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Q&A on the UK Bribery Act for the Insurance Sector

The UK Bribery Act (the "Act") received Royal Assent in April 2010 and will come into force on 1 July 2011, following yesterday's publication of the Ministry of Justice's Guidance for commercial organisations.

The Act replaces the fragmented and complex bribery-related offences at common law and in the Prevention of Corruption Acts 1896-1916 with:

1. general offences of bribery (offering, promising or giving of a financial or other advantage in return for the improper performance of a function or activity – i.e. active bribery) –s.1 of the Act;
2. general offences of being bribed (requesting, agreeing to receive or accepting of a financial or other advantage in return for the improper performance of a function or activity – i.e. passive bribery) – s.2 of the Act;
3. a discrete offence of bribery of a foreign public official – s.6 of the Act; and
4. a new corporate offence of failure by a commercial organisation to prevent a bribe being paid for or on its behalf (the "corporate offence"), subject to a defence of "adequate procedures" being in place to prevent a bribe – s.7 of the Act.

It is generally acknowledged that the new corporate offence creates a very strict regime for commercial organisations, making a company effectively vicariously liable for both private and public sector private bribery by its employees, agents and other more loosely connected parties. Adding the fact that the Act's reach goes beyond purely domestic scenarios, it is understandable that the Act has created some degree of uncertainty as to whom it applies and to what extent companies must implement or enhance their anti-bribery procedures in order to be compliant with the Act's requirement that they be "adequate".

In this note we are considering some of the implications of the Act for participants in the insurance sector. Firms regulated by the UK FSA are already expected to have anti-bribery controls in place. For example, a firm's senior management is responsible for making an appropriate assessment of financial crime risks, including those relating to bribery and corruption, and to take reasonable steps to prevent those risks crystallising (FSA Handbook rule SYSC 3.2.6R). There is also the overriding principle that any regulated firm must conduct its business with integrity (PRIN 2.1.1). The FSA has also given specific anti-bribery guidance to the insurance broking community (see Final Notice in respect of Aon Limited dated 6 January 2009 and FSA Report on "Anti-bribery and corruption in commercial insurance broking" dated May 2010).

The Act is going to widen the circle of firms that need to address bribery risks and the offences under the Act are not merely regulatory breaches but are within the realm of criminal law.

Key Issues

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Who is exposed to prosecution under the Act?

Insurance market participants that are incorporated in the UK will be subject to the Act in respect of active and passive bribery. Non-UK companies will be subject to the Act if they participate in an act of bribery which involves a UK element. In addition, any company which carries on business in the UK (even if not incorporated in the UK) is at risk of prosecution under the Act for the corporate offence where the bribery was committed on its behalf anywhere in the world (even without its knowledge) and regardless of whether that conduct could be prosecuted under the laws of the jurisdiction in which it occurs.

For non-UK incorporated companies it is presently unclear exactly what level of connection with the UK will amount to carrying on business in the UK so as to trigger exposure to the corporate offence. A non-UK insurer with a UK branch is almost certainly within the ambit of the corporate offence, but having a UK securities listing may not be.

However, there are a number of practical issues that may arise if a non-UK company without even a branch office in the UK is to be prosecuted: for example, how are summons or warrants issued to companies abroad and how would a prosecutor go about obtaining evidence in relation to an offence that has been committed abroad? To what extend will, or can, the prosecutor rely on co-operation arrangements with other jurisdictions?

How is the corporate offence committed?

Under s.7 of the Act, a commercial organisation will be guilty of the corporate offence if a person associated with the organisation bribes another person with the intention of obtaining or retaining business or an advantage in the conduct of business for that organisation. The corporate offence can be triggered by acts of bribery anywhere in the world. There is an "adequate procedures" defence to liability which we will discuss in more detail below.

As regards the commercial organisation no *mens rea* is required (i.e. there is no need to show intent in respect of its senior officers) and, in that sense, the corporate offence is one of strict liability. However, in order for the corporate offence to be constituted it would be necessary to show that the associate person has actively bribed another person and has had an intention to obtain or retain business or an advantage in the conduct of business for that organisation. Accordingly, the corporate offence is not constituted if it cannot be shown beyond reasonable doubt that the associated person intended the recipient of the bribe to exercise his duties in a way that would benefit the business as result of the bribe.

For example, if employee A of UK insurer X invites employee B from broker Y and employee C from reinsurer Z to a dinner to discuss a placement of X's risk with Z, A may realise that there is a risk that C may be so impressed by the hospitality that he would recommend to Z accepting the risk. However, if it is not A's intention that the placement would be accepted for that reason or any other improper reason (e.g. because A considers that Z would provide reinsurance because it is a risk acceptable to Z on its merits and for which Z would be competitively remunerated), A does not have the pre-requisite intention for the corporate offence to be constituted.

Whilst much has been said about the harshness of the offence, it is our view that a conviction for the corporate offence is not that easily secured given that the prosecutor would have to prove beyond reasonable doubt that (i) a general bribery offence has been committed by person A, (ii) A is a person associated with the company, (iii) A intended to obtain or retain business or obtain a business advantage, and (iv), if the "adequate procedure" defence (about which more is said below) is plead by the defendant, that the company's anti-bribery procedures were not adequate and could have prevented the bribery offence by A if they had been adequate.

The corporate offence does not operate in relation to passive bribing, i.e. where an associated person accepts a bribe. Another point to note for those who are familiar with the US Foreign Corrupt Practices Act ("FCPA") is that the corporate offence applies to acts of bribery in the public and private sector (the FCPA only applies to public sector bribes).

Who may be "associated persons" in the insurance context?

For the purposes of the corporate offence, a person is associated with a commercial organisation if he performs services for or on behalf of the organisation (disregarding the bribe). The associated person may be an employee or an agent of the organisation or its subsidiary, though the Act specifically states that the capacity in which the associated person performs services for or on behalf of the organisation does not matter.

Subject to the "adequate procedures" defence, it is clear from this that there will be real risk that (re)insurers may become criminally liable where an act of bribery has been committed by an employee, by a broker acting on its behalf or by any third party (such as a consultant) to whom it has outsourced services such as claims handling or loss adjusting. Insurance brokers may be exposed if they delegate any of their duties to sub-brokers.

Concerns have been expressed how a company could exert control over another company to which it has merely delegated a number of services. For example, simply by instructing a producing broker abroad, a London market broker would not ordinarily have any influence over, or knowledge of, any acts of bribery the producing broker may engage in

with a potential local insured. To protect itself from prosecution, the London market broker would need to take some measures that would qualify for the "adequate procedures" defence discussed below. This could be done, for example, by conducting some degree of due diligence on the producing broker and its business practices and by including an express provision in its terms of business that the producing broker must not engage in any acts of bribery.

When does the "adequate procedures" defence apply?

The corporate offence is subject to a defence that the commercial organisation had in place adequate procedures designed to prevent associated persons from bribing (s.7(2) of the Act). Yesterday, the Ministry of Justice issued guidance about the procedures commercial organisations can put in place to prevent persons associated with them from bribing (the "Guidance").

The Guidance is non-prescriptive in nature and does not provide "safe harbours" defences although whether or not a company has considered the guidance is likely to be taken into account in any decision to prosecute. Whether adequate procedures are in place is likely to be tested on a case-by-cases basis by reference to a business' operational structure and the risks it is exposed to. The guidance advocates a risk-based approach (which should be a familiar concept to FSA-regulated firms which need to adopt a risk-based approach, *inter alia*, to putting into place adequate systems and controls in respect of bribery risk).

What might be entailed in "adequate procedures" in the insurance sector?

The Guidance sets out a list of six non-prescriptive principles which should inform those establishing or refreshing compliance programmes. The six principles for companies to consider when determining the nature of their compliance programme will be entirely familiar for those who have compliance programmes for the purposes of the FCPA or are familiar with guidance published by international organisations such as the OECD, the ICC and Transparency International. The six principles are:

1. Proportionality – the procedures should be proportionate to the risk a business faces and the size of that business. It is implicit that a risk-based programme will suffice providing that there has been an adequate assessment of the risks that need to be addressed.

2. Top level commitment – the requirement that the Board of directors establish the culture of the company will be familiar. In relation to bribery, top-level management should foster a culture within the organisation in which bribery is not acceptable.

3. Risk assessment – the requirement that a commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf and in relation to associated persons. The assessment must be periodic, informed and documented.

4. Due diligence – thorough due diligence is already an important element of FCPA programmes, and the Bribery Act looks set to extend this further to associated persons who perform or will perform services on behalf of an organisation. The objective of due diligence should be to identify and mitigate bribery risks.

5. Communication (including training) – any bribery prevention policies and procedures should be clear, practical and accessible. Training provides the knowledge and skills needed to effectively establish an anti-bribery environment.

6. Monitoring and review – monitoring follows implementation and any programme must of course be dynamic in the sense that it must identify and address new risks as they emerge.

In relation to each principle the Guidance sets out specific procedures an organisation may wish to adopt. The Guidance also contains a series of case studies which detail the type of procedures the organisation in the case study could have adopted in order to address a specific bribery risk.

Another useful source for insurance-industry specific guidance is the FSA Report on "Anti-bribery and corruption in commercial insurance broking" dated May 2010. Whilst the Report is primarily concerned with the commercial brokerage market, it is also relevant, *mutatis mutandis*, to insurers and reinsurers. In that Report, the FSA gives many specific examples of what it considers good and bad practice in relation to anti-bribery and corruption systems and controls.

What does the offence of bribing a foreign public official entail?

It is a separate offence under s.6 of the Act to bribe a foreign official if the intention of the person giving the bribe is to influence the official in his capacity as foreign public official. The person giving the bribe must also intend to obtain or retain business or an advantage in the conduct of business.

In addition, for the offence to be fully constituted it must be shown that the official is no permitted or required by written law applicable to him to be so influenced. Accordingly, companies will be forced to seek legal advice on the locally

applicable law in circumstances where a benefit or advantage is envisaged to provided to a foreign public official. It is worth noting, however, that the company would not be able to rely on a defence that the legal advice was not correct.

All elements of the offence are likely to be present in a typical facilitation payment. There is no need for the prosecutor to prove that the benefit or advantage was in any way "improper" or "corrupt", nor would it be a defence that facilitation payments are common business practice in the relevant jurisdiction. There are no exemptions or exceptions under the Act. The Guidance confirmed in no uncertain terms that, once the Act comes into force, most facilitation payments must be presumed to be illegal.

Can companies also be liable under the general offences of bribery?

Further to s.14 of the Act, a company could also be convicted under of the general offences of active or passive bribery and the offence of bribing a foreign official if the offence is proved to be committed with the consent or connivance of a senior officer of the company or a person purporting to act as such. A senior officer may be a director, a senior manager or the company secretary.

Can senior officers be personally liable?

A senior officer (or a person purporting to act as such) can be personally convicted of a criminal offence if it can be proved that he or she consented to or connived in the commission of one of the general bribery offences or the offence of bribing a foreign official. The punishment could be a fine and / or imprisonment of up to 10 years.

To what extent are corporate hospitality and gifts permissible under the Act?

Whilst the popular press delights in reporting on extreme or excessively lavish corporate entertainment (in particular in the financial services sector), at the other end of the spectrum there is a degree of scaremongering that even low-key acts of corporate hospitality may fall foul of the Act. One thing that is clear is that companies will need to put in place some kind of appropriate corporate hospitality and gifts policy. It is also helpful that the Guidance clarifies that bona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish good relations, is recognised as part of doing business and that it is not the intention of the Act to criminalise such behaviour.

In relation to foreign public officials, any hospitality that could be described as in excess of common courtesy risks triggering the offence of bribing a foreign public official under s.6 of the Act although the Guidance seeks to somewhat downplay the effect of s.6 by arguing that the dining of, or giving tickets to an event to, a foreign official could be characterised as routine business courtesy.

In relation to private sector hospitality, corporate hospitality and gifts policies should prohibit employees offering hospitality or gifts known to be in excess of that which the recipient is permitted to receive under his own company's policy or in excess of the standards and norms applying to a particular industry sector. Applying this rule to practical circumstances could be difficult as the level of expenditure that may be regarded as acceptable will differ dramatically by reference to the circumstances and, in particular, will depend upon the characteristics of the person being entertained (e.g. seniority, authority to take decisions, relevant industry, relevant market and jurisdiction). By way of example, the cost of entertainment offered by a senior underwriter of an international insurance company to the chief risk manager of a major international corporation may not raise any inference of bribery in that context but would be regarded as bribery if offered by a motor cycle courier company to the individual in the mailroom charged with selecting which courier service to use.

The very low threshold for establishing bribery of foreign public official by comparison with the private sector offences suggests that companies may decide to bifurcate their hospitality policy to permit higher levels of expenditure and a lower level of scrutiny of their private sector entertainment than that to which entertainment of public officials is currently subject.

Who will enforce the Act and what are the consequences of conviction?

Proceedings for an offence under the Act can be commenced by the Crown Prosecution Service, the Serious Fraud Office (if the value of the bribe(s) exceed(s) £1 million) or the Revenue and Customs Prosecution Office. Unusually, the decision to launch a prosecution must be sanctioned by a senior law officer.

The Director of the Serious Fraud Office and the Director of Public Prosecution have published a joint guidance note identifying the factors English prosecutors will take into account in deciding whether to prosecute in circumstances where there is sufficient evidence to justify prosecution. Whilst it is clear that conduct that technically constitutes a bribery offence may not always be prosecuted, at this stage, it remains unknown how the prosecutors will exercise their discretion in practice and what further resources will be devoted to investigation and prosecution. It also remains to be seen how courts will interpret the corporate offence (for which there will be no precedents). We have already alluded to the practical problems that may arise if a prosecution is pursued against a non-UK defendant.

A person convicted of a bribery offence is liable to a fine and / or imprisonment up to a term of 10 years. Companies would be liable to a fine if found guilty. In addition, it is possible that companies convicted of any bribery offence might face a ban from public contracts under the Public Contracts Regulations 2006 and the Utilities Contracts Regulations 2006 (further to which public authorities are required to exclude from public contracts all suppliers which have been convicted of, *inter alia*, a corruption offence).

In relation to FSA-regulated firms conviction of bribery offences may also lead, or be concurrent with, an FSA investigation into regulatory breaches which may ultimately result in enforcement action being taking by the FSA, including the imposition of fines. For example, in relation to the Principle 3 breaches by Aon Limited, the FSA imposed a fine of £5.25 million. FSA-regulated firms with bribery issues (including a suspicion that a bribery offence has been committed by the firm or an associated person) may also face money laundering issues, giving rise to a need to report to the UK Serious and Organised Crime Agency.

Top tips

Whilst FSA-regulated participants in the insurance market should already have anti-bribery procedures in place that are periodically reviewed and updated if necessary, all companies that are within the reach of the Act should now (re)assess their exposure to bribery risks and review their existing anti-bribery controls and, if necessary, take additional precautions to guard against acts of bribery being committed on their behalf. The risk of "associated persons" bribing others or accepting bribes and the risk of conduct that was not previously recognised as bribery but which could now be prosecuted should now be on a company's risk management radar.

Any anti-bribery programme should have the full support of top-level management and should be based on assessment of the bribery risks the organisation faces. It should address both public sector and private sector corruption and prohibit facilitation payments, as well as including policies on corporate gifts and hospitality and charitable donations.

There is now a need for increased due diligence on third party business partners and consideration should be given to what further action may be necessary in relation to third parties (such as review of their anti-bribery policies, anti-bribery declarations; and contractual anti-bribery warranties).

Companies should ensure that their employees, particularly those at most risk, are fully aware of the implications of relevant anti-bribery laws, and the requirements of their corporate compliance programme. If necessary, anti-bribery and anti-corruption training should be provided.

Finally, once an anti-bribery programme has been implemented or revised, companies should monitor compliance with their anti-bribery programme and ensure that new bribery risks are addressed as they emerge.