Liability & Defence

Fraud

Anti-bribery Enforcement: FCPA v Bribery Act – A Practical Comparison

Contributed by: Satindar Dogra and Joseph P. Armao, Linklaters LLP

The U.S. Foreign Corrupt Practices Act 1977 (FCPA) is well known across the globe. The U.S. authorities have interpreted its scope aggressively since its inception and it has returned increasingly higher fines and other penalties. This was, until recently, in clear contrast to the UK's outdated and often criticised anti-corruption laws spread across many different statutes, some of which have been on the books for over a hundred years.

The position is, however, set to change. The UK Bribery Act 2010 will come into force in April 2011. With it comes much more broadly defined offences both in subject matter and jurisdictional scope. When the provisions of the two Acts are read together, the Bribery Act appears even broader than the FCPA in several respects and is rightfully a hot topic across the global corporate community. How these technical differences will play out in practice remains to be seen, but the UK prosecuting authorities face no simple task if they are to follow in the footsteps of their U.S. cousins.

FCPA v Bribery Act: The Key Differences

The Bribery Act provides for two general offences of bribing and being bribed. These are not new offences, although the terminology is brought up to date. A further offence of bribing a foreign official is also introduced, which broadly replicates the effect of the old legislation. The focus of attention has been on the new corporate offence of failing to prevent bribery. A relevant commercial organisation will be criminally liable if a person "associated" with it bribes another person intending to obtain or retain business or an advantage in the course of business for the company and there are no "adequate procedures" in place designed to prevent bribery.

The Bribery Act is significantly broader in its terms than the FCPA in a number of ways. Whilst the FCPA applies only to the bribery of public officials, the Act also applies to bribery of private citizens. Many corporate anti-corruption policies assume that compliance with the FCPA is the "gold standard" and focus on prohibiting certain dealings with public officials. Those guidelines will need to be significantly widened if they are to comply with the Bribery Act.

The FCPA contains no equivalent to the new UK strict liability offence of failing to prevent bribery. It does include provisions relating to books and records and effective internal controls, but the UK strict liability offence is much broader. The Bribery Act can ascribe liability to a company following a single instance of bribery by any "associated person" (a term defined widely to potentially include any third party that performs services "for or on behalf of" the corporate).

The FCPA contains an exception for facilitation or "grease" payments. These are payments made to expedite a routine governmental action. The Bribery Act contains no equivalent exception and potentially captures all such payments. The FCPA also contains an exception for reasonable and bona fide promotional expenditures for public officials, such as travel and

lodging expenses. The Bribery Act again contains no such exception for promotional expenses and any forms of gifts, hospitality and entertainment can in principle be a violation of the law.

The FCPA requires that a "corrupt intent" be demonstrated for a prosecution to succeed. The Bribery Act refers to the more workable concept of inducing the "improper performance" of a "relevant function." This covers the performance of any function of a public nature. It also covers any activity performed in the course of a person's employment by or on behalf of a company, if performed either in bad faith, not impartially or in breach of trust.

The Bribery Act also has a wider territorial reach than its predecessors. Whilst the general offences can only be committed if any part of the relevant conduct occurred in the UK or was carried out by a British citizen or UK company, the corporate offence of failing to prevent bribery can be committed by any company that carries on a business or "part of a business" in the UK regardless of where the bribe was committed. It is unclear what triggers this jurisdictional threshold. What degree of connection with the UK is required? Is, for example, no more than a listing on a UK exchange sufficient? Draft guidance recently issued by the Ministry of Justice (MOJ) primarily concerning the scope of the "adequate procedures" defence provides no answers.[1]

Enforcement in Practice: DOJ & SEC

Whilst the UK Bribery Act appears on its face to have more teeth than the FCPA, it remains to be seen whether it can match the bite of the FCPA when it comes to enforcement. Enforcement of the FCPA continues to be a top priority for both the Department of Justice (DOJ) and Securities and Exchange Commission (SEC), as evidenced, in part, by the record setting monetary penalties recently imposed against corporations to settle alleged FCPA violations. Eight of the top 10 largest settlements of all time, ranging from $48 million to $400 million, took place in 2010 and all but two of the top 10 settlements involved non-U.S. companies.[2]

The DOJ is also vigorously targeting individuals for FCPA violations. This trend includes the prosecution of non-US third party intermediaries, on the ground that they acted as "agents" of U.S. issuers or U.S. domestic concerns subject to the FCPA. The DOJ, for example, has charged Jeffrey Tesler, a UK national, with violations of the FCPA, alleging that Tesler was hired as a third party agent of a joint venture to bribe Nigerian government officials to obtain a contract with a state-owned company. The DOJ is seeking the extradition of Tesler to stand trial in the U.S.

Furthermore, while the FCPA does not authorise the prosecution of foreign officials who receive bribe payments, this has not prevented the DOJ from bringing charges against those foreign officials under an alternative criminal statute. In June 2010, Robert Antoine, a former director of a state-owned national telecommunications company in Haiti (a "foreign official" under the FCPA), was sentenced to 48 months in prison for conspiring to commit money laundering in connection with a foreign bribery scheme. In his guilty plea, Antoine admitted that he accepted bribes from U.S. telecommunication companies. Assistant U.S. Attorney General Lanny Breuer remarked that the guilty plea "represents another important milestone in [the DOJ's] ongoing effort to tackle overseas corruption."[3]

The DOJ has recently broadened its goals in connection with FCPA enforcement, targeting individuals as well as business organisations. In January 2010, the DOJ arrested 22 individuals from the arms industry for alleged FCPA violations. These arrests were the result of a long term undercover operation with the Federal Bureau of Investigation (FBI) – the first time that undercover law enforcement techniques were used in connection with an FCPA investigation. The SEC, like the DOJ, has dedicated more resources to enforcing the FCPA. The SEC Enforcement Division has recently been restructured to include a new FCPA Enforcement unit, the primary mission of which "is to devise ways for [the SEC] to be more proactive in [its] enforcement of the FCPA," including the use of more targeted sweeps and sector wide investigations.[4]

Both the DOJ and SEC also continue aggressively to expand the reach of the FCPA through the use of aiding

and abetting and conspiracy charges. The SEC is generally responsible for enforcing, civilly, the books and records provisions of the FCPA, which apply only to U.S. Issuers.[5] But, in November 2010, the SEC settled an FCPA enforcement action against Panalpina, Inc., a U.S. subsidiary of the Swiss company Panalpina World Transport (Holding) Ltd. (PWT). Neither Panalpina, Inc. nor PWT are U.S. issuers subject to the SEC's jurisdiction. The SEC alleged that Panalpina, Inc. "aided and abetted" the books and records violations of its customers, who were U.S. issuers, and violated the anti-bribery provisions of the FCPA as an agent of those customers. This settlement broke new ground in the reach of FCPA enforcement.

Similarly, the DOJ has brought several FCPA conspiracy and aiding and abetting charges where it appears there may be weaknesses in bringing a substantive FCPA charge. In July 2010, for example, the DOJ charged Snamprogetti Netherlands B.V., (Snamprogetti) a Dutch corporation and the subsidiary of Italian company Snamprogetti S.p.A., with conspiracy and aiding and abetting violations of the FCPA. While the indictment alleges that Snamprogetti "caused" certain transactions to occur through U.S. bank accounts, the DOJ may have perceived a risk that the U.S. territorial nexus was too remote to establish jurisdiction for a substantive FCPA charge. In alleging instead that Snamprogetti conspired and aided and abetted in FCPA violations, the indictment focused on Snamprogetti's participation in a joint venture with companies that were more clearly subject to FCPA jurisdiction as U.S. issuers or U.S. domestic concerns.

Another recent development in FCPA enforcement is the controversial whistleblower program established by the Dodd-Frank Wall Street Reform and Consumer Protection Act, which was enacted on 21 July 2010. This program allows an award to whistleblowers who provide the SEC with "original information" about an FCPA violation that results in a monetary sanction over $1 million. The award could range from "not less than 10%" but "not more than 30%" of the monetary sanctions imposed by the SEC and the DOJ.[6] There is concern that the program provides an incentive for employees of a corporation to by-pass internal reporting procedures, thereby weakening the company's ability to identify and rectify potential FCPA issues. Providing such an incentive to employees runs contrary to the DOJ's and SEC's enforcement goal of ensuring that companies comply with the FCPA. The SEC is currently seeking comments to its proposed rules implementing the whistleblower program.

Enforcement in Practice: SFO

Unlike the DOJ, the UK's Serious Fraud Office (SFO) has had historical problems in effective criminal enforcement. An independent review conducted in 2008 criticised its then low conviction rates compared to New York prosecuting authorities.[7] These were blamed in part on the UK's criminal procedural rules and in part on the SFO's lack of internal prioritisation during the investigation of a case.

The position is much improving, with latest conviction rates reported at 91 percent.[8] Significant penalties have also been imposed. In March 2010, for example, Innospec Limited was fined $12.7 million as part of a global settlement, which also involved the DOJ, after pleading guilty to bribing employees of an Indonesian state owned refinery and other Indonesian government officials.[9] In October 2010, Julian Messent, director of the London-based insurance business PWS International Limited, was sentenced to 21 months' imprisonment after admitting to making or authorising payments of approximately $2 million to Costa Rican officials for their assistance in obtaining broker appointments. A compensation order of £100,000 was also granted.[10] However, the SFO still faces barriers to effective enforcement "U.S. style," particularly given the recent focus on budget cuts across the public sector.

The reaction of both the SFO and MOJ to concerns as to the wide scope of the new offences is to refer to "prosecutorial discretion" as a backstop to enforcement where the public interest would not warrant a prosecution. This may reduce the scope of the Bribery Act's wide ranging prohibitions in practice.

Take facilitation payments as an example. A group representing the FTSE-100 companies recently expressed concern in an open letter that ethical multinational companies could overlook minor infringements of the Bribery Act, particularly in

relation to making small facilitation payments abroad. Robert Amaee, Head of Anti-Corruption at the SFO, responded by confirming that such breaches will only be prosecuted if they are "significantly serious."[11] Gifts and hospitality are another example. In a similar vein, the SFO has suggested that where promotional expenses are reasonable and not lavish, the public interest would probably not merit prosecution even though they could constitute a 'technical' breach of the Act.

The Bribery Act also contains no "books and records" offences comparable to those in the FCPA. As has been seen, the SEC has enforced these offences creatively to widen the scope of the US prohibitions. The UK Financial Services Authority (FSA) has in at least one case mirrored the approach of the SEC. In January 2009, it fined Aon Limited £5.25 million for failing to take reasonable care to establish and maintain effective systems and controls to counter the risk of bribery and corruption associated with making payments to overseas firms and individuals.[12] However, this tool is only available to the FSA against regulated firms in the financial sector and is therefore potentially narrower than the SEC's books and records jurisdiction, which applies to all issuers of securities on U.S. exchanges.

Much of the DOJ's success in efficiently obtaining fines and other penalties has been the use of plea agreements. The SFO has used similar techniques to pursue civil settlements under UK money laundering legislation, which allows it to use civil courts to confiscate the proceeds of a crime. However, the current UK procedure does not permit U.S. style "deferred prosecution agreements." The UK courts retain their discretion to sentence guilty defendants as they see fit. They have gone so far as to criticise the SFO in recent cases concerning Innospec and De Puy International for trying to push "agreed" fines through the court process. Unless the UK courts are willing to adopt the deference that U.S. prosecutors are afforded by U.S. courts, it will be difficult to effectively enforce the UK Bribery Act.

The extent to which individual company officials will be pursued also remains to be seen. The Bribery Act provides for criminal liability of a "senior officer" of a company if that company commits one of the principal bribery offences (but not the new corporate offence) with that officer's consent or connivance. However, this wording is already included in many statutes containing corporate criminal offences and the number of cases in which these have reportedly been enforced is not particularly high. The SFO has suggested that it will not hesitate to pursue an individual that qualifies as an "associated person" of a company in cases where the company can make out the "adequate procedures" defence, but for the individual to be prosecuted in such a case he will have to be a UK citizen or his relevant conduct will have to have taken place at least partially in the UK.

Finally, any incentives to blow the whistle in the UK are limited. The SFO has encouraged companies to report suspected corrupt conduct in response to concerns that the Bribery Act's broad prohibitions render companies that must comply with its terms less competitive than those that do not. The UK's Office of Fair Trading recently introduced an incentive package that could result in whistleblowers receiving up to £100,000 in exceptional circumstances for providing inside information concerning cartels.[13] Historically, the UK tax authorities have also had powers to grant financial rewards for information.[14] However, no such formal program is planned for corruption cases.

Conclusion

The practical scope of any criminal legislation is driven both by its terms and the manner in which it is enforced. U.S. authorities continue to push the boundaries of their own legislation. The potentially wide scope of the Bribery Act has raised a number of concerns regarding its effect on competitiveness and the risk of inadvertent breaches and prosecutions. The UK authorities clearly intend to use their new powers to fight corruption as effectively as possible, but the public interest may require the boundaries of the Act's terms to be reigned in under the guise of "prosecutorial discretion." Even if, however, the Bribery Act on its face can empower the UK authorities to become world leaders in anti-bribery enforcement, whether the UK authorities will actually be able to fill that role remains to be seen.

Satindar Dogra is a partner of Linklaters LLP's litigation practice in London. Joseph P. Armao is a partner of Linklaters LLP's litigation practice in New York. Both focus their practice on acting for business organisations involved in regulatory and criminal investigations and enforcement. E-mail: satindar.dogra@linklaters.com and joseph.armao@linklaters.com.

The authors gratefully acknowledge the contributions of Dario Dagostino and Linda Regis-Hallinan, managing associates of Linklaters LLP in London and New York, respectively, in researching and drafting this article.

---

[1] Consultation about guidance on commercial organisations preventing bribery (section 9 of the Bribery Act 2010) – MOJ Consultation Paper, 14 September 2010.

[2] In New Top Ten, Eight Are Foreign – The FCPA Blog, 5 November 2010.

[3] Former Haitian Government Official Pleads Guilty to Conspiracy to Commit Money Laundering in Foreign Bribery Scheme – Office of Public Affairs, DOJ Press Release, 12 March 2010.

[4] Announcing New SEC Leaders in Enforcement Division – Speech by SEC Staff, 13 January 2010. *See* individual speech by Cheryl Scarboro.

[5] The books and records provisions require a U.S. issuer to main accurate records of its transactions and to maintain a sufficient system of internal controls.

[6] 15 USC 78u-6(b).

[7] Review of the Serious Fraud Office – Jessica de Grazia Final Report, June 2008.

[8] Annual Report 2009-2010 – SFO.

[9] *See R v Innospec Limited* – Sentencing remarks of Lord Justice Thomas, 26 March 2010.

[10] *See* Insurance Broker jailed for bribing Costa Rican officials – SFO Press Release, 26 October 2010.

[11] Letter from Robert Amaee to The Telegraph newspaper, 23 September 2010.

[12] Final Notice to Aon Limited – FSA, 6 January 2009.

[13] OFT offers financial incentives for information regarding cartel activity – Office of Fair Trading Press Release 31/08 of 29 February 2008.

[14] Section 26 of the Commissioners for Revenue and Customs Act 2005.