EDWARDS ANGELL PALMER & DODGE

Guidance

Proposed reform of UK bribery laws

Contents

At a glance 3

Introduction 4

The new offences 5

— The general offences of receiving or giving a bribe 5
— Bribery of foreign public officials 7
— The corporate offence of failure to prevent bribery 8
— Connivance by directors 10
— Extra-territoriality application 10
— Penalties 10
— Facilitation payments 10

Conclusion 12

Capability statement 13

At a glance

- The law of bribery in England and Wales is widely regarded as outdated and uncertain
- Draft legislation has been proposed intended to make "the law of bribery simpler and more appropriate to modern times and consistent with [the UK's] international obligations"
- The offences would apply to bribery both in the public and private sectors
- A specific offence is proposed of bribery of foreign public officials
- A new corporate offence is proposed of failure to prevent bribery
- This will effectively require companies to implement, maintain and enforce rigorous anti-bribery policies
- It is unclear whether conviction for failure to prevent bribery could lead to exclusion (debarment) from public contracts
- Directors and other officials could be personally criminally liable if they have consented to or connived at the commission of an offence
- Criminalisation extends to bribes paid overseas
- Facilitation payments are criminalised, but it is suggested they will only rarely be prosecuted – further guidance is necessary as to when a prosecution would be brought

Introduction

The law of bribery in England and Wales is widely regarded as outdated and uncertain. The Government is under significant international pressure to revise and simplify the law, in particular from the Working Group responsible for monitoring compliance with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, to which the UK is signatory. In an October 2008 report, the Working Group stated that the United Kingdom's failure "to enact effective and comprehensive legislation undermines the credibility of the UK's [anti-bribery] legal framework and potentially triggers the need for increased due diligence over UK companies by their commercial partners or Multilateral Development Banks".

On 30 November 2008, following an earlier consultation paper, the Law Commission published a detailed review of the existing law, and proposed a draft bill that would repeal existing offences, and replace them with new offences. The ambition is to provide a "new, clearly defined offence of bribery" and "to make the law of bribery simpler and more appropriate to modern times and consistent with our international obligations". The proposed bill does not distinguish between bribery in the public and private sectors, save for a specific offence of bribery of a foreign public official.

The proposals include a corporate offence of "failure to prevent bribery". Its introduction would undoubtedly create an obligation to implement, maintain and enforce rigorous anti-bribery policies, systems and controls to avoid prosecution if an employee or agent pays a bribe, as the existence of adequate procedures designed to prevent bribery would be a defence to the offence.

The Government intends to respond to the Law Commission's report early this year and aims to introduce a draft bribery bill for pre-legislative scrutiny in the current session of parliament. The proposed bill, or something akin to it, could therefore be passed in late 2009 or early 2010.

The new offences

The draft bill proposes the following broad 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 general offences of receiving or giving a bribe

If the draft bill becomes law, a bribery offence could be committed only in relation to broadly defined functions or activities: any function of a public nature; any activity connected with a business trade or profession; any activity performed in the course of a person's employment or any activity provided by or on behalf of a company, partnership or unincorporated association.

In each case it would be necessary for the prosecution to demonstrate that the person performing one of these functions or activities was expected to perform it in good faith, or was expected to perform it impartially, or was in a position of trust by virtue of performing it.

Unusually, the proposed offences are expressed as scenarios, termed cases in the draft bill. There are four offences covering the receipt of bribes, and two covering their payment. The formulations of the offence are complex, and probably overly so, although the Law Commission suggests that this is necessary to ensure that the bill covers all of the widely differing ways in which bribes or other illicit advantages are promised, made, demanded or received.

The proposed offences are expressed as follows:

Recipient offences

- Case A, the defendant requests, agrees to receive or accepts a financial or other advantage intending that one of the defined functions or activities should be performed improperly;
- Case B, the defendant requests, agrees to receive or accepts a financial or other advantage, where the request, agreement or acceptance constitutes the improper performance of one of the functions or activities;
- Case C, the defendant requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance of one of the functions or activities;
- Case D, the defendant performs one of the functions or activities improperly in anticipation or in consequence of the receipt of a financial or other advantage.

Payment offences

- Case E, the defendant offers, promises or gives a financial or other advantage intending to induce another to perform improperly one of the functions or activities, or as a reward for improper performance;
- Case F, the defendant offers, promises or gives a financial or other advantage to another, knowing or believing that the acceptance of the advantage would itself constitute the improper performance of one of the functions or activities.

Illicit payments through third parties, or for the benefit of third parties, will be outlawed.

Bribery of foreign public officials

The Law Commission has proposed a specific and stand-alone offence of bribery of a foreign public official. The offence would be committed if the defendant offers or pays a bribe with the intention of influencing a foreign public official in his or her official capacity to obtain or retain business, or an advantage in business. The bill includes a broad definition of "a foreign public official". Again, the offence would catch both direct payments and payments made through third parties.

It would be a defence to show:

- that the payments were "legitimately due", that is were permitted or required by local law or, in the case of representatives of public international organisations such as the United Nations, by the rules of that organisation; or
- that the defendant reasonably believed that this was the position - in determining this a jury will specifically have to consider the adequacy of the steps taken to find out whether the payment was required or permitted under local law.

The offence inevitably overlaps with the general offences described above. This is justified on the basis of the need for the UK to demonstrate and monitor compliance with its international obligations to deter and punish corruption transactions taking place overseas in accordance with the OECD Convention on Combating Bribery, and to make it easier for the Courts to interpret the scope and nature of the offence against the 'evolving background' of the OECD Convention.

The corporate offence of failure to prevent bribery

A company or other entity could be liable for the proposed general offences outlined above, if committed by individuals representing its "controlling mind". However, it is notoriously difficult to prosecute companies on this basis and there has never been a successful prosecution in England of a company for bribery. The OECD Working Group, in its October 2008 report, stated that the United Kingdom had not effectively criminalised bribery by companies.

The Law Commission now proposes a new offence of failure to prevent bribery. It would apply to companies and limited liability partnerships whose registered office is located in England and Wales. The proposed offence does not extend to companies registered overseas with a place of business in England and Wales, even if trading in the UK.

The offence would be committed if:

- any person performing services for or on its behalf of a company or partnership pays a bribe (whether an employee, agent or subsidiary);
- the bribe was in connection with the defendant's business; and
- any person with responsibility for preventing bribery negligently failed to prevent the payment of the bribe.

It would be a defence to show that adequate procedures had been implemented intended to prevent bribery by the person paying the bribe. That defence is not available if the negligence complained of is that of a director, manager, secretary or officer of the company, or a member of a limited liability partnership. Criminal liability should be avoided if a properly trained but fraudulent employee found a way to circumvent adequate compliance procedures. Companies or partnerships without adequate training, systems and controls are clearly at significant risk of prosecution if one of their representatives pays a bribe.

A company can be prosecuted whether or not criminal proceedings are brought against the person paying the bribe.

The introduction of the offence would, in effect, require companies to implement, maintain and enforce rigorous anti-bribery and anti-corruption policies, systems and controls, and to keep them under review.

The Law Commission, in proposing this offence, has rejected automatically imposing criminal liability on companies for bribery by their employees or agents, as is the case for example in the United States. This approach has traditionally been taken only in relation to less serious wrongdoing. Doing so in relation to bribery offences in isolation was considered unadvisable pending a broader review of the nature and scope of corporate criminal liability.

Similarly, that review will consider the question of whether companies should be criminally liable for failure to prevent bribery by foreign subsidiaries, where those subsidiaries are acting on their own account and not on behalf of their parent companies.

European Union law, implemented in the UK, provides for mandatory exclusion (debarment) of a company from public sector contracts if the company, or its directors or certain other representatives, have been convicted of bribery or fraud. It is unclear whether it is proposed that conviction for failure to prevent bribery should lead to mandatory debarment from tendering for public projects. This needs clarification (indeed the present law on debarment already has substantial deficiencies, not least that debarment is mandatory regardless of the seriousness of the offence and that no account is taken of mitigating factors).

Connivance by directors

The Law Commission has recommended that directors, managers, secretaries or those holding similar offices should be personally criminally liable if they have consented to or connived at the commission of one of the proposed general offences or the offence of bribing a foreign public official. This is consistent with similar provisions in the Fraud Act 2006.

Extra-territoriality application

It is proposed that criminalisation will extend to bribes paid overseas by British citizens, UK residents and companies or partnerships incorporated in the United Kingdom[1], even where no steps in relation to those bribes are taken in the UK. The offence of a failure to prevent bribery could also be committed where the bribe, and all steps taken in relation to it, occurred outside of the UK.

Penalties

Individuals found guilty of an offence would face a maximum of 10 years imprisonment or a fine, or both. The maximum penalty for a company would be an unlimited fine.

Facilitation payments

Facilitation payments are payments made to induce a person to perform a duty which that person is obliged to perform, without resulting in preferred treatment, and where that payment exceeds that properly due. Such payments are typically, but not necessarily, of low value. Payments made to obtain any kind of preferential treatment are not facilitation payments, for example, payments made to obtain a licence where the criteria for issue have not been met.

1 The proposed offences would also apply to citizens of British Overseas Territories, British Nationals (Overseas), a British Overseas Citizens, British subjects and British protected persons.

The criminalisation of true facilitation payments is a matter of some debate. Demands for facilitation payments are customary in some countries and the person from whom the payment is demanded is often the victim of extortion. The making of facilitation payments is at present a criminal offence in England, in common with many jurisdictions with the notable exception of the United States.

The Law Commission's draft bill criminalises facilitation payments, both under the general offences and also under the specific offence of bribing a foreign public official. In its report, however, the Law Commission recognises that facilitation payments pose particular difficulties, and has suggested that it "will be rarely in the public interest to prosecute… for the payment of small sums to secure the performance of routine tasks", suggesting that such payments are best handled through sensible use of the discretion not to prosecute. In practice, this reflects the present position.

There is considerable confusion and uncertainty as to liability under the existing law for facilitation payments. If the Law Commission's proposals are adopted, clear guidance would be welcome describing the circumstances in which a facilitation payment would be prosecuted, and the circumstances in which it would not.

Conclusion

Whilst there is scope for improvement in the drafting of the proposed bill, implementation of the present draft would make UK bribery law clearer and simpler, both in the private and public sector. It will also assist in demonstrating compliance with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Clarity is required on the treatment of facilitation payments in practice, and on whether conviction for failure to prevent bribery could lead to debarment. Robust and effective anti-corruption and anti-bribery policies, systems and controls are, effectively, a requirement of the draft bill. Vigorous enforcement by the US Department of Justice and Securities Exchange Commission of the US Foreign Corrupt Practice Act against both domestic and foreign companies already make this essential for any company trading internationally. UK law enforcement agencies are also demonstrably prioritising the investigation and enforcement of bribery, as demonstrated by recent successes for the Serious Fraud Office and the Financial Services Authority, and this can be expected to increase following the modernisation of the law.

Capability statement

Edwards Angell Palmer & Dodge has substantial experience and capabilities in assisting corporations and individuals confronting corruption issues in a wide array of contexts. Our offices in the US and in London can guide clients through almost any corruption-related issue, whether it be implementing effective training and compliance programmes, vetting prospective business partners, conducting multi-national internal investigations, or responding to government inquiries or enforcement actions. Our team includes former UK and US prosecutors. We also have extensive experience in data protection, whistleblower protocols, and privacy compliance duties of companies in different countries arising from corruption enquiries, investigations and remedial compliance actions.

For further information on FCPA and how it may affect you, contact any of the members of our FCPA Practice:

Matthew D. Batastini	Providence Office mbatastini@eapdlaw.com	+1 973 520 2399
Paul D. Brown	Wilmington Office pdbrown@eapdlaw.com	+1 302 425 7109
Andre K. Cizmarik	New York Office acizmarik@eapdlaw.com	+1 212 912 2731
Joseph E. Czerniawski	Hartford Office jczerniawski@eapdlaw.com	+1 212 912 2839
Joshua W. Gardner	Boston Office jgardner@eapdlaw.com	+1 617 951 2259
Michael T. Gass	Boston Office mgass@eapdlaw.com	+1 617 239 0343
Jaime D. Guttman	West Palm Beach Office jguttman@eapdlaw.com	+1 561 820 0208

Laurence Harris	London Office lharris@eapdlaw.com	+44 (0) 20 7556 4445
Stephen G. Huggard	Boston Office shuggard@eapdlaw.com	+1 617 239 0769
Colin Joseph	London Office cjoseph@eapdlaw.com	+44 (0) 20 7556 4434
Scott R. Magee	Boston Office smagee@eapdlaw.com	+1 617 239 0304
Matthew A. Martel	Boston Office mmartel@eapdlaw.com	+1 617 239 0115
James Maton	London Office jmaton@eapdlaw.com	+44 (0) 20 7556 4547
Richard J. McCarthy	Boston Office rmccarthy@eapdlaw.com	+1 617 951 2230
Robert Novack	Madison Office rnovack@eapdlaw.com	+1 973 520 2325
Christine M. O'Connor	Boston Office coconnor@eapdlaw.com	+1 617 239 0163
Alexandra Radcliffe	London Office aradcliffe@eapdlaw.com	+44 (0) 20 7556 4593
John L. Reed	Wilmington Office jreed@eapdlaw.com	+1 302 425 7114
Mark E. Schreiber	Boston Office mschreiber@eapdlaw.com	+1 617 239 0585

Charles W. Stotter	Madison Office cstotter@eapdlaw.com	+1 973 520 2326
Antonio Suarez-Martinez	London Office asuarez-martinez@eapdlaw.com	+44 (0) 20 7556 4526
Eric Tunis	Madison Office etunis@eapdlaw.com	+1 973 520 2340
Mark R. Vernazza	Boston Office mvernazza@eapdlaw.com	+1 617 239 0207

February 2009

This publication is for general guidance only and is not intended to be a substitute for specific legal advice. If you would like any further information please contact:

James Maton tel: +44 (0)20 7556 4547 *jmaton@eapdlaw.com*

EDWARDS ANGELL PALMER & DODGE UK LLP

One Fetter Lane, London EC4A 1JB United Kingdom
tel: +44 (0)20 7583 4055 fax: +44 (0)20 7353 7377

eapdlaw.com