Nick Kochan
Investigative journalist & freelance writer

079 7329 7490
author@kochan.co.uk

# Britain set to clamp down on Bribery

A curb on foreign bribery and corruption by British firms is in the wings as the authorities seek to catch up with clampdowns currently in place in Germany and the United States. The move comes in the wake of a welter of bad publicity over law enforcement's inability to move against arms manufacturer British Aerospace which allegedly paid middlemen in the Arab world and elsewhere to win arms sales as part of the multi-billion al-Yamamah contract. More recently the SFO confirmed it planned to sue BAe in relation to deals in Czech Republic, Tanzania, South Africa and Romania. These cases have raised issues about corporate behaviour and standards.

The Organisation for Economic Cooperation and Development (OECD), based in Brussels and comprising 37 of the largest developed countries, has been a key critic, issuing a broadside against British standards and practice. It said that it was 'disappointed and seriously concerned' about the UK's failure to enact modern bribery laws.

The publication of a Bribery Bill, in response to these criticisms, ratchets up pressure on British corporations to comply with international standards. This bill gathers together under a single piece of legislation all previous measures relating to corruption. It has corporate responsibility at its core. The model for the legislation is The United States Foreign Corrupt Practices Act (FCPA) passed in 1977. The British law, like that of the US, has extra-territorial powers to enable it to target any company or individual citizen who engages in corruption, wherever they are.

The bill is particularly significant for companies because it includes a new corporate offence of corporate liability based on a 'negligent failure to prevent bribery.' Coupled with this is an offence of bribery of a foreign official. The legislation introduces two key bribery offences, one for giving bribes and one for agreeing to accept them. According to Robert Barrington, director of external affairs at Transparency International, 'Companies must now realise that the risk of paying bribes to win a contract is greater than the benefits to be obtained by winning the contract.'

The legislation dramatically changes the terms under which companies can be prosecuted for bribery. Whereas under former law, it has to be shown that a company knew about and actively instigated an act of bribery by one of its employees, now the company need only have neglected to set up and implement systems to monitor and contain the risk of bribery. Barrington says that the bar has been significantly lowered for corporate prosecutions. 'There are rarely paper trails of instructions from headquarters' says Barrington, 'but now companies can't shy away from their role in foreign corruption, intended or unintended'. Companies must be able to show that the board has a policy and set of standards relating to corruption, they must have a policy for training employees to avoid bribery and corruption, there must be working whistle-blowing policies in place.

A government paper accompanying the new bill further pinpoints the way in which a wider group of companies and activities can be drawn into the net. ' The new discrete corporate offence will capture instances of bribery to secure a business advantage which occur in the context of inadequate corporate governance. It will apply to any business activity from large corporations to SMEs. The offence supports wider Government policies focusing on the promotion of good governance and ethical guidance, which underpin the drive to ensure that open competition in domestic and foreign markets is not distorted by bribery. The offence is carefully targeted at the circumstances where a company fails on three separate grounds. In addition to requiring that

079 7329 7490
author@kochan.co.uk

bribery has taken place on behalf of the body, a person or persons responsible for preventing bribery must have negligently failed in this duty. Finally, there is a proposed "due diligence" or "adequate systems" defence concerned with measuring the adequacy of a company's internal standards. A company will have a defence if it can show that it has exercised adequate supervision generally even if it did not prevent bribery occurring in the particular circumstances of the case.'

Companies working in high risk areas of the world will need to review their bribery law compliance programmes, says Tim Cave, a partner at Freshfields, the lawyers. 'The courts are likely to consider the training provided to relevant employees, the rigour of due diligence undertaken before entering into arrangements with counterparties and the quality of checks applied when processing payments. Financial institutions may find that the courts take into account the FSA's Principle 3. This says that 'A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems' and relevant rules in determining whether procedures are adequate. This would be a step towards the criminalisation of systems and controls failures.'

The police will also be involved in examining and testing companies anti-corruption systems, says Detective Superintendent Colin Cowan, the head of the Overseas Anti Corruption Unit (OACU) at the City of London Police. The existence of an anti-corruption is only sufficient if it is implemented. 'You could have a good, solid, anti-corrupt, strategic vision at the top, but if it's not turned into proper compliance at the bottom, it's kind of meaningless. So the corporate liability offence rule will mean that they will have to have shown that they have implemented that policy all the way through their organisations. If they haven't, the buck slides back up. If they have, it stays in the hands of the person who has done the corrupting. They've got to ensure that they've trained their staff, that they've put in the proper monitoring mechanisms and procedures in, and that they carefully consider who they use as intermediaries.'

Cowan continues, 'The question is, have they just introduced them but ignored them, or are they actually monitored, checked and implemented? If an individual decides to break those rules, once they've been trained and given all the advice, then they are criminally liable as an individual, the corporate body has done all that they possibly can do.'

The OACU, which has thirty six cases under examination, is set to produce a report examining countries where bribery, graft and corruption thrive, and the conditions that give rise to them. It shows how graft moves from sector to sector as a developing country's political and economic circumstances change. Cowan says that 'companies paying bribes hold back the progress in developing countries.'

The implementation of an existing set of systems was critical to the Financial Services Authority's groundbreaking criticism of practices used by Aon, an insurance company. The FSA said that the firm had made 'various suspicious payments' amounting to some $7m to a number of overseas firms and individuals.

The FSA reported in January 2009 that it had fined the company £5.25m 'for failing to take reasonable care to establish and maintain effective systems and controls to counter the risks of bribery and corruption.' Aon had 'failed to give its staff, particularly those within the Aviation and Energy divisions, adequate training or written guidance in respect of specific bribery and corruption risks. Although Aon Ltd staff received training on the code and were require to declare annually that they had read and understood the Code, they were not provided with focussed training on the anti-bribery statements..' The failure of the company's whistle-blowing system meant that staff

079 7329 7490
author@kochan.co.uk

complaints about the practices went unheard, says Transparency International's Barrington. 'There was a cultural problem.' The case was a trigger for the FSA to conduct a thematic review into the way overseas third parties were being used by commercial insurance companies to pay illicit inducements. Aon has since said that it has upgraded its practices regarding corruption. According to Jeremy Cole at solicitors Lovells, 'corporates will need to tailor guidelines to suit the nature of their business and to raise the priority and profile of monitoring compliance. They will need to thoroughly review and update their compliance systems well in advance of the Bribery Bill's enactment.'

The FSA rather than the Serious Fraud Office or City of London Police examined the case, says Barrington, for two reasons: first it is the regulator for the insurance industry and secondly because the infringement was regarded more as a regulatory type offence, rather than as a criminal one. However, the case is also under examination by the US Department of Justice, who police the Foreign Corrupt Practices Act. The DoJ, which is regarded as the toughest authority policing corruption, has yet to report on the case. The DoJ signalled its determination to tackle corruption last year when it levied an $450m fine against Siemens, the German engineering group. It also had to pay out $350m to the Securities and Exchange Commission. Siemens has reputedly had to pay out a total of Euro 2.5 billion to authorities in Germany as well as the United States. This figure includes a massive Euro 850m in lawyers and accountants fees.

UK responsibility for policing corruption is divided between the SFO and the City of London police. The former examines corruption by corporations. It is staffed by accountants and lawyers, many seconded from the private sector. The City of London Police's anti-corruption unit targets individuals involved in bribery. Cowan outlines the difference in approach. 'The SFO looks at the corporate controlling mind that leads to corruption. A corporate policy about paying bribes to gain influence impacts upon the share price, the pensions schemes connected to those shares, and UK economic issues. The SFO has the powers and the skills you need to investigate that. When there is no corporate mind controlling the corruption, but individuals are doing wrong, you need different types of powers, you need to be more intrusive into the individuals, rather than to the business world. That is when you need the policing powers of the Overseas Anti-Corruption Unit.' A 50% increase in the SFO's anti-corruption team is predicted for 2009.

The Overseas Anti-Corruption Unit notched up its first convictions for bribery and corruption in late 2008. In September, an employee of CBRN Team, a UK security consulting firm, and an official of Uganda pleaded guilty to bribery charges stemming from a scheme in which CBRN paid the Ugandan official to receive a contract to advise the Ugandan Presidential Guard. The CBRN employee received a suspended sentence, while the Ugandan official was sentenced to twelve months' in prison. According to Fulbright and Jaworski, the American law firm, ' the UK's ability to prosecute the foreign official who took the bribe sets the UK's legislation apart from the Foreign Corrupt Practice Act. Under the FCPA, only the *giver* of a bribe, and not the foreign official who received the bribe, may be prosecuted. For all the criticism that the UK's foreign bribery legislation has received in recent years, those laws are stronger than the FCPA.'

The second conviction occurred in October 2008, when the SFO announced that it had reached a £2.25m settlement with the British building company Balfour Beatty for alleged unlawful accounting in connection with certain 'payment irregularities' which it self-reported. This was the first time a company has reached this type of civil settlement as part of a foreign bribery investigation. According to Fulbright and Jaworski, 'This is a significant event in the UK's enforcement of anti-corruption laws and comes only 6 months after the SFO was given the powers to make a civil recovery of the proceeds of crime.' Details of the case may be found in the attached box.

079 7329 7490
author@kochan.co.uk

There is no hiding place for companies who behave badly overseas, says Cowan. 'T hey've got to be sure that they implement a zero corruption stance. They need to review what has happened in the past, and if there is anything in that review, they need to make sure they go to the money laundering reporting officer and it gets reported properly. If they are finding suspicious activity in their quarterly reviews, they must report it, they have the legal obligation to do that if they're in a regulated sector. They can't just keep in for internal benefit. They've got the law to report it, and if they don't report it, and they have uncovered it, then they'll be dealt with for that too.'

**Box on Balfour Beatty**

**A groundbreaking prosecution for corruption**

Balfour Beatty had conducted an internal investigation into the accounting treatment of certain 'payment irregularities' within a subsidiary involved in a joint venture with an Egyptian company. The payments related to contracts in which the subsidiary was involved as part of a $130m UNESCO project to rebuild the Alexandria Library in Egypt between 1998 and 2000. In April 2005, Balfour Beatty "self-reported" the payment irregularities to the SFO, following which the SFO launched an official investigation. The UK press reported that the SFO was investigating alleged foreign bribery in connection with the payment irregularities, though Balfour Beatty has denied the bribery allegations.

The SFO found that inaccurate accounting records relating to the payment irregularities amounted to unlawful conduct in that the subsidiary failed to complete accurate business records as required by the Companies Act 1985. The SFO said that nothing justified the formal prosecution of the company or any individual as it did not obtain a commercial advantage and no individual employee reaped any financial benefit. The SFO could have pursued a long and costly criminal prosecution. In this case, however, the SFO took unprecedented action in obtaining a Civil Recovery Order ("CRO"). By application to the High Court, the SFO may obtain a CRO to claw back the proceedings of any 'unlawful conduct' through the recovery of property (or forfeiture of cash) which is, or represents, property obtained through unlawful conduct. It is interesting to note that the SFO may use these powers in relation to any property (including cash) whether or not any criminal proceedings have been brought for an offense in connection with the property.

Balfour Beatty agreed to pay £2.25m and contribute to the costs of the proceedings. The company is also to put in place compliance processes to ensure against a repeat of the irregularities, and to submit these processes to supervision by the regulator for a defined period.