

First Conviction under the UK Bribery Act 2010

The UK saw its first successful prosecution under the new Bribery Act ("the Act") on 14 October 2011. The Act entered into force on 1 July 2011 and the Crown Prosecution Service ("CPS") has been quick to test the new legislation. This should be interpreted as a warning by the UK prosecutors of their intentions to use the new Act aggressively. The case is also a timely reminder to companies that their procedures must be sufficiently robust to demonstrate that employees and agents have been trained and are not susceptible to requests for bribes.

Background Facts

Mr Munir Patel, acting in his capacity as an administrative clerk to a Magistrates Court, promised on 1 August 2011 an individual summonsed for a motoring offence that he (Mr Patel) could influence the course of criminal proceedings in exchange for a sum of £500. Mr Patel will be sentenced in November 2011 and faces imprisonment for a term of up to 10 years, and/or an unlimited fine. In addition, the CPS may bring confiscation or civil recovery proceedings under the Proceeds of Crime Act 2002 for the value of the bribe Mr Patel received.

Commentary

Unlike the US Foreign Corrupt Practices Act 1977 ("FCPA"), the Patel case confirms that the Act is not just about paying bribes to overseas government officials. It applies equally to the domestic and commercial contexts, and to both receipt and payment of bribes.

The prosecution of Mr Patel is no doubt the first of many prosecutions which will be brought by the CPS and/or the Serious Fraud Office ("SFO") under the Act. Most commentary has focussed on the SFO, but it should be noted that the SFO only

investigates and prosecutes cases of serious or complex fraud (including corruption). Such cases must be of more than £1 million in value or particularly complex. Richard Alderman, Director of the SFO has said:

"What we will be doing will be to look for the most difficult cases. That is our challenge and I believe it is a challenge that is supported by the community, whether business or social. The most difficult cases will be those involving companies (whether UK or foreign) operating in a range of challenging environments that want to continue to use corruption in order to undermine ethical companies. Our ethical companies want to see fair competition. They can compete on equal terms because of the quality of what they produce. They cannot though compete properly when there is corruption. They want me to do something about that and I certainly want to do that when the foreign companies are within our jurisdiction. This will be a high priority for the SFO and we should be actively looking for these cases."¹

¹ Speech by Richard Alderman, Director, Serious Fraud Office 30 June 2011 at TRACE Anti-Bribery Compliance Solutions

As the case of Mr Patel shows, the CPS, acting with the police as investigators, will prosecute under the Act where corruption is of a lower level.

Risk Areas for Companies

Companies must bear in mind that the making of or offer of corrupt payments by their employees or agents could trigger criminal liability under section 7 of the Act. Section 7 creates a strict liability corporate offence which is committed by a relevant commercial organisation (“RCO”) if a person associated with the RCO bribes another person, with the intention of obtaining or retaining business or an advantage in the conduct of business for the RCO. An associated person can be an employee, agent or anyone performing services on behalf of the RCO. For a section 7 offence, the conduct amounting to a bribe is that prohibited by section 1 (offences of bribing another person) or 6 (bribery of foreign public officials), and may occur in whole or in part within the UK or wholly overseas. There is only one possible defence to a section 7 prosecution—that the RCO had “adequate procedures” in place to prevent bribery.

In recent months, many corporates have been rightly focusing their efforts on devising and implementing adequate procedures. Companies have correctly taken a risk based approach, allocating time and resources to high risk overseas jurisdictions. However, the prohibition on bribery is not limited to acts overseas and it is widely accepted there are risks in dealing with domestic government agencies such as the courts, local authorities, planning officers and the like. Under the Act both the person soliciting the bribe and the person paying the bribe would commit an offence. In the event that a person associated with an RCO does pay a bribe, the RCO will need to be able to demonstrate the adequacy of its procedures in order to avoid or defend a prosecution.

Corporates should ensure that policies and procedures are proportionate and address the specific risks the organisation faces, whether inside or outside the UK.

Examples of some of the key questions a corporate should consider are:

- What should our risk assessment look like?
- What checks do we need to do with suppliers and agents?
- How do we assess how well our employees understand the correct behaviours?
- What due diligence do we need to do during a corporate acquisition?
- Does this mean we should prohibit all entertainment?
- How, and how often, should we monitor compliance?
- Do we need to upgrade our FCPA compliance programme?

In the event of an issue being uncovered, companies will need to act swiftly to address matters. This may include preserving documents, undertaking an investigation to ascertain the extent of the issue, identifying who sanctioned or knew about it, and considering how to deal with the relevant external agencies, such as the SFO.

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Dechert’s leading corporate crime and compliance team has advised clients on the creation and implementation of their internal procedures and policies and has addressed all of the above questions, and many others. Unlike most other law firms in the UK, our team has many years of experience defending companies that have been the subject of criminal investigation by law enforcement agencies around the world. We have seen firsthand how enforcement is carried out. This informs our approach to compliance. It has also helped us to develop our employee compliance assessment services.

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