes, even if it may result in the company losing business.
- All employees of the company should receive appropriate training in the anti-corruption principles so that they have a good understanding of the business requirements.
- Have safe and secure lines of communication, both internally and externally, available for employees. Actively encourage employees to raise concerns, report violations and seek guidance regarding their own activities or the activities of others.
- Accurate records should be maintained. Encourage the use of regular audits and periodic review of the programme's suitability adequacy and effectiveness. Such audit should be reflective of an independent assessment, with such findings being disclosed to shareholders.

NOBODY WANTS TO BE THE FIRST TO BE NAMED AND SHAMED.

US law enforcement has always applauded and rewarded effective corporate anti-corruption policies. Doubtless law enforcement in the OECD countries will follow suit. Whether foreign public officials are bribed because it is the only way business can be done in a particular foreign country, whether bribes are paid because they are extorted from the paying company, or whether they are paid because it is considered to be the only way to keep up with, or get an edge on one's competitors, this kind of behaviour is distasteful, immoral, unethical and now increasingly illegal. No company, however prominent, will wish to be named and shamed or become UK law enforcement's first scalp.

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