

Clean hands

SQUEEZE, SLUSH, SWEETENERS – WHATEVER BRIBES MAY BE CALLED, THERE'S NO PLACE FOR THEM IN BUSINESS. AND IF YOUR COMPANY CAN'T PROVE IT HAS TAKEN ROBUST STEPS TO PREVENT BRIBERY, THEN IT COULD FIND ITSELF IN BIG TROUBLE, AS **STEPHEN NORTON** EXPLAINS.



We in the UK tend to pride ourselves on our honesty. So it may come as an unwelcome surprise to learn that the UK is seen as turning a blind eye to corruption. International bodies have been pressuring the UK government to update its bribery legislation and fall into line with the OECD convention on combating bribery of foreign public officials, to which the UK signed up (along with 37 other countries) in 1999.

A report from the OECD anti-bribery working group in October 2008 expressed "serious concerns" and "disappointment" at the UK's continued failure to address deficiencies in its laws on the bribery of foreign public officials and corporate liability for foreign bribery, which it said had hindered investigations. It also warned foreign multinationals and institutions dealing with British companies to take extra care due to the additional risks and to spend more money to avoid becoming entangled in corruption. The working group called for rapid reform of the UK's antiquated and inadequate corruption laws, and tougher action against miscreant companies.

Closer to home the Law Commission acknowledged there was some basis for the criticism, describing the current law as "obscure, inconsistent and insufficiently comprehensive". And more generally there has been increasing focus on restoring ethical standards in public life and a desire to create a society in which individuals do not gain an unfair advantage at the expense of others.

Within the UK the Serious Fraud Office (SFO), the government department that investigates and deals with serious or complex fraud, has been criticised for its negligible record of prosecuting UK companies. It is, however, hindered in its work by a complex framework of laws dating back to the Public Bodies Corrupt Practices Act 1889. The UK's fraud laws are generally regarded as not fit for purpose to combat increasingly sophisticated international bribery in the 21st century.

The result is the Bribery Bill. The bill aims to replace the current mix of conflicting and archaic statutes and common law with one effective statute dealing with corruption. The bill has all-party support in parliament and is expected to be passed before the general election. If it does, a corporate offence of bribery will come into force on 1 October. Before then, the justice minister will publish guidance on what procedures commercial organisations should put in place to prevent bribery.

Clearly, this affects treasurers. Put simply, bribery is the offer, promise or giving of any advantage to a person with the intention of obtaining an improper advantage. The bill aims to establish an effective legal framework for combating bribery in the public and private sectors; to set out a modern and comprehensive scheme of bribery offences so that prosecutors and the courts can deal effectively with bribery at home and abroad; and to provide clearer compliance with the UK's international obligations.

The bill outlines four offences:

- paying a bribe (offering, promising or giving a bribe to another person);
- receiving a bribe (requesting, agreeing to receive or accepting a bribe from another person);
- bribing a public official in order to obtain or retain business; and
- failing to prevent bribery by an employee or agent.

The fourth offence, that of corporate bribery, is a new one. Measures will need to be taken by all businesses to ensure they don't fall foul of it, and include the training and supervision of employees and the implementation of comprehensive risk management and whistleblowing procedures.

Launching the bill, the justice minister Jack Straw said: "Modernisation of the law is a priority to deal with those who accept or offer bribes, and to reinforce transparency and accountability in international business. This is why we are committed to the foundation of a new and consolidated criminal law of bribery. This bill will better help the police, prosecutors and courts to tackle bribery wherever it occurs."

The bill does not exist in isolation. Many treasurers will be aware of the US Foreign Corrupt Practices Act 1977 and its long-arm jurisdiction in rooting out bribery throughout the world. However, the Bribery Bill gives a root and branch overhaul of existing criminal law in this area and introduces a vigorous new regime for business in the UK. The bill goes beyond the scope of the US legislation as it covers all business transactions, not just payments to foreign officials or state-owned businesses.

The new corporate offence makes a business criminally liable for failing to prevent bribery (although there is an "adequate procedures" defence), which includes culpability for acts of bribery and corruption committed by its agents and intermediaries as well as employees. The offence extends to acts performed outside England and Wales, which in practice will mean extra-territorial jurisdiction to prosecute bribery committed anywhere in the world by persons resident in the UK, and UK nationals and UK corporate bodies. Also covered will be non-UK corporates with a UK office, UK operations or employees with UK citizenship.

Convicted companies face a potentially unlimited fine, and individuals found guilty of consenting to or conniving with the commission of bribery (or who themselves commit bribery) may be imprisoned for up to 10 years.

Since 2008 the SFO has also had the power to pursue corruption

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through criminal prosecution and civil recovery orders. It has recovered millions of pounds from companies including Balfour Beatty and AMEC, and prosecuted Mabey & Johnson. The Financial Services Authority has been similarly active in the financial services sector, and imposed a fine of £5.25m on Aon for failing to have in place and to implement adequate anti-corruption controls. More recently BAE Systems

has accepted guilt and agreed to pay penalties of £30m in the UK and \$400m in the US to settle corruption charges lodged by the SFO and the US Department of Justice.

However, the size of the fines and the length of any prison sentence are only part of the downside. The attendant publicity and reputational risk arising from a conviction for corporate bribery are potentially cataclysmic.

The prudent corporate should take steps now to ensure that it has adequate and appropriate anti-bribery systems and controls in place, and to limit the scope of sanctions imposed should bribery be uncovered. The defence for the corporate will be to prove that it has adequate procedures in place designed to prevent bribery being committed on its behalf.

Business organisations have lobbied the government to provide clear official guidance on what these procedures will be before the act comes into force; after all, the burden of proof to establish that adequate procedures are in place will fall on the corporate. The justice minister has promised to publish detailed guidance about the procedures.

Although they have yet to be formally announced, some examples of the principles which the guidance should contain have already been provided: the board of directors should take responsibility for anti-corruption programmes, a senior officer accountable for oversight should be appointed, and whistleblowing or speak-up procedures should be implemented so staff can report corruption safely and confidentially. The SFO, which will enforce the overseas corruption clause, also published guidance last year on what it considered to be adequate procedures; they included the business setting up a helpline that staff could use to report concerns.

Many corporates will already have whistleblowing procedures in place but will need to assess and upgrade them as part of a comprehensive review of anti-bribery and corruption compliance policies. Those businesses that have not implemented anti-bribery initiatives will need to consider doing so as a matter of urgency, as well as ensuring adequate training and supervision is provided to all employees, and implementing risk management procedures and proper systems to combat bribery.

Lack of preparedness to combat bribery will be no defence in a law court. The SFO has made clear that, having alerted businesses to the need for action some time ago, it will show little sympathy to those left behind or that pay lip service only. "Corruption has never been compulsory," it points out. "Take the risk: pay the price."

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