

Proposed UK Bribery Bill: It's Implications and Contrasts to the FCPA

In March 2009, the United Kingdom introduced into Parliament a Bribery Bill drafted to consolidate and bring into the 21st Century the various UK anti-corruption and bribery laws. As stated by Her Royal Highness Queen Elizabeth II, in her speech of November 18, 2009, the purpose of the Bribery Bill is to "Provide a modern and comprehensive scheme of bribery offences to equip prosecutors and courts to deal effectively with bribery at home and abroad." As of February 9, 2010, the Bribery Bill had its third and final reading in the House of Lords, where no changes were proposed, and the bill has now been presented to the House of Commons for the first reading.

Background

General reform of the bribery laws was first proposed in a Law Commission report in 1998. This led to a draft Government Bill in 2003 that failed to win broad support in pre-legislative scrutiny. This defeat led to mounting pressure as the UK faced criticism from the Organization for Economic Co-Operation and Development (OECD) for the UK's lack of clear substantive prohibitions on bribery and its failure to comprehensively implement and enforce its obligations under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

The Secretary of State for Justice Jack Straw introduced the draft Bribery Bill, which was informed by a further review by the Law Commission and was published in March 2009. The bill was subject to pre-legislative scrutiny by a Joint Committee of both the House of Lords and Commons from May to July 2009. The Joint Committee report, published in July 2009, was broadly supportive of the Government's proposals. The Government's response to the Joint Committee report was published on November 20, 2009; the same day as the publication of the Bribery Bill.

With wide cross-party support it is anticipated that the Bribery Bill will pass the House of Commons and become law by May, 2010. The Bribery Bill amends and repeals existing anti-bribery offences under the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916 and abolishes the UK common law offenses of bribery and embracery (bribery of jurors). This proposed legislation represents a long awaited simplification of the law on corruption and makes the UK compliant with its international obligations under the OECD. It will have a major impact on the way businesses connected to the UK manage their international business.

Offenses under the Bill

A. Individuals

Individuals can be prosecuted for making an offer to, or a promise to, bribe where such promise or offer gives a financial or other advantage to another person to obtain a reward.

The bribe need not be financial but can be of “other value”. This can occur for any function of “of a public nature” (i.e. ‘governmental official’) or “connected with a business” (i.e. ‘private entity’). The Bribery Bill makes it a crime to accept a bribe where a person agrees to receive or accepts something of value and it occurs whether or not the person actually receives it; if the action is linking to providing improper performance. As with offering a bribe, the legislation prohibits such actions by both public officials and those “connected with a business”. The test for whether an offer or promise is a bribe is “what a reasonable person in the UK would expect in relation to the performance of the type of function or activity concerned.”

B. Companies

In addition to the ongoing corporate liability for its employees engaging in bribery, this Bill creates a ***strict liability*** crime when a company fails to prevent bribery. This means that if an employee offers or makes a bribe and the person, who has the responsibility of preventing bribery, fails to prevent the bribe such person can be liable under the Bribery Bill. If there is no 'person responsible' for preventing bribery within the company, responsibility for the action is deemed to be that of any senior officer, such as a director, secretary or manager of the company. The only defense to this situation is if the company can show it had “adequate procedures designed to prevent...such conduct.”

C. Extraterritorial application

This legislation has extraterritorial application so that any UK citizen or company transacting business anywhere in the world can be liable under this Bill. This means that the relevant criminal act can occur outside the UK and persons or companies in the UK can be liable. But more importantly for non-UK companies, they are covered as well if they have a UK office or operation or even probably if they employ a UK citizen. There is no requirement in the Bribery Bill that the illegal conduct be approved by or paid through the UK branch or subsidiary. The simple instance of having a UK presence will create jurisdiction. So if a Dutch company has a UK branch and engages in bribery in some country in Asia, that Dutch company can now have UK liability under the Bribery Bill and be prosecuted in the UK.

D. Penalties

The Bribery Bill provides penalties for individuals for up to 10 years in jail per offense and unlimited fines. Senior company officials who consent to or are a part of a bribery scheme are liable as individuals as well. Equally significantly prohibited actions by companies are punishable by fines that not limited.

Contrast with the Foreign Corrupt Practices Act

The Bribery Bill is significantly broader than the US Foreign Corrupt Practices Act (FCPA). There is more strict scrutiny in the Bribery Bill and enhanced criminal penalties

available to UK prosecutors. The significant differences in the two pieces of legislation are as follows.

A. Public v. Private

The FCPA focuses on anti-corruption of foreign governmental officials. The Bribery Bill specifically covers non-governmental officials, i.e., private citizens. This makes any bribery illegal; not just trying to or bribing a foreign governmental official.

B. Facilitation Payments

The FCPA has a specific defense for facilitation payments. The Bribery Bill has no such defense and indeed, certain types of corporate hospitality are prohibited if they are “intended to subvert the duties of good faith or impartiality that the recipient owes his or her employer”.

C. Strict Liability for Failing to Prevent Bribery

The FCPA has no strict liability either written directly into the statute or interpreted by judicial review. The Bribery Bill creates a new strict liability of corporate offense for the failure of a corporate official to prevent bribery.

D. Penalties

The FCPA has criminal penalties of 5 years per offense. The Bribery Bill has penalties of up to 10 years per offense.

Defenses under the Bill

There are two affirmative defenses listed in the Bribery Bill. The first is listed as the ‘adequate procedures’ defense. The Explanatory Notes to the Bribery Bill indicate that this narrow defense would allow a corporation to put forward credible evidence that it had adequate procedures in place to prevent persons associated from committing bribery offences. Although not explicit on the face of the Bill, in accordance with established case law, the standard of proof the defendant would need to discharge is the balance of probabilities. The legislation requires Secretary of State to publish guidance on procedures that relevant commercial organizations can put in place to prevent bribery by persons associated with their entity.

Other than this commentary, the Bill provides no further information on what might constitute ‘adequate procedures’ as a defense but the Government has signaled that it will work with the UK business community to provide appropriate guidance to this critical component of the Bribery Bill. The UK law firm KattenMuchin has indicated that they expect the Government will apply a test regarding the ‘adequate procedures’ defense “with regard to the size of the company, its business sector and the degree to which it operates in high risk markets.”

Conclusion

The Bribery Bill is a significant departure for the UK in the area of foreign anti-corruption. It is the culmination of many years of debate within the British government on how to move forward with its responsibilities under the OECD Convention on the Combating of Bribery. The Bribery Bill is significantly stronger than the US FCPA. Many internationally focused US companies have offices in the UK or employ UK citizens in their world-wide operations. This legislation could open them to prosecution in the UK under a law similar to, but stronger than, the relevant US legislation. US companies should monitor the progress of this Bribery Bill and be ready to enact changes to their FCPA compliance programs to incorporate the required changes if they have UK subsidiaries or business operations.