

LIUC - Castellanza

European Comparative Contracts Law

**Contractual Ethical Governance Hot
Topics: Bribery/Anti-corruption Laws &
effects on private contracting and public
procurement**

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Contractual Corruption Laws & Enforcement

- A brief introduction
- US Foreign Corrupt Practices Act
- OECD Convention
- Other similar laws
- UK act
- This affects so many aspects of corp. operations:
bidding/tenders, travel, gifts, entertainment, training,
commissions/pay, agents/consultants, political relations, etc.

Before starting, let's discuss

- What is bribery?
- What is corruption?
- What differentiates it from “normal” business practices?
- Why is it bad? Why should it be prohibited and punished?
- Can the state or the UN ever forcibly eradicate it?
- What about cultural norms to bribery? The “golden gift” requirement...

What is bribery & corruption?

- Why should it be prohibited and punished?
- *Si fueris Rōmae, Rōmānō vīvitō mōre; si fueris alibī, vīvitō sicut ibi...?*
- Commissions?
- Bonuses?
- Loyalty rewards?
- Discounts?
- Rebates?
- Consulting or management fees?
- GREY AREAS

Definitions

- Corruption can take many forms that vary in degree from minor use of influence to institutionalized bribery.
- Transparency International's defines it as "the abuse of entrusted power for private gain".
- Can mean not only financial gain but also non-financial advantages, & Transparency International's Business Principles for Countering Bribery define it as such:
 - "Bribery: An offer or receipt of any gift, loan, fee, reward or other advantage to or from any person as an inducement to do something which is dishonest, illegal or a breach of trust, in the conduct of the enterprise's business."

Example of “ethical vaccum”: Nigeria and Corruption = lack of ethics has a human cost

- ▶ Nigeria ranks 54th on the Human Poverty Index (HPI) and has shown an alarming increase in poverty incidence over the last twenty years.
- ▶ From approximately 28% nationally in 1980, poverty incidence has risen to about 66% today.
- ▶ Latest estimate of income suggest that about two-thirds of Nigerians (more than 80 million people) survive on less than one dollar per day.
- ▶ The country is rated as one of the most corrupt in the world, but is sadly not alone
- ▶ A number of the well known MNC corruption/bribery cases occurred there

The US FCPA

- Result of SEC investigations in mid-70's, over 400 US cos admitted questionable or illegal payments over \$300 million to foreign government officials, politicians & political parties
- Enacted to stop bribery of foreign officials & to restore public confidence in integrity of US business system
- Numerous firms that paid bribes to foreign officials subject of criminal & civil enforcement actions, resulting in large fines & suspension & debarment from federal contracting, **& their employees & officers have gone to jail**
- To avoid consequences, many firms implemented detailed compliance programs to prevent & detect improper payments
- *In 1997, US & 33 other countries signed OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions = thus US' major trading partners have enacted legislation similar to FCPA*

Key Co Go focus: US FCPA & enforcement

- FCPA generally prohibits US cos & citizens, foreign companies listed on US stock exchanges, or any person acting while in US, from corruptly paying or offering to pay, directly or indirectly, money or anything of value to a foreign official to obtain or retain business (“**Antibribery Provisions**”)
- Also requires “issuers” (any company including foreign companies) w securities traded on US exchanges or SEC reporting to keep books & records to accurately reflect business transactions & maintain effective co go internal controls (“**Books and Records and Internal Control Provisions**”)

FCPA exemptions – 3 main ones

- **Reasonable and bona-fide expenditures**
 - A payment that is directly related to demonstration, explanation, or promotion of products or services, or directly related to performance or execution of a contract, is considered to be reasonable & bona fide expenditure and therefore not prohibited (but see Intel case in China)
- **Payments which are lawful under foreign law**
 - If a payment is lawful under regulations and legislation of relevant foreign country, it is not prohibited (but even most corrupt countries have them)
- **...and**

Exemption for facilitating payments – US

- Historic exemption for “grease payments”
- Defined as “facilitation or expediting payment to a foreign official, political party, or party official for the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official”.
- “Routine government action” does not include any decision by public official to award new business or continue existing business with a particular party, or if discretionary in nature (e.g. H&S inspection or drug approval)

Facilitating payments US- FCPA defines “routine governmental action” including:

- obtaining permits, licenses, or other official documents to qualify a person to do business in a country;
 - processing government papers, such as visas or work orders;
 - providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or transit of goods across country;
 - providing phone service, power & water supply, loading & unloading cargo, or protecting perishable products from deterioration; and
 - actions of similar nature.
-
- No \$\$\$ threshold for determining when payment crosses line btw facilitation payment & bribe, but FCPA accounting provisions require they be accurately reflected in books & records, even if payment itself is permissible
 - **Lots of paperwork involved to justify it.**

Facilitating payments US

- *Au contraire*, prohibited under UK & most other national anti-bribery legislation
- OECD head Angel Gurría described them as “corrosive . . . particularly on sustainable economic development and the rule of law”. OECD recommends not allowing them.
- US under pressure: in fact, so many FCPA enforcement actions concern payments to low-level foreign officials to secure permits, licenses & such...
- In words of former SEC FCPA enforcement attorney Richard Grime, it is because *“the DOJ and the SEC’s narrow interpretation of the facilitating payments exception is making that exception ever more illusory, regardless of whether the federal courts – or Congress – would agree.”*
- Criticism of insufficient case law, court involvement
- US using new expansive theories to interpret “to obtain business” (Haiti Telecoms case)

Grey areas: definitions

- A “foreign official” is defined in the FCPA as *“any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.”*

See 15 U.S.C. §§ 78dd-2(h)(2)(A)

FCPA

- Jointly enforced by DOJ & SEC (high level of coordination on many matters, incl. Insider Trading & market manipulation)
- Proof of US territorial nexus not required for FCPA to be implicated, & FCPA violations can, & often do, occur even if prohibited activity takes place entirely outside of US
- For this reason, business leaders must be knowledgeable about all business activity, incl. activities 1000s of miles away from corp. headquarters = major impact on global UK/European firms & their acting/compliance depts

FCPA

- Antibribery provisions make it unlawful for US persons, & certain foreign issuers, to make corrupt payments to foreign officials to obtain or retain business for or with, or directing business to, any person
- Since 1998, also apply to foreign firms & persons who take any act for such corrupt payment while in US
- FCPA also requires cos whose securities are listed in US to meet accounting provisions
- Accounting provisions require cos covered by provisions to keep books & records that accurately & fairly reflect corporate transactions & to devise & maintain adequate system of internal accounting controls

FCPA Sanctions - Criminal

- Businesses subject to fines of up to \$2M
- officers, directors, stockholders, employees, & agents subject to fine of up to \$100,000 & imprisonment up to 5 years
- fines may be actually quite higher -- actual fine may be up to twice the benefit that defendant sought to obtain by making corrupt payment

FCPA Sanctions - CIVIL

- The Attorney General or the SEC, as appropriate, may bring a civil actions against any firm *as well as* any officer, director, employee, or agent of a firm, or stockholder acting on behalf of the firm, who violates the antibribery provisions, as well as enjoin any act or practice of a firm

FCPA Sanctions – Other governmental actions

- Business may be barred from doing business w US government.
- Also, a person or firm found guilty of violating the FCPA may be ruled ineligible to receive export licenses
- SEC may suspend or bar persons from securities business & impose civil penalties on persons in securities business for violations of FCPA
- US Commodity Futures Trading Commission & Overseas Private Investment Corporation both provide for possible suspension or debarment from agency programs for violation of FCPA

FCPA

- Conduct that violates antibribery provisions of FCPA may also give rise to private cause of action for treble damages under Racketeer Influenced and Corrupt Organizations Act (RICO), or to actions under other federal or state laws (NY)
- For example, might be brought under RICO by competitor alleging that bribery caused defendant to win a foreign contract – see Victor Dahledah case in UK with Alcoa
- Dovetails w other US corporate governance law, such as SOX and the recent Dodd Frank Act

FCPA – the current co go ‘hot topic’

- Massive increase in scope of investigations (both US & non-US cos) and fines, plus more likely to go after foreign companies:
- Dec 2008- Siemens – US\$1.6 billion in joint US/German fines (US\$800 million, largest FCPA penalty ever- a sign of things to come) - Plus additional \$1B to fix their internal corporate culture to prevent future crimes
- Jan 2009 Halliburton paid \$559 million fine to end investigation of former sub for Nigerian corruption (\$382 million to DOJ & \$177 million to SEC)
- Many many others, both US and int’l cos

Stings – White collar crime gets dirty

- Tie in with securities fraud, insider trading, etc.
- Recently, US authorities have increased their use of wire-tapping and “sting”-style operations regarding FCPA investigations. For example, in early 2010 at a Las Vegas weapons fair, numerous individuals were arrested.
- As well, certain industries have been subject to past or ongoing “industry sweeps”, such as the oil and gas, pharmaceutical / medical devices, financial services and Hollywood film studio sectors – some secretly happening now

Whistleblowing under Dodd Frank

- One area that may prove important moving forward will be potential FCPA ramifications of significant expansion of role of whistleblowers under Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010.
- There, people with material information about FCPA violations, including employees, would be eligible to receive large rewards or bounties ranging from 10% to 30% of fines collected worldwide because of such FCPA violations.
- These substantial financial incentives to potential whistleblowers will likely result in notable increase in investigations, as informants perceive large pay-offs for info leading to such fines.

- Dodd-Frank also expressly prohibits retaliation by employers against whistleblowers & provides them w private cause of action if improperly discharged or discriminated against.
- Will also likely result in more development of “cottage industry” w law firms & consultants stepping up to solicit potential FCPA whistleblowers (similar to *Qui Tam*/False Claims Act cases and shareholder derivative suits).
- Similar program by IRS fueled development of “cottage industry” in legal/tax matters
- Is radically changing dynamics of determining when & if to “self-disclose” potential FCPA violations
- Are having a significant impact on companies' decisions to disclose potential FCPA violations
- Adopting “wait-and-see” approach to FCPA disclosure will become much riskier, as corp will not know if whistleblower has already contacted gov’t.

Dodd Frank 2010 whistleblower provisions

- Siemens fines were \$1.6B = qualified whistleblower could have potentially received up to \$480M under new program.
- E.g. case late May: former home appraiser to receive \$14.5M after accusing subprime lender Countrywide Financial of inflating appraisals on gov't-insured loans.
- \$104 Swiss banker tax case

US approach: DPAs (Deferred Prosecution Agreements)

- Prior to 2003, were primarily entered into in juvenile or drug cases, but since then DOJ encouraged prosecutors to consider entering into DPAs w businesses charged w/ criminal offenses.
- Before use of DPAs, prosecutors dealing w/ corporate crimes either had to proceed w/criminal charges against a corp, likely destroying it in process, or let it off w/o penalties
- DPAs much like name implies: agmts btw DOJ & corporations suspected of committing FCPA violations that defer prosecution for those offenses for set period. At end of set period, if corp has complied w/terms, charges dropped
- Criminal charges still filed, usually in form of a criminal information – which is similar to an indictment but does not require action by grand jury - but will be stayed and, if DPA complied with, eventually dismissed.

US DPAs

- While DPA terms may be specifically tailored to fit circumstances of each case, a review of DPAs out of FCPA violations show they are quite uniform in content: corp must accept responsibility for FCPA violations for which it stands accused. A statement of facts related to case is attached to DPA, & corp is prohibited from publicly contradicting those facts.
- Other provisions require continued cooperation by co, successor protection under agmt; waiving the statute of limitations for the stated violations; waiving challenges to the admission of evidence related to the investigation & requiring the co to accept as true the statement of facts in DPA
- If prosecution deferred by DPA goes forward in future, corp may be prohibited from contesting facts as laid out in DPA in court.
- Second, as part of a deferred prosecution agreement, a corporation should accept payment of criminal fines, based on severity and scope of charges (about 10 times what they were even a few yrs ago)

US DPAs

- Corps entering into DPAs expected to fully cooperate w DOJ and others gov't agencies for entire term
- Often requires corp to turn over docs & internal records relating to FCPA violations upon request; while corp may still claim attorney-client privilege, DOJ may consider this in determining whether the corporations has fully cooperated.
- Forced cooperation is very valuable to DOJ, who will be better positioned to investigate individual employees or managers involved in FCPA violations, as well as any subs or affiliates involved. The corp, to save itself, may have to provide gov't w evidence needed to secure convictions of people w/i & entities related to the corp.

US DPAs

- If corp abides by DPA terms for entire period, DOJ will drop any charges that it could have brought against it
- Duration varies, but expect them to last at least 18 months; 3 yrs more common, although recent trend to 2 yrs
- If corp fails to abide by terms, DOJ will move forward w prosecution for FCPA violations, as well as any additional charges accruing

Non-Prosecution Agreements

- Closely related to DPA, involves many of same requirements, including payment of fines, an agreement to cooperate w DOJ or others
- Has a statement of facts setting out violations details
- However, unlike DPA, non-prosecution agreement does not include filing of criminal information or indictment; rather, in exchange for corp's concessions, gov't agrees not to charge/prosecute it
- Allow corp to avoid consequences criminal charges may have on its ability to operate its business, particularly for companies involved in gov't contracts (but more rare than DPAs)

US approach: Opinion Procedure Releases

- DOJ “No Action Letters” guidance letters
- Enable issuers & domestic concerns to obtain AG opinion as to whether certain specified, prospective-not hypothetical-conduct conforms w DOJ present enforcement policy regarding antibribery provisions
- Entire transaction which is subject of request must be an actual--not hypothetical—transaction (opinion request should be made prior to requestor's commitment to proceed with transaction)
- Recent example:
<http://www.justice.gov/criminal/fraud/fcpa/opinion/2011/1-01.pdf>

• Let's take a look at one.

U.S. FCPA 1977 & UK Bribery ACT 2010

FCPA examples- French companies

- On June 28, 2010, DOJ announced that Technip S.A. (Paris global engineering, construction, and services) entered into deferred prosecution agmt & to pay \$240 M criminal penalty to resolve charges it violated FCPA's anti-bribery provisions.
- Separately, it agreed to disgorge an additional \$98 M in ill-gotten gains to SEC to resolve charges co violated FCPA's anti-bribery, books and records, and internal controls provisions.
- stem from participation in "TSKJ" JV alleged to have paid bribes to Nigerian officials between 1995 and 2004 to secure contracts valued at over \$6 billion to build LNG facilities on Bonny Island in Nigeria

- Technip & JV partners formed a “cultural committee” to consider how to carry out the bribery scheme and entered into sham contracts w shell co controlled by a U.K. agent & Japanese trading company to conceal more than \$180 million in illicit payments.
- JV partners allegedly used agents to bribe a range of Nigerian government officials
- Notably, SEC alleges JV partners paid bribes to employees of Nigeria LNG, Ltd., a co owned by Nigerian gov’t & 3 three multinationals (fall w/i definition of “foreign officials”)

FCPA – French cos.

- In early 2010 Alcatel-Lucent reported it had reached agreements in principle with DOJ & SEC in Dec. 2009 to settle FCPA charges for activities in Costa Rica, Taiwan, and Kenya- proposed agmt with SEC would involve paying \$45.4 M
- Investigated jointly w French and Costa Rican authorities
- Settlement w DOJ, 3-year DPA and pay \$92 M in criminal fines for accounting & internal controls violations
- Both agmts require Alcatel-Lucent to engage a French compliance monitor for 3 yrs. 3 non-U.S. Alcatel-Lucent subs plead guilty to anti-bribery, books and records, and internal controls charges

Transnational Cooperation and Parallel Investigations.

- Both the Technip and Alcatel-Lucent matters involved cooperation among U.S. and French (and other) authorities. In February 2010, new agreements between US & EU countries went into effect that facilitate information exchanges for criminal investigations and trials as well extradition
- Multinational companies are increasingly facing parallel investigations and prosecutions by US authorities and their French and foreign counterparts under FCPA and analogous laws in other countries

FCPA

- Supposedly 100+ SEC/DOJ ongoing investigations in pipeline
- In UK, Serious Fraud Office (SFO) is considering civil claims or criminal prosecution under UK Bribery Act (at times, prior laws) & violations of these laws may result in fines, restitution and confiscation of revenues
- “Tag-a-long” FCPA-like enforcement actions or inquiries in other countries appears to be becoming new norm

Why more FCPA enforcement now (last couple of years)?

Former US AG John Ashcroft in recent Wall St speech, cited following why current political climate creates increased opportunities & momentum for enforcement :

- Heightened international awareness of human cost of corruption as evidenced by international treaties addressing corruption (OECD, et al.) & new signatories to them;
- Economic urgency created by global economic downturn & possibility of more whistleblower & “disgruntled competitor” reports of corruption/misconduct;
- Climate of distrust of financial services & business community & related appetite for uncovering / punishing corporate wrongdoing;
- Post 9/11 cooperation between States to control flows of \$\$\$ to terrorist organizations conditions them to cooperate in other multinational investigations (definitely true w US/Euro cooperation)

FCPA – part of US/global anti-corruption campaign

- DOJ: “Through international instruments like the OECD convention and the UN convention against corruption, ***we have seen our international partners significantly step up their anti-corruption efforts.*** Everything we're seeing suggests that this trend will continue..... We are now working with our foreign law enforcement colleagues in bribery investigations to ***a degree that we never have previously.*** In the past, in a case of joint jurisdiction between the United States and another country, it was typically the case that only the U.S. prosecution would succeed. That is now significantly less likely to be the case.”

Magnitsky Act – the anti-corruption story of 2012

- Pres. Obama signed into law in December 2012: It targets travel and economic sanctions against those responsible for jailing & death of Russian lawyer Sergei Magnitsky.
- For decades US has been looking for legal way to punish foreign kleptocrats: immediate aim is to hold people in Russia accountable for what happened to Magnitsky. After he uncovered \$230M tax fraud apparently orchestrated by mobsters & gov't officials, he was detained without trial. After year in custody, he died in jail. No one in Russia has been arrested or tried for his 2009 death or crimes he discovered.
- W/o Act, there were obstacles for US to punish Russians implicated in the case. FCPA only reaches bribe payers & not bribe takers. A newer law, Presidential Proclamation 7750, enacted by Pres. Bush in 2004, allows State Department to deny U.S. visas to kleptocrats & their cronies -- but only in secret, never naming those targeted.

- And the DOJ's more recent Kleptocracy Asset Recovery Initiative uses cumbersome asset forfeitures against crooked foreign leaders but doesn't impose any punishment on individuals themselves.
- This Act -- passed w/ overwhelming bi-partisan support -- fills the legal gaps. It requires naming publicly the Russian kleptocrats implicated in Magnitsky's death, it bans them from entering US, & it streamlines legal process to freeze their US assets.
- Sen. John McCain, a co-sponsor, has talked about plans to go global w/new law.
- This year, he said, Congress should expand law to reach kleptocrats anywhere.
- The Magnitsky Act is now a model for anti-kleptocracy legislation, backed by Washington's political will to lead global fight against corruption and impunity.

OECD anti-corruption efforts

- Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "OECD Convention")
- On November 21, 1997, 29 member nations of OECD adopted Convention
- Sets forth essential elements of a foreign corrupt practices statute that each signatory country is obligated to enact into law.

OECD cont'd

- As a written international agreement, OECD Convention specifically sets forth basic, model elements of a foreign corrupt practices statute that each signatory country has agreed to enact into law soon after each's ratification
- Upon their ratification of OECD Convention, signatory nations will each adopt implementing legislation

France

- To implement OECD Convention, France enacted legislation amending French Penal Code -- Act 2000-595 -- which became final on June 30, 2000.
- Adds a new chapter to Code entitled "Interference with the Public Administration of the European Communities, the Member States of the European Union, other Foreign States, and Public International Organizations."
- Although France asserts both territorial and nationality jurisdiction, the latter is subject to several qualifications. For example, offense must be punishable under the laws of foreign state in which the offense allegedly occurred, & it appears that a complaint from the foreign state must be filed with French government as condition of initiating prosecution.

France

- In addition, jurisdictional & prosecutorial requirements for bribery offenses under Convention seem more stringent than those arising under EU anti-corruption arrangements, creating an apparent disparity in enforcement criteria
- Penalties under French law include fines & imprisonment up to 10 years, disqualification from public office & professional debarment, confiscation of bribe or related proceeds, & deportation of foreign persons.
- In addition, legal persons are subject to a range of potential sanctions, including fines, revocation of certain business privileges (including exclusion from government procurement), & judicial supervision.

UK Bribery Law in force

- Parliament passed law in April 2010, entry into force had been delayed until 1 July 2011
- Sweeping changes to previous legislation
- Law creates two new general offences of promising or offering a bribe, and requesting, agreeing to receive or accepting a bribe (whether in UK or abroad)
- Also offence of bribery of a foreign official
- Max. 10 yrs and unlimited fine on conviction
- Removes parliamentary privilege for MPs or peers in relation to prosecution for bribery
- Cf. USA legislation

UK Bribery Act

- Passed after period when UK Serious Fraud Office (SFO) had its first ever successful prosecution for corporate bribery in case of bridge-builders Mabej & Johnson Ltd. (Sept. 2009)-Ghana, £437k;
- Arms firm BAE last couple of embroiled in major scandal in US and UK (c. \$500M in US fines); SFO aimed for massive fines, ended up with approx. £30M
- UK antibribery laws had grown up piecemeal and were criticized as being uncertain and complex
- OECD Working Group criticism also (e.g. Part 12 of the Anti-Terrorism, Crime and Security Act 2001) which seeks to implement UK's obligations under OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

UK Bribery Act details

- Unlike prior laws, new law does not draw distinction between public & private bribery. Rather, recipient of bribe must be performing 1 of 4 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)

Application of UK law

- Law provides that courts of England, Wales & Northern Ireland have jurisdiction in relation to general bribery offences & offence of bribing an Foreign Public Official, even if conduct is committed overseas, if person in question is British citizen, a body incorporated under law of any part of UK or, importantly, an individual who is ordinarily resident in UK
- Thus goes one step further than 2001 Act in applying even to foreign nationals in certain circumstances.

Facilitating payments

- Were illegal under prior UK law and remain so under new law, as they are likely to be "improper" domestically, or not "legitimately due" under foreign official offence
- Indictment for violations subject to prosecutorial discretion
- Drafting Committee again expressed view that basic principles of proportionality in prosecutions should apply in practice
- Where businesses are in doubt as to appropriateness of hospitality events, proper advice should be sought

UK's new bribery law

- Provision likely to be of most concern to businesses is that of new offence for cos and partnerships that fail to prevent bribery by persons undertaking activities on their behalf
- Provisions relate to entities incorporated or formed in or under laws of UK (minus Scot.), wherever they carry on business, & to any other body corporate or partnership which carries on business in UK (not Scot.)
- Offence is committed if person connected w the organisation, whose responsibilities included preventing bribery, negligently failed to prevent bribe being made in connection w business
- Where no one person charged w preventing bribery, responsibility would be deemed to be that of any senior officer. Co would not be liable for offence of bribery itself, but for negligently failing to prevent it.

UK Bribery Act

- Thus, UK Act goes one step further than previous laws in applying even to foreign nationals in certain circumstances.
- Foreign cos & individuals (especially those living or spending large amounts of time in UK), need to assess their risk exposure under new law, especially as the first real cases are brought in order to evidence UK's enforcement approach.

UK Bribery Act

- On the extent of extraterritorial reach of UK Act, UK Serious Fraud Office (SFO) head Richard Alderman has opined:
 - *“For the first time, non-UK companies will be brought within the jurisdiction of the SFO if they have some business presence in the UK. What this will mean is that a foreign corporate which is involved in corruption anywhere in the world will be within the SFO’s jurisdiction if it has a business presence here even if the corruption has no connection with that business presence. This is a very important provision for us. I believe that foreign corporates are waking up to the significance of this.”*
 - **NB this “US style” approach to jurisdictional reach in modern business law – it is spreading**

What are adequate procedures to escape liability?

- Importantly, it will be defence to charge of failure to prevent bribery to show that organisation had adequate procedures in place to prevent persons performing services on its behalf from committing relevant offences
- However, act gives no specific definition as to what is "adequate" for the purposes of the defence, which may vary according to the threat faced by a particular organisation.
- Drafting Committee therefore recommended that official guidance be prepared for the law, on the meaning of "adequate procedures".
- Bar is being set quite high - ...

Adequate procedures?

- SFO indicated types of policies that it will consider as to whether businesses' procedures were adequate, including:
 - a clear statement of anti-corruption culture supported at the highest levels of management
 - a code of ethics
 - Accountability of personnel
 - processes for auditing the programme
 - adequate training
 - a system of reporting
 - investigation and disciplinary processes; and
 - various behavioural policies, including ones for gifts and hospitality, facilitation payments, outside advisers and political contributions.
- Potential major impact of financial / audit-related monitoring and reporting processes

- In March 2011, SFO & Director of Public Prosecutions published their joint guidance for prosecutors under Bribery Act.
- **Two-stage test for prosecutors** – i) the evidential stage and ii) the public interest stage.
- If not sufficient evidence to make a conviction more likely than not, prosecutors should not go on to consider whether a prosecution is in public interest, no matter how serious or sensitive case is.
- **Public interest considerations** – In determining whether a prosecution is in public interest, prosecutors should take into account a number of factors which tend either in favour or against prosecution. These factors differ depending on the offence in the Act in respect of which prosecution may be brought.

- They include, among other factors:
 - whether conviction is likely to result in a substantial sentence
 - whether the suspect was in a position of authority or trust; and
 - whether there was an element of corruption of the victim in the way the offence was committed.

- In respect of the Corporate Offence, SFO guidance will be considered: further factors likely to weigh in favour of prosecuting a co. which include:
 - whether company has history of similar conduct;
 - whether conduct is part of co's established business practices
 - whether company already subject to warnings or sanctions; and
 - whether co's reporting was slow or concealed full extent of offending conduct.

- Prosecutors are also entitled to consider whether conviction of co personnel for minor offence under Act would have disproportionate effect by leading to co's debarment from public contracts.

- **Strict Liability Corporate Offence of failing to prevent bribery** – The Guidance makes clear that the Corporate Offence does not require prior prosecution of associate person although there needs to be sufficient evidence to prove bribery by associate person to the normal criminal standard.
- For cos seeking to avail themselves of adequate procedures defence, they will need to establish it on balance of probabilities. Guidance makes clear that single instance of bribery does not necessarily mean that an organisation's procedures are inadequate. The actions of an employee may be wilfully contrary to very robust corporate contractual requirements, instructions or guidance.
- **Hospitality** – if not excessive or disproportionate and which is made in good faith it is unlikely to attract attention of the prosecutors. The more lavish the hospitality or expenditure, the greater the inference that it is intended to encourage or reward improper performance of a function or activity. Lavishness is just one factor that may be taken into account in determining whether an offence has been committed.

UK Ministry of Justice March 2011

Guidance for “Adequate procedures”

- **Principle 1 - Proportionate Procedures:** to bribery risks faced, and to nature, scale and complexity of the commercial organisation's activities; should be clear, practical, accessible, effectively implemented and enforced. *“The guidance also explains that the procedures that need to be put in place to rely on the statutory defence only have to be proportionate to the size and nature of the business. Modest risks require modest procedures to mitigate them.”*
- **Principle 2 - Top Level Commitment:** top level management communication of anti-bribery stance & work on procedures
- **Principle 3 - Risk Assessment:** 5 groups of commonly encountered external risks: country risk, sectoral risk, transaction risk, business opportunity risk, and business partnership risk.

- **Principle 4 - Due Diligence:** proportionate and risk-based due diligence should be carried out on persons providing services to the organisation.
- **Principle 5 - Communication (including training), based on size, extent of operations**
- **Principle 6 - Monitoring and Review:** improvements made as necessary

Looking forward

- Experts believe test cases may involve bribery by large foreign cos w UK operations, in which UK co lost business because of bribes, to send message & possibly to start building case law.
- Other investigations may involve medium to medium-large businesses which lack resources to properly implement procedures, in order to set an example & to “encourage” others.
- Finally, UK courts may also take an active role in working out limits of legal interpretations, building up body of case law, and self-reporting, like voluntary disclosures in US, may become a way for prosecutors to enforce the law & secure large fines.

UK Act first case

- Recently, 1st case & conviction brought under UK Act: it foreshadows significant penalties, even for “minor” offenses.
- In November 2011, a former London magistrates' court clerk become 1st person sentenced under UK Act, after he admitted accepting a GB£500 bribe for omitting to record traffic offence on court database at request of another person.
- He was sentenced to 6 years in prison after pleading guilty to bribery & misconduct in public office (3 yrs of sentence was under UK Act, w rest for official misconduct).
- Harsh sentence and a sign of things to come.

UK Act – 2d case

- Dec. 2012 – trainee taxi driver sentenced to 2 mos prison (plus some curfew limitations) for trying to bribe driving inspector (£200-300) after failing driving test
- SFO has confirmed case in the pipeline, but general feeling is not enough has been done to enforce law, even though plenty of “raw material” for prosecutions.

UK Bribery Act – final thoughts

- Presents much needed overhaul & modernization of confusing myriad of UK anti-bribery laws
- New offence of negligently failing to prevent bribery is particularly significant & potentially controversial development, which will significantly increase need for cos to ensure they have appropriate & rigorous anti-corruption policies & procedures & compliance systems in place
- Must be read in conjunction w SFO's prior guidelines on self-reporting of overseas corruption
- Companies carrying on business in UK should prepare themselves for **a notable shift towards US-style anti-corruption enforcement & prosecution** with heavy emphasis on corporate compliance and voluntary cooperation with authorities
- Ministry of Justice plan to introduce US style-DPA's, probably by early 2014

UK DPAs

- “DPAs will be an invaluable tool for the SFO and CPS. In cases where a company accepts wrongdoing, and is committed to put things right, a DPA will mean that it must comply with stringent conditions to compensate and ensure there are no repeat incidents, whilst avoiding a lengthy and expensive prosecution with the prolonged uncertainty it brings for the victims, blameless employees and others dependent on the fortunes of the company.”
- UK Solicitor General, Oliver Heald QC, 23 October 2012

UK DPAs

- DPA regime intended to be flexible - legislation contains non-exhaustive list of “indicative criteria” expected to be covered in DPAs, including:
 - ☐ the need for and amount of any financial penalty;
 - ☐ the need for and amount of any profit or benefit to be disgorged;
 - ☐ the need for and amount of any reparation to victims;
 - ☐ obligation of organisation to use all reasonable efforts to make available to Prosecutor relevant non-privileged info (*e.g., the factual findings of any internal investigation that was conducted, including interview summaries*);
 - ☐ obligation of organisation to implement anti-corruption or anti-fraud policies/procedures; and/or
 - ☐ whether a compliance monitor is to be appointed.

END

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