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Who Leads the Way in Anti-Corruption Enforcement: A Comparison Between the UK, the United States and France

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1. Introduction

The United States has led the way for many years in anti-corruption enforcement by frequently enforcing the best known anti-corruption legislation, the Foreign Corrupt Practices Act of 1977 (the **FCPA**). Since 2004, the FCPA has been enforced with increasing penalties. Europe has lagged behind but this is starting to change.

On 1 July 2011, a new Bribery Act came into force in the United Kingdom (the **UK Act**). Its effect is far-reaching, both in terms of the extra-territorial nature of the UK Act, and also in its applicability to commercial organisations. Moreover, public statements by the UK's main investigating and prosecuting body for cases of corruption, the Serious Fraud Office (the **SFO**), are indicative of an intent to use the UK Act in a renewed effort to clamp down on bribery and corruption, not just against UK companies, but also against foreign companies that are competing unfairly with British businesses through bribery.

But how different is the UK's law and enforcement to that of other countries in the world? It is certainly a tougher piece of legislation than the FCPA, but how does it compare with the anti-bribery laws in France?

Space does not permit this article to look at the laws of all jurisdictions in the world. Instead, the article will focus on the position in the UK, the United States and France. All are signatories to the OECD Anti-Bribery Convention (along with the US and 34 other countries), but there remain significant differences in law, penalties and approach.

2. The UK

Prior to the coming into force of the UK Act, the anti-bribery framework was an outdated collection of laws that were not rigorously enforced, particularly against companies. In many respects, aside from some quaint language in the older statutes, those laws were, in reality, sufficient to enable prosecutors in the UK to take action where bribery occurred either in the UK or abroad. However, the general perception was that the UK laws were inadequate and that the enforcement record was patchy. Against this background, the UK Act was drafted, enacted in the final days of the last Labour government and eventually brought into force by the new coalition.

The UK Act came into force on 1 July 2011 and includes three general offences: bribing (section 1), being bribed (section 2) and a separate offence of bribing a foreign public official (section 6). No corrupt intent or improper conduct is required for the offence of bribing a foreign public official. All that is required is that the payment or bribe is intended to influence the official. This is a low threshold for a prosecutor and one of the (deliberate) consequences of this is that so-called facilitation or "*grease*" payments are caught by the UK Act.

2.1 A New Corporate Offence

The UK Act has attracted much interest because it creates separate new corporate offence which is committed by a company (or other relevant commercial organisation) wherever "*an associated person*" who "*performs services for or on its behalf*" pays a bribe (section 7). Provided that the company is caught by the jurisdictional provisions of the UK Act (see further below), and provided that the bribery was intended to gain business or an advantage in the conduct of business, then that bribe will **automatically** give rise to criminal liability on the part of the company. Persons "*associated*" with the company will include employees, agents, subsidiaries, joint ventures or anyone performing services on behalf of the company.

The new corporate offence is a significant departure from the old law. There is no longer any need for a prosecutor to prove that the offence was committed with the knowledge or encouragement of a "*directing mind*" of the company. It is sufficient that a bribe has been paid or offered by an associated person, even if the prosecutor takes no action against the individual who has paid the bribe.

2.2 Defence

There is only one possible defence to the corporate offence. The company (or other relevant commercial organisation) must show that it had "*adequate procedures*" in place designed to prevent bribery. This has caused a sea change in compliance culture among companies that carry on business in the UK. Companies have rushed to put in place improved procedures.

The Ministry of Justice has developed six guiding principles for what constitutes "*adequate procedures*":

- Procedures in place must be proportionate for the size, nature and scale of the business;
- There must be top level commitment to prevent bribery;
- A company should identify where the company's main areas of risks lie and devise procedures to address those risks;
- There should be a risk-based due diligence;
- A company should embed policies and procedures in the company to prevent bribery;
- Anti-bribery policies and risk assessments should be monitored and reviewed.

Much has been written elsewhere about what will constitute "*adequate procedures*", and we do not propose to address the issue in detail here. The organisations that already had in place effective programmes to comply with the FCPA have had to upgrade them to plug the compliance gaps created by the UK Act. However, in such organisations, generally the most difficult component to change overnight – the top level culture – is already in place.

By contrast, other companies see the exercise as being a compliance burden in a difficult economic climate and seek to do the bare minimum. Such companies risk not being able to demonstrate that their procedures are "*adequate*".

The defence under the UK Act will only be applicable where procedures in place are "*adequate*". The Director of the SFO has indicated that the SFO is "*very interested in the lead set by the top of the organisation*" and "*will not be impressed*" where a company "*is not prepared to pay much*" and "*expects a certificate of adequate procedures for its worldwide enterprise under say £25,000*". The Director of the SFO is clearly expecting a proper, risk-based approach with full support from senior management that is likely to be effective in stamping out corrupt behaviour.

2.3 Jurisdictional Reach

The offences of bribing, being bribed and bribing a foreign public official are committed if any part of the conduct occurs in the UK; or where the person performing the act has a "*close connection*" to the UK, i.e. is a British citizen, a British national, a company incorporated in the UK or ordinarily resident in the UK regardless of whether the act takes place abroad.

However, the jurisdictional reach in relation to the new corporate offence is far more wide-reaching. There is no need for the conduct to take place in the UK; nor does it matter if the act or omission in question is committed by a person with no UK connection. To this extent, it is something of a misnomer to refer to the legislation as the "UK" Bribery Act, since it applies to conduct anywhere in the world. The only jurisdictional requirement is that the company (or other relevant commercial organisation) "*carries on business or any part of a business*" in the UK. Once that test is satisfied, the company (or other relevant commercial organisation) could face investigation and prosecution for bribes paid anywhere in the world, even if the transaction in question had nothing to do with the UK.

But why would agencies such as the SFO be interested in bribes paid overseas by foreign companies? The SFO has indicated that it will prosecute foreign companies where the bribe paid disadvantages an ethical UK company and puts UK companies at a competitive disadvantage with other European or international business which paid bribes. The SFO has indicated that such prosecutions will be "*a high priority*". Although there may be a temptation for companies headquartered outside the UK to think that the UK Act might not apply to them, this belief would be incorrect. The Director of the SFO has told companies "*that it would be very dangerous for them to use a highly technical interpretation of the law to persuade themselves that they are not within the Bribery Act and that it is permissible for them to carry on using bribery*."

The Ministry of Justice guidance has said that the interpretation of "*carrying on business*" will be an issue for the UK Courts. The current perceived wisdom is that if a company sells something in the UK, this will be sufficient to "*carry on business*" even if the company has no office or factory or resident employees or resident agents in the UK. But it is perhaps more relevant to focus on the SFO's interpretation outlined above as this will determine whether they consider themselves to have grounds to investigate and prosecute.

2.4 Penalties

Under the UK Act, the penalties for a conviction of bribery are severe. The maximum penalty is imprisonment (for individuals) for a term not exceeding 10 years, or a fine, or both. Upon conviction, the offender may be ordered to pay a sum equal to the "benefit" received from the commission of the offence. A confiscation order is also enforceable against property in the possession of third parties who have received a gift from the defendant, up to the value of the gift. The court may also issue a restraint order when criminal proceedings have been or are about to be institutes to prevent the

dissipation of assets. Furthermore, persons convicted of corruption are excluded from bidding for public sector contracts and contracts obtained through corruption may be set aside.

3. Comparison

We will now compare the UK Act with the positions in the United States and France. The table summarises the differences, but the most important issues are set out below.

3.1 United States

Offences

The FCPA makes it illegal for any US person, US company, issuer, anyone acting on their behalf (whether a US person or not) or anyone on US soil to bribe a foreign official or foreign political party for the purpose of obtaining or retaining business. There are some important differences from the UK position. Most notably:

- Receiving bribes is not an offence under the FCPA;
- There is no equivalent to the new UK strict liability offence of failing to prevent bribery. However, a company may be responsible for the actions of its employees; and
- The FCPA contains an exception for facilitation or "*grease*" payments. The FCPA also contains an exception for reasonable and bona fide promotional expenditures for public officials (e.g. travel and lodging expenses).

The FCPA also imposes accounting and record-keeping requirements on companies registered on any US stock exchange, including foreign companies, and on any companies who are required to file reports pursuant to the Securities Exchange Act.

Jurisdictional Reach

Prior to 1998, foreign companies, with the exception of those who qualified as "*issuers*" and most foreign nationals, were not covered by the FCPA. However, foreign companies and persons are now subject to the FCPA if they take any act in furtherance of the corrupt payment while within the territory of the United States. The FCPA's anti-bribery provisions apply to "*any person*", including non-US persons and corporations, who commit any act in furtherance of a bribe "*while in the United States or its territories*."

Penalties

Criminal penalties in the United States are as follows:

- Up to five years imprisonment for individuals for a criminal conviction of bribery and fines of up to USD 250,000 or up to twice the benefit sought or received, whichever is greater;
- Fines of up to USD 2 million for companies for a criminal conviction of bribery or up to twice the benefit sought or received, whichever is greater;

- Up to 20 years imprisonment for individuals for a criminal conviction of books and records offences and fines of up to USD 50 million; and
- Fines of up to USD 250 million for companies for a criminal conviction of books and records offences.

Civil penalties in the United States are as follows:

- Fines of up to USD 10,000 for individuals or companies for civil convictions of bribery by the Securities and Exchange Commission (**SEC**);
- Possible fines imposed by Courts equal to the gross amount of the pecuniary advantage or fines of up to USD 100,000 for individuals and up to USD 500,000 for corporate;
- Fines of up to USD 150,000 for individuals for a civil conviction of books and records offences; and
- Fines of up to USD 500,000 for companies for a civil conviction of books and records offences.

3.2 France

Offences

In France, there is no comparable strict liability corporate offence of failing to prevent bribery. The offences of corruption relate to:

- The active or passive corruption of a French public official or judicial staff including but not limited to judges of French courts and members of arbitral tribunals;
- The active or passive corruption of a foreign public official in a foreign State or in an international public organization, or international judicial staff including but not limited to members of international courts or members of international arbitral tribunals; and
- The active or passive corruption of any individual (a private individual or a corporate entity).

Jurisdictional Reach

Offences will be punishable in France:

- If at least one of the constituent elements of the offence was committed on the French territory; or
- If a person, within the French territory, is guilty as an accomplice for a bribe committed abroad if (a) the bribe is punishable both by French law and the foreign law; and (b) it was established by a final decision of the foreign court; or
- If it was committed abroad by a French national whether a natural or legal person and is punishable under the law of the country in which it was committed; or

- If the victim of the offence is a French national at the time the offence took place.

French Courts have even broader jurisdiction over corruption cases in the event a bribe is offered to or accepted by a European public official.

In the third and fourth cases set out above, proceedings may only be initiated at the request of the Public Prosecutor and must be preceded by a complaint lodged by the victim or legal successor or by an accusation formally made by the authorities of the county in which the acts took place.

Penalties

The penalties for a conviction of bribery in France for individuals are as follows:

- Fines of up to €150,000 and up to 10 years imprisonment for the corruption of public officials;
- Fines of up to €75,000 and up to 5 years imprisonment for the corruption of individuals;
- In addition, the following secondary penalties may be ordered:
    a) Deprivation of rights (civic, civil and family rights) for up to 5 years;
    b) Professional restrictions, for example a ban of up to 5 years on performing a public function or professional or social activity in connection with which the offence was committed;
    c) Confiscation of the sums or objects offered as bribes or of the sum representing the profit obtained as a result of offering the bribe; and
    d) The display of any Court decision.

The penalties for a conviction of bribery in France for companies are as follows:

- Fines of up to €750,000 on companies;
- In addition, the following secondary penalties may be ordered:
    a) A ban on directly or indirectly performing the professional or social activity in connection with which the offence was committed;
    b) Placement under judicial supervision for a maximum period of five years;
    c) Closure for up to five years of the establishment or one or more of the establishments of the enterprise that was used to commit the offences in question;
    d) Exclusion from public tenders for a maximum period of five years;
    e) Prohibition to make a public appeal for funds for a maximum period of five years;
    f) Prohibition to draw cheques, except those allowing the withdrawal of funds by the drawer from the drawee or certified cheques, and the prohibition to use payment cards, for a maximum period of five years;

g) Confiscation of the sums or objects offered as bribes or of the sum representing the profit obtained as a result of offering the bribe; and

h) The display of any Court decision.

3.3 Enforcement Trends

The 2010 Progress Report on the OECD Anti-Bribery Convention prepared by Transparency International categorises the enforcement performance of the UK and the United States as "*active*" and that of France as "*moderate*".

UK

The SFO has had historical problems in effective criminal enforcements. However, there is a new commitment in the United Kingdom to police international corruption. Significant penalties have recently been imposed. For example, in February 2011, MW Kellogg Limited was ordered to pay just over £7 million in recognition of sums it was due to receive which were generated through the criminal activity of third parties. In March 2010, Innospec Limited was fined $12.7 million as part of the first global settlement which also involved the Department of Justice (the **DOJ**) after pleading guilty to bribing employees of an Indonesian state owned refinery and other Indonesian government officials.

The UK saw its first successful prosecution under the UK Act in November 2011. A court clerk, who accepted a bribe of £500 was convicted and sentenced to six years imprisonment. The recent conviction demonstrates that the UK Act applies equally to the domestic and commercial contexts, and to both receipt and payment of bribes. This prosecution is also no doubt the first of many prosecutions which will be brought by the Crown Prosecution Service and/or the SFO under the UK Act.

On 12 January 2012, the SFO also secured the civil recovery of dividends previously paid up to the shareholders of Mabey & Johnson, a privately owned UK company that was convicted in 2009 for bribery offences. It is the first time that the SFO has used its powers under Part V of the Proceeds of Crime Act to trace the proceeds of unlawful conduct into the hands of shareholders. It is entitled to recover dividends from shareholders, even though the shareholders are themselves innocent of any wrongdoing. The SFO's rationale for taking this action is to encourage institutional investors in publicly traded companies to take a more active role in driving compliance (particularly anti-corruption compliance) in the companies in which they invest.

United States

With the exception of a slight dip in 2008, FCPA prosecutions have increased every year since 2004. FCPA prosecutions have increased almost two-fold from 2009 to 2010 and according to the 2010 Progress Report on the OECD Anti-Bribery Convention prepared by Transparency International, the United States "*has more than 150 criminal and 80 civil ongoing FCPA investigations*." Eight of the top 10 largest settlements of all time, ranging from USD 48 million to USD 400 million, took place in 2010 and all but two of the top 10 settlements involved non-US companies.

The DOJ is increasingly also targeting individuals for FCPA violations. For example, the United States prosecuted non-US third parties on the ground that they were "*agents*" of US issuers or US domestic concerns subject to the FCPA. For example, Jeffrey Tesler, a former

consultant to Kellogg, Brown & Root Inc. and its joint venture partners, pleaded guilty in March 2011 to conspiring to violate the FCPA and to violating the FCPA for his participation in a decade-long scheme to bribe Nigerian government officials to obtain engineering, procurement and construction contracts.

The resources in the United States dedicated to FCPA prosecutions are impressive. The Fraud Section of the DOJ has 12 to 16 attorneys working full-time on FCPA matters with the goal of increasing this number to 25 attorneys; the FBI FCPA squad has one supervisory special agent, 12 special agents, one investigative analyst and one administrative support officer; and the SEC FCPA Unit has 30 attorneys. As Lanny Breuer, the Assistant Attorney General stated, the majority of cases "*are the result of pro-active investigations, whistleblower tips, newspaper stories, referrals from our law enforcement counterparts in foreign countries, and our Embassy personnel abroad*".

Penalties actually imposed in the United States have become much more severe than in the past for similar levels of conduct. For example, in May 2006, DPC (Tianjin) Co. Ltd, a Chinese subsidiary of a US medical device manufacturer which paid USD 1.6 million in bribes was ordered to pay a USD 2 million fine by way of criminal penalty and USD 2.8 million in disgorgement. However, in May 2009, Novo Nordisk, a Danish pharmaceutical company which paid USD 1.4 million in bribes was ordered to pay a USD 9 million criminal penalty, USD 3,025,066 in civil penalties and USD 6,006,079 in disgorgement.

Another recent development has been the Dodd-Frank whistleblower bounty programme, under which there are substantial monetary incentives to report any wrongdoing to the SEC. Whistleblowers who provide "*original information*" relating to a securities law violation get 10% to 30% of any sanction imposed.

There has also been a trend of international co-operation. From July 2002 to March 2010, the United States completed 31 incoming mutual legal assistant requests from other countries, of which assistance was granted in 24 cases. During the same period, the United States made 65 outgoing formal requests in FCPA cases.

France

In 1993, France created a governmental body called the Central Service for the Prevention of Corruption (its acronym in French being SCPC), which is in charge of (i) centralising and analysing the information on corruption, and if applicable, communicating such information to the Public Prosecutor; (ii) providing technical assistance to French judicial authorities; and (iii) cooperating with foreign anti-corruption bodies.

The SCPC has rendered a report on its activity in 2010 commenting on recent trends on the corruption convictions in France. In 2009, it was reported that:

- There have been 63 convictions for active corruption of public officials. Out of these 63 convictions, the Court has only imprisonment without remission penalties twice and the average fines ordered ranged between €1,000 and €6,000;
- There have been 10 convictions for active corruption of individuals. Out of these 10 convictions, the Court has only ordered conditional imprisonment; and
- There has been no conviction for active or passive corruption of judicial staff.

4. Conclusion

The UK Act represents the new "gold standard" in anti-bribery legislation. The SFO has improved its track record significantly over the past three years, aided by a new process for self-reporting and plea negotiations. Moreover, the UK Act will make prosecuting companies much easier. However, the UK still lags behind the United States, which through the DOJ Fraud Section, the FBI's FCPA Squad and the SEC's FCPA Unit, has been enforcing the FCPA with renewed vigour since 2004. As recently as 2007, the highest penalty imposed in the United States for FCPA violations was USD 44 million which is comparable with the financial consequences of the UK action against BAE Systems. However, recent settlements in the United States and penalties have typically been in the hundreds of millions of dollars (for example, on 6 April 2011, the DOJ announced that JGC Corporation agreed to pay a USD 218.8 million criminal penalty to resolve FCPA-related charges for bribing Nigerian government officials to obtain engineering, procurement and construction contracts). France is hampered in its prosecutions of foreign bribery by a ban on plea agreements and the lack of deterrent penalties. However, further to increasing public scrutiny and international co-operation between the different prosecuting authorities around the world, it is expected that the number of prosecutions in all jurisdictions will dramatically increase.

A redenomination might also be challengeable if it was based on an exit from the euro zone which was itself an illegal act. This would certainly be the case on a unilateral euro event, which would be a breach of the TEU and potentially invalid on grounds of public policy. However even a controlled euro event might be challengeable on legal grounds if it did not follow the precise process required for a treaty amendment. [See paragraph 6 above]