

## THE DRAFT BRIBERY BILL

29 September 2009

To Our Clients and Friends:

At a moment when the U.K. Serious Fraud Office (SFO) has announced its first ever successful prosecution for corporate bribery in the case of Mabey & Johnson Ltd.,<sup>1</sup> and the British Parliament is returning soon to its parliamentary session, it is appropriate to look at the terms of the proposed U.K. draft Bribery Bill.

The Bill was presented to Parliament in March 2009. It is substantially based on the recommendations of the Law Commission published in November 2008.<sup>2</sup> The U.K.'s anti-bribery laws have grown up piecemeal and have been criticized as being uncertain and complex. There have been criticisms, too, by the OECD's Working Group, although the U.K. has never acknowledged that its laws did not comply with the OECD Convention. An earlier proposed new law did not pass scrutiny in Parliament.

The draft Bill proposes sweeping changes to the existing law on bribery. It recommends the creation of two new general bribery offences, which do not distinguish between public and private bribery. It also advocates the creation of two new specific offences, one of bribing foreign public officials and the other of negligently failing to prevent bribery by a commercial organisation. The draft Bill also proposes tougher sanctions for bribery and seeks to remove the requirement that prosecutions for bribery require the consent of the Attorney-General.

The Bill has been scrutinized by a parliamentary Joint Committee on the Draft Bribery Bill. Its report was published on July 28, 2009, and the Committee broadly supported the Bill, but nevertheless recommended certain amendments. The most controversial provision is the proposed new offence of negligently failing to prevent bribery.

The key provisions of the draft Bill are examined below.

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<sup>1</sup> See [http://www.sfo.gov.uk/news/prout/pr\\_645.asp?id=645](http://www.sfo.gov.uk/news/prout/pr_645.asp?id=645).

<sup>2</sup> Law Commission Report No.313, *Reforming Bribery*.

## THE CURRENT LAW

The current anti-bribery law is fragmented with a number of different common law and statutory offences applying. The statutory offence of bribery is based on three Acts of Parliament (dating from 1889, 1906 and 1916, respectively), each of which has a different scope of application. Unlike U.S. corrupt practices law, the English bribery offence is based on an agency concept, the relevant test broadly being the corrupt giving or agreeing to give consideration to an agent (or conversely, the receiving or agreeing to receive such consideration by the agent) as an inducement or reward for doing or omitting to do any act in relation to his principal's affairs.

Part 12 of the Anti-Terrorism, Crime and Security Act 2001 (the "2001 Act") seeks to give effect to the U.K.'s obligations under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "OECD Convention") by providing that if a U.K. national (or a body incorporated under U.K. law) performs any act outside the U.K. which would, if performed in the U.K., be a corruption offence, then that person is liable in exactly the same way as if the offence had been committed within the U.K. Importantly, this does not extend to foreign nationals who habitually reside or are domiciled in the U.K.

The shortcomings in the current law have been the subject of consistent criticism and are beyond the scope of this note. Importantly, however, they included comments by the OECD Working Group to the effect that the U.K. had failed to comply with its obligations under the OECD Convention, in part because it failed to create liability for legal persons.<sup>3</sup>

## THE PROPOSED GENERAL BRIBERY OFFENCES

The draft Bribery Bill proposes that the common law offence of bribery be abolished and the existing Acts of Parliament dealing with corruption be repealed. It proposes two general bribery offences, one relating to the offering, promising or giving of bribes, and the second to the requesting, agreeing to receive or receiving of bribes. For both offences, it is necessary that the bribe relate to the improper performance of certain specified functions or activities. The question of what these functions or activities are, and what counts as improper performance of them, is dealt with below.

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<sup>3</sup> *United Kingdom: Phase 2bis Report by the OECD Working Group on the Implementation of the OECD Convention.*

The first general bribery offence can be committed in two ways. Case 1<sup>4</sup> is where the payer offers, promises or gives a financial or other advantage to another person, and intends that the advantage either induce the “recipient” to perform one of the specified functions or activities improperly, or reward them for performing that activity improperly.<sup>5</sup> Case 2, requires the offering, promising or giving of a financial or other advantage, together with a knowledge or belief on the part of the payer that the acceptance of the advantage would itself constitute the improper performance of a specified function or activity. The term financial advantage is not defined anywhere, but is left to be interpreted by the courts.

The distinction between the two cases is that the first requires intention on the part of the payer that improper performance result from the payment, the second mere knowledge or belief that acceptance of the payment would be improper, in and of itself. Case 2 seems to include situations where it would be difficult or impossible to show that the payer was trying to persuade the recipient to act improperly, but the payer would nevertheless have known or believed that the receipt or payment would constitute improper performance. In both cases, however, it does not matter whether the person to whom the financial advantage is offered, promised or given is the same person who has to carry out the function in question. It also does not matter whether the financial advantage was offered, promised or given directly or via a third party.

The second general bribery offence, which relates to being bribed, can be committed in four ways, described as Cases 3 to 6. In Case 3, an offence is committed when the recipient requests, agrees to receive or accepts a financial or other advantage intending that, as a consequence, a specified function or activity be performed improperly. In Case 4, an offence is committed when the recipient requests, agrees to receive or accepts a financial or other advantage, and the request or agreement of acceptance itself constitutes the improper performance of a specified function or activity. In Case 5, an offence is committed when the recipient requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance of a specified function or activity. In Case 6, an offence is committed when, in anticipation of or in consequence of requesting, agreeing to receive or accepting a financial or other advantage, a specified function or activity is performed improperly, either by the recipient, or by a third party at the request of, or with the acquiescence of, the recipient. In all four of these cases, it is irrelevant whether the

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<sup>4</sup> *This nomenclature matches that used in the draft Bill itself.*

<sup>5</sup> *The term ‘recipient’ has been used throughout as a shorthand means of describing a party who either receives, requests, is intended to receive or agrees to accept a bribe.*

advantage in question is for the benefit of the recipient or a third party. It is also irrelevant whether the recipient requests, agrees to receive or receives the advantage directly or through a third party.

As mentioned above, a common factor to both of the general offences is that the bribe in question must relate to the improper performance by the person bribed of a specified function or activity. Unlike the current law, the draft Bill does not draw a distinction between public and private bribery. Rather, the recipient of the bribe must be performing one of four functions or activities, namely:

- any function of a public nature;
- any activity concerned with a business, trade or profession;
- any activity performed in the course of a person's employment; or
- any activity performed by or on behalf of a body of persons (whether corporate or unincorporate).

Furthermore, the performance of the recipient of the bribe in carrying out one of these functions or activities must meet one or more of three conditions: that the function or activity is expected to be carried out in good faith, that the function or activity is expected to be carried out impartially, or that the person carrying out the function or activity is in a position of trust by virtue of performing it.

The bribe in question must relate to the improper performance of one of these functions or activities. In order for the function or activity to be performed improperly, it must be performed in breach of a "relevant expectation." These relevant expectations relate to the three conditions noted above: that performance be in good faith, or impartial, or in line with the expectations that result from the position of trust. The question of what amounts to a "relevant expectation" is objectively determined: in other words, the test of what is expected is a test of what a reasonable person would expect. It is clear that non-performance of the function in question can also be held to be improper, if such failure to perform would itself be a breach of the relevant expectation.

Important distinctions can thus be drawn between the various cases, depending on the mental element required. At one end of the spectrum, Cases 1 and 3 require actual intent on the part of the person accused: either an intention on the part of the payer to induce or reward improper performance (Case 1) or an intention on the part of the recipient to perform improperly (Case 3). These must be distinguished from Case 2, which also requires a mental element, albeit at the level of knowledge or belief, as opposed to actual intention.

At the other end of the spectrum are Cases 4 to 6, where it is expressly provided that no mental element whatsoever is required.<sup>6</sup>

Concerns have been expressed as to the scope of both the offences of paying bribes and those of receiving bribes. In relation to the offences of paying bribes, for example, there is the concern that conduct generally thought only to amount to a civil wrong could nevertheless be caught by the offences as currently defined. Testimony before the Joint Committee gave the example of a director at an investment bank being offered a bonus by a competitor if he could persuade his whole team of traders to leave its present employment to join the competitor. Given that this might induce the director to breach an obligation of good faith, which would constitute improper performance of a specified function or activity, it might fall within the offences as defined, even though it amounts to nothing more than the tort of interference with contractual relations. Similar concerns were raised before the Joint Committee as to the test of improper performance under Cases 4 to 6, which requires no knowledge of impropriety or an intention to act improperly.

Nonetheless, the Joint Committee endorsed both the improper performance test and the imposition of liability for receiving a bribe without proof of knowledge or intention. The report did, however, express concern that conduct which ought to be viewed merely as a civil wrong could fall within the definition of the offences of paying bribes. The Joint Committee stated that it would be undesirable to rely on prosecutorial discretion in this area, adding that the government ought to explore the feasibility of inserting a provision to the effect that, for the avoidance of doubt, a person should not be found guilty when his/her conduct amounts to nothing more than a civil wrong.

## **BRIBERY OF A FOREIGN PUBLIC OFFICIAL**

Although the U.K. has already sought to comply with its obligations under the OECD Convention by virtue of the 2001 Act, that Act simply gave extraterritorial application to the existing law (including the law applying to private bribery). The draft Bill goes further by providing for a specific new offence of bribery of a foreign public official. Like the U.S. Foreign Corrupt Practices Act (“FCPA”), it does not extend to the receipt of a bribe by a foreign public official.

Clause 4 of the Bill provides that a person is guilty of an offence if he/she bribes a foreign

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<sup>6</sup> Clause 2(7) expressly provides that “in cases 4 to 6 it does not matter whether [the recipient] knows or believes that the performance of the function or activity is improper.”

public official (“FPO”),<sup>7</sup> provided that he/she intends (i) to influence the FPO in his/her capacity as an FPO, and (ii) to obtain or retain business (or an advantage in the conduct of business).<sup>8</sup>

Bribery is defined, for the purpose of this section, as the offering, promising or giving of a financial or other advantage not “legitimately due” to the FPO. This offering, promising or giving can be directed either to the FPO himself, or to a third party if at the request of, or with the acquiescence or assent of, the FPO. An advantage is deemed to be legitimately due only if the law applicable to the FPO either permits or requires the FPO to accept it. Therefore, if the giving of advantages is merely customary, or officially tolerated, this does not of itself amount to it being required or permitted by law. In its report, the Joint Committee suggested that this ought to be clarified, by providing that the advantage is only “legitimately due” if a written law requires it. Such an amendment would provide greater certainty to businesspeople and prosecutors alike and bring the draft Bill into line with similar requirements under the FCPA.

## **OFFENCES BY BODIES CORPORATE**

One of the most important features of the draft Bill is its introduction of the new offence of negligent failure to prevent bribery by a commercial organisation. The Bill provides that a relevant commercial organisation (a body corporate or partnership incorporated or formed in England and Wales or Northern Ireland and carrying on business there or elsewhere, or any other body corporate or partnership wherever incorporated or formed, which carries on business in England and Wales or Northern Ireland) is guilty of an offence under this section if (a) a person performing services for or on behalf of the organisation<sup>9</sup> bribes another person, (b) the bribe was in connection with the organisation’s business and (c) a responsible person, or a number of such persons taken together, was negligent in failing to

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<sup>7</sup> The term ‘foreign public official’ is defined broadly to include those persons who hold legislative, administrative or judicial positions in foreign countries, those who exercise public functions in foreign countries and officials or agents of public international organisations.

<sup>8</sup> This intention to influence the foreign public official can include an intention that the foreign public official failed to perform any of his functions, or an intention that the foreign public official act in a way which is outside of his authority.

<sup>9</sup> The question of whether someone is performing services for the organisation depends on all of the relevant circumstances, rather than the capacity in which the person in question is employed by the organisation. Having said that, when the person who has paid the bribes is an employee of the company, there is a presumption that he/she are performing services for the company.

prevent the bribe.<sup>10</sup> A “responsible person” is defined as either any person connected with or employed by the organisation, whose functions included preventing persons from committing bribery offences, or (if there is no person with such a function), any senior officer of the organisation. The inclusion in the definition of “commercial organisation” of foreign corporations or partnerships carrying on business in England and Wales or Northern Ireland makes this offence of potentially very wide application.

The draft Bill provides that it is a defence to a charge of negligently failing to prevent bribery to prove that the organisation had in place adequate procedures designed to prevent persons performing services for the organisation from paying bribes. However, this defence is only available if the “responsible person” accused of negligence is a person whose functions included preventing persons from committing bribery offences. Therefore, if the negligence in question was that of a senior officer (because there was no person in the organisation whose functions included preventing persons from committing bribery offences), then this defence is not available. The effect of this provision is that an organisation cannot escape liability for negligently failing to prevent bribery by refusing to nominate a person responsible for preventing those performing services for the organisation from engaging in bribery.

In its report, the Joint Committee proposed substantial amendments to this offence. Most importantly, it argued that the negligence requirement be removed, with companies instead being held strictly liable for any bribes paid on their behalf.<sup>11</sup> The Joint Committee, however, also proposed that the adequate procedures defence be available to everyone (including senior officers). It remains to be seen how this and other controversial issues are resolved in the final Bill.

## **EXTRATERRITORIAL APPLICATION**

The draft Bill provides that the courts of England, Wales and Northern Ireland have jurisdiction in relation to the general bribery offences and the offence of bribing an FPO, even if the conduct is committed overseas, if the person in question is a British citizen, a body incorporated under the law of any part of the U.K. or, importantly, an individual who is ordinarily resident in the U.K. The draft Bill thus goes one step further than the 2001 Act in applying even to foreign nationals in certain circumstances.

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<sup>10</sup> The term “bribe” referred to in this section includes bribes paid to both public and private persons.

<sup>11</sup> It was pointed out that a number of other countries have regimes which were at least as strict as this, including the United States, Australia, Switzerland, Finland, Italy and Austria.

Under the draft, Bill the offence of negligently failing to prevent bribery can be committed irrespective of where the alleged bribery has taken place.

## **PENALTIES**

All of the offences discussed above are triable either summarily or on indictment, with the exception of the new offence of negligently failing to prevent bribery, which is triable on indictment only. Upon conviction, the maximum penalty for individuals tried on indictment has been increased from seven to ten years. Companies convicted after an indictment, meanwhile, are liable for an unlimited fine.

The Joint Committee has supported the penalties proposed under the draft Bill. However, it recommended that the government ought to clarify certain matters, such as the means by which the unlimited fine ought to be assessed, and urged the government to take action at a European level on the issue of automatic debarment.

## **CONSENT TO PROSECUTE**

The draft Bill removes the requirement that any prosecution for bribery requires the consent of the Attorney-General to proceed. Instead, the necessary consent must be given by the director of the relevant prosecuting agency.<sup>12</sup>

## **CONCLUSION**

The draft Bill presents a much needed overhaul and modernisation of what can only be described as the myriad of U.K. anti-bribery laws. The new offence of negligently failing to prevent bribery is a particularly significant and potentially controversial development, which will significantly increase the need for companies to ensure that they have appropriate and rigorous anti-corruption policies and procedures and compliance systems in place. The draft Bill must, of course, be read in conjunction with the SFO's recent guidelines on self-reporting of overseas corruption (see Debevoise & Plimpton LLP Client Update of 10 August 2009). Companies carrying on business in England and Wales or Northern Ireland should prepare themselves for a notable shift towards U.S.-style anti-corruption enforcement and prosecution with a heavy emphasis on corporate compliance and voluntary cooperation with the authorities.

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<sup>12</sup> *The relevant directors are the Director of Public Prosecutions, the Director of the Serious Fraud Office and the Director of Revenue and Customs Prosecutions.*



There can be no doubt that the U.K. government is making very serious efforts to put in place a solid legislative framework to deal with the problem of international corruption and an effective regime for prosecution of corporations engaged in overseas corruption in particular.

While the precise provisions of the final Bill remain to be seen and the timeframe for the enactment of the Bill remains unclear, the draft Bill clearly presents a very significant step in the right direction.

We will be monitoring developments in this area over the coming months. Please feel free to contact any of the undersigned if you have any questions.

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