INTERNATIONAL

Bye-bye backhanders

After much delay and controversy, the British government has finally issued guidance covering the UK's Bribery Act 2010. Susannah Cogman assesses the implications for European corporations

Reading the early press commentary on the Bribery Act, one would be forgiven for thinking that the legislation would permanently cripple the ability of UK companies to transact business overseas.

Several weeks ago, reading the commentary on the British government's new guidance on the act, one might think the opposite – that the legislation had been emasculated and that, in the words of campaigning group Transparency International, the guidance is 'more like a guide on how to evade the act, than how to develop company procedures that will uphold it'.

In reality, both views are exaggerated. The act is a significant piece of legislation, and companies within its scope would be well advised to review their compliance programmes. Nonetheless, the guidance rightly advocates a proportionate and common sense approach to compliance.

Corporate offences

The act – which comes into force on 1 July 2011 – will replace the UK's existing anti-corruption regime. It creates the following criminal offences: active and passive bribery, bribing a foreign public official, and the 'corporate offence', which imposes liability on companies and partnerships where a bribe is paid on their behalf.

While all the offences are broad in scope, it is the corporate offence that is the most radical. That offence effectively imposes strict liability (in other words, liability without proof of fault) on corporations where a bribe is paid by a person performing services on a corporate's behalf (an 'associated person'). This is a significant departure from the current law.

The only defence to the corporate offence will be to show that the business had 'adequate procedures' designed to prevent associated persons from paying bribes. Effective anti-corruption programmes are therefore key in mitigating risk. In that context, the government's snappily-titled 'Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)' has been eagerly awaited.

Policing the world

While the UK legislation is yet to be tested on the international stage, Homer Moyer and James Tillen reiterate that a 35-year-old US law still rules the global business waves

The recent success of the US in seeking extradition of two UK citizens for their alleged involvement in a scheme to bribe Nigerian officials on behalf of a consortium led by American company KBR demonstrates the broad jurisdictional reach of the US Foreign Corrupt Practices Act (FCPA), legislation that prohibits bribery of non-US government officials.

One of the individuals, UK lawyer Jeffrey Tesler, who this spring has pleaded guilty to federal charges involving bribes in Nigeria worth millions of dollars, is to be sentenced next month.

Until the UK's own Bribery Act beds down and its future contours become clear, the FCPA retains its position as the most aggressively enforced law prohibiting transactional bribery in the world. Indeed, four of the five largest FCPA resolutions to date have involved non-US companies, including Siemens, BAE, Eni and Technip.

Extraterritorial ripples

The extraterritorial ripple effects of the FCPA are both legal and practical and there are many ways that European companies may, directly or indirectly, feel the impact of the FCPA.

In some circumstances, companies may be directly subject to the FCPA, which includes acting in a US territory. The FCPA extends its reach to any corporation or individual, regardless of nationality, that causes, directly or through agents, an act in furtherance of the corrupt payment to take place within the US. The territorial 'nexus' with the US need be nothing more than an e-mail or a funds transfer to or from the US.

Companies listed on US stock exchanges, or that raise capital in the US, are 'issuers' under the FCPA and fully subject to its terms, regardless of nationality. If a European issuer fails in its SEC filings to disclose bribes it paid in anywhere outside the US, it can be found to have violated the accounting provisions of the FCPA.

The FCPA also extends its prohibitions to agents, officers, directors, and employees of any company subject to FCPA jurisdiction, regardless of the individual's nationality. This statutory language thus encompasses a European national or company who is an agent of a US company, and indeed, that is the basis of jurisdiction for the Tesler prosecution.

Indirect impacts

The impact of the FCPA can also be indirect, affecting European companies by virtue of their affiliation with US

The guidance was published at the end of March (see: *www.justice.gov.uk/guidance/making-and-reviewing-the-law/bribery.htm*). Joint prosecution guidance from the director of the UK's Serious Fraud Office and the Director of Public Prosecutions, setting out their approach under the act, was published on the same day.

The government guidance is, in its own words, 'not prescriptive and is not a one-size-fits-all document'. It is based around six guiding principles, together with some general commentary on the legislation and its interpretation, and 11 illustrative case studies.

Not comply or explain

This is not a 'comply or explain' regime; a departure from the suggested procedures will not, of itself, give rise to a presumption that an organisation does not have adequate procedures. Nonetheless, the advice is statutory guidance (under section 9 of the act) and – amid a plethora of unofficial guidance from non-governmental organisations, supranational bodies, professional firms, and others – it is the only 'official' commentary available.

Furthermore, the prosecution guidance states that the government guidance will be taken into account when considering a prosecution for the corporate offence. As such, the guidance should be afforded particular significance.

The six guiding principles are:

- Proportionate procedures. A commercial organisation's procedures are proportionate to the bribery risks it faces and to the nature, scale and complexity of its activities. They are clear, practical, accessible, effectively implemented and enforced. The guidance provides a non-exhaustive list of the areas that policies may cover, including: due diligence, gifts and hospitality, charitable and political donations, facilitation payments, recruitment, disciplinary and remuneration policies, financial and commercial controls, contractual arrangement with third parties, whistleblowing, communication and training, and monitoring and review.
- Top level commitment. The organisation's top level management are committed to preventing bribery. They foster a culture within the organisation in which bribery is never acceptable. Top-level commitment is likely to include the communication (internally and externally) of the organisation's anti-bribery stance and an appropriate degree of involvement in the development of the anti-corruption programme.
- Risk assessment. The organisation assesses the nature and extent of its exposure to external and internal corruption risk. The assessment is periodic,

corporations. This includes subsidiaries of 'issuers' and subsidiaries of US companies, which may face FCPA-based rules by virtue of its parent company's compliance programme. Having a US subsidiary does not subject a European company to the FCPA; however, as a 'domestic concern' the US subsidiary is fully subject to the FCPA.

In other instances, FCPA principles find their way abroad through commercial channels. This variety of extraterritoriality is driven by the concern of US companies that they not be held vicariously under aggressive provisions of the FCPA for the acts of third parties with whom they do business. To reduce that risk, US companies frequently insist that their business partners conform their business practices to FCPA standards, a requirement that non-US businesses sometimes find objectionable.

Because US companies may be held vicariously liable under the FCPA for bribes paid by third parties whom they retain, European agents, consultants, or sales representatives may find themselves being required to comply with the strictures of the FCPA, even though they are not legally subject to them.

A US party that holds a majority interest in a joint venture with a European company will be expected not only to enforce FCPA accounting standards, but also to control, and take full responsibility for all of the actions of the minority joint venture partner. Consequently, US companies with a controlling interest in a joint venture may impose on their partners all of the obligations imposed by the US FCPA, including the right to terminate the joint venture in the event of a violation.

Probing diligence

A European company that is the target of an acquisition or merger with a US company may come face-to-face with FCPA rules through a probing due diligence process. Because the legal principle of successor liability holds that the acquiring company will inherit the target company's legal liabilities, due diligence may probe for business practices that are, or could become, FCPA violations, even though the target company may not be subject to the FCPA.

In light of the far-reaching aspects of the FCPA, European companies doing business in the US or with US companies should be aware of the FCPA and its prohibitions. Awareness of the FCPA scope and requirements will protect them from legal exposure and ensure an understanding of US counterparties' approach to business.

In addition, application of the FCPA to non-US companies and individuals over the past 30 years provides guidance for the potential scope and application of the UK Bribery Act to non-UK businesses and individuals. By understanding the potential scope of the Bribery Act, UK companies can begin to prepare their foreign subsidiaries, partners, agents, and other counterparties for the effects of implementation.

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