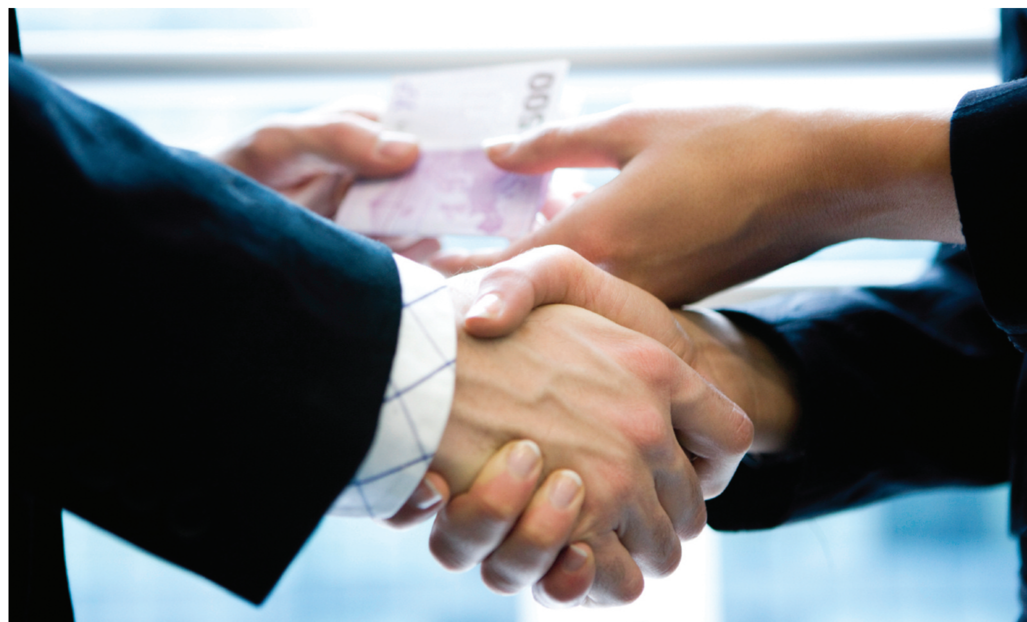
FRAUD BULLETIN
December 2010
9 GOUGH SQUARE

Business or bribery?

The Bribery Act 2010 reforms the criminal law to provide a comprehensive scheme of bribery offences home and abroad. Draconian, it is intended to foster a zero tolerance culture in business and eradicate the threat of bribery to world-wide economic progress and development.

The Act's predecessors, Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1906 and 1916, were dated and inadequate to comply with our international obligations and are now repealed and replaced in full. The Bribery Bill was published in draft on 25th March 2009 for pre-legislative scrutiny by a Joint Committee of both Houses of Parliament, and received Royal Assent on 8th April 2010. Available for viewing, together with the impact assessment and correspondence on the legislation, at www.justice.gov.uk/publications/bribery-bill.htm , the Act creates:

- *two general offences covering the offering, promising or giving of an advantage (Section 1), and requesting, agreeing to receive or accepting of an advantage (Sections 2);*
- *a discrete offence of bribery of a foreign public official (Section 6);*
- *a new offence of failure by a commercial organisation to prevent a bribe being paid for or on its behalf (Section 7). It will be a defence if the organisation has adequate procedures in place to prevent bribery;*
- *a requirement of the Secretary of State to publish guidance about procedures that relevant commercial organisations can put in place to prevent bribery on their behalf (Section 9).*



Offence of bribing another person

The focus is on whether a person intended to induce improper conduct. Two 'cases' illustrate the offences. Dishonesty does not need to be proved. The bribe can be indirect, that is via an assistant to the briber or the person to be bribed.

Section 1: A person is guilty of an offence where:

Case 1: he offers, promises or gives a financial or other advantage to another person, and intends the advantage to (i) induce a person to perform improperly a relevant function or activity, or (ii) to reward a person for the improper performance of such a function or activity.

Case 2: he offers, promises or gives a financial or other advantage to another person, and knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.

Prizes for coming up with a function or activity falling outside the definition of 'relevant'. A function or activity is relevant if it is one of the following (Section 3(2)):

- any function of a public nature *(in public service of the Crown)*,
- any activity connected with a business *(including trade or profession)*,
- any activity performed in the course of a person's employment,
- any activity performed by or on behalf of a body of persons *(whether corporate or unincorporate)*.

And it meets one of the following conditions (Section 3(3-5)):

- Condition A is that a person performing the function or activity is expected to perform it in good faith.
- Condition B is that a person performing the function or activity is expected to perform it impartially.
- Condition C is that a person performing the function or activity is in a position of trust by virtue of performing it.

Even if it:

- has no connection with the United Kingdom, and
- is performed in a country or territory outside the United Kingdom.

Performance of the function is improper if it (Section 4(1)):

(a) is performed in breach of a relevant expectation, and

(b) is to be treated as being performed improperly if there is a failure to perform the function or activity and that failure is itself a breach of a relevant expectation.

The relevant expectation is that a person should act in good faith (for Condition A) or impartially (for Condition B). For Condition C it is any expectation arising form the position of trust as to the manner in which, or the reasons for which the function or activity will be performed. Rather broad then.

The expectation test in Section 5 provides that, when deciding whether conduct is improper, the test is "what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned". Foreign local practice should not be taken into account unless it is permitted or required by the written law of that country. For example, any custom to pay 'speeding fines' to foreign police or 'planning fees' to local authorities should be disregarded unless enshrined in written law.

Offences relating to being bribed

Section 2 is aimed at those who accept or seek bribes.The bribe can be sought indirectly.The state of mind of R is irrelevant (Section 2(7)), and whether he knew or believed the function or activity to be improper. Four 'cases' illustrate the offences. A limited defence (Section 13) for bribery offences contrary to Section 1 and 2 is provided where the defendant proves on the balance of probabilities that the conduct was necessary for the proper exercise of any function a) of an intelligence service, or b) of the armed forces when engaged on active service.

Section 2: a person is guilty of an offence where:

Case 3 is where R requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly (whether by R or another person).

Case 4 is where R requests, agrees to receive or accepts a financial or other advantage, and the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity.

Case 5 is where R requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance (whether by R or another person) of a relevant function or activity.

Case 6 is where, in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly by R, or by another person at R's request or with R's assent or acquiescence.

Bribery of foreign public officials

This specific offence (arguably covered by preceding sections) mirrors the Organisation for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, ratified by the UK in 1998, albeit with no requirement, as in the Convention that the advantage is improper. This covers facilitation payments intended to smooth routine transactions, which might otherwise be permitted by foreign jurisdictions. Again, the bribe may be indirect. 'Foreign public official' is widely defined. The briber's understanding of the law is irrelevant.

Section 6: A person ("P") who bribes a foreign public official ("F") is guilty of an offence if P's intention is to influence F in F's capacity as a foreign public official and intending to obtain or retain business, or an advantage in the conduct of business. A bribe is where P offers, promises or gives any financial or other advantage to F and F is neither permitted nor required by the written law applicable to F to be influenced in F's capacity as a foreign public official by the offer, promise or gift.

Corporate bodies (Section 14): Where an offence under s. 1, 2 or 6 is committed by a corporate body, with the consent or connivance of a senior officer, that officer commits an offence. If the offence takes place abroad, but the senior officer has "a close connection with the UK" he may be prosecuted in the UK.

Failure of commercial organizations to prevent bribery

Section 7: A relevant commercial organisation ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending to obtain or retain business for C, or to obtain or retain an advantage in the conduct of business for C.

Companies are now vicariously liable for the acts of their employees, agents or subsidiaries, including contractors or service providers. The country in which they are based is irrelevant, provided part of the business occurs in the UK. An offence is committed if conduct would constitute an offence under Section 1 or 6. Previously prosecutors had to identify the directing will and mind within a company at the relevant time, and adduce evidence of their knowledge and involvement. Now prosecutors need only prove fault by the individual concerned, however lowly ("A"). It is a defence (Section 7(2)) for the company to prove to the civil standard that adequate procedures designed to prevent the offence were in place, but this requires active policing rather than simply 'reasonable steps'. This could be called the 'rogue agent' defence. (See for further analysis the Ministry of Justice link to correspondence from Lord Bach and Lord Tunnicliffe and Archbold Review Issue 5, 7th June 2010, D. Aaronberg QC, N. Higgins.)

Corporate hospitality could lead to prosecution if it is 'lavish corporate hospitality to secure advantage' rather than for legitimate commercial purposes. In the current economic climate prosecutors may be more critical of a generous 'thank you' to clients, because inevitably they are intended to induce or encourage the placing of business. With the limited guidance currently available, businesses could find themselves in an unexpected and unwelcome quandry.

Similarly, **referral arrangements**, under scrutiny from the Legal Services Board in any event, could be criminalized for example where an advocate is selected for reasons other than the lay client's best interests.

Consent required (Section 10): the personal consent of the director of the relevant prosecuting agency is required before proceedings can be instituted.The DPP, DSFO or DRCPO may delegate this power if he is unavailable.

Penalties (Section 11): a conviction on indictment for an offence contrary to s. 1, 2 or 6 carries a maximum sentence of 10 years imprisonment plus an unlimited fine. Commercial organisations convicted of the section 7 offence are liable to pay an unlimited fine.

Conclusion:

The Bribery Act 2010 is draconian legislation which drags the UK into the 21st Century, and can achieve its laudable aims provided prosecutors are properly funded. However businesses will have to deal with a worrying level of uncertainty when considering their own internal policies, and arguably an unfair disadvantage against international competitors in stringent economic times.

Emily Verity

FSA Retains Prosecutions

As the prosecuting arm of the FSA getsconfirmation that it will not be joining the Economic Crime Agency, Eleanor Mawrey examines the reasons behind this decision.

Nobody practising in the field of white collar crime can have failed to notice the sudden emergence of the FSA as a serious prosecuting authority. The timing, though coincidental, reflects a wider acknowledgement post the banking crisis that those committing financial crime should be held accountable as their behaviour has repercussions well beyond the City. With proposed changes to financial regulation and the abolition of the FSA, who would prosecute such crimes was up in the air.

The proposal is for the FSA to be split, with the Bank of England absorbing the regulation of deposit takers, insurers and investment banks and a new regulator, the currently named Consumer Protection and Markets Authority being responsible for consumer protection in financial services and market conduct. The decision announced this month to keep the prosecutions for market abuse and insider dealing alongside the regulatory arm within the structure of the CPMA, rather than merging it with the ECA, is a reflection of the new found confidence in the FSA as a Prosecutor both within the City and wider government.

The FSA had traditionally punished market abuse and insider dealing using its regulatory rather than criminal powers and this is a route still open to them. It had originally been thought that civil enforcement would be the quicker yet still effective way of dealing with those set on manipulating the market, especially against a background of unsuccessful insider-dealing prosecutions by the DTI. However, as some of the civil cases dragged, on the advantages of only pursuing this route became less obvious and a gradual shift took place for a more balanced approach to enforcement where the dual powers are used to reinforce one another. The success of this change of emphasis is clearly reflected by the growing number of convictions coupled with a greater acceptance of market abuse penalties by those eager to avoid prosecution; and avoiding prosecution is no small consolation when one looks at the likely sentence. To date all those convicted have received custodial sentences, a position confirmed by the Court of Appeal in R v McQuoid [2009] 4 All E.R 388, with the Lord Chief Justice stating, "if there was ever a feeling that insider dealing was a matter to be covered by regulation, that impression should rapidly be dissipated. The message must be clear: when it is done deliberately, insider dealing is a species of fraud: it is cheating. Prosecution in open and public court will often, and perhaps much more now than in the past, be appropriate."

It is not surprising therefore that the decision has been made to keep the criminal and civil enforcement together under the control of CPMA rather than drag the prosecutions over to the ECA. There is no doubt however that there will be close liaison with the ECA, just as the FSA currently does with the SFO, the FPU and the City of London Police.

This month also saw Neil Rollins being convicted of both money laundering and insider dealing following his unsuccessful appeal all the way to the Supreme Court on the grounds that the FSA did not have jurisdiction to prosecute POCA offences as they were not contained within FSMA. This argument had found little favour for as the court pointed out this would have prevented the FSA from prosecuting conspiracies, a consequence parliament clearly could not have intended. Indeed the first case of conspiracy follows shortly behind this conviction with the prosecution of the four former directors of iSOFT due to commence in early 2011. Whether it be called the FSA or the CPMA it appears that those committing insider dealing or market abuse will continue to be pursued vigorously.

Eleanor Mawrey
is currently junior counsel in an FSA investigation.

How do we treat complaints of NHS Fraud? *with a health warning!*

During this time of efficiency savings the government has promised to cut waste and with the NHS budget increasing there is likely to be greater pressure placed upon the NHS Counter Fraud Service ("CFS") to crack down on fraud.

Investigating and prosecuting professionals such as doctors, dentists, consultants, managers and directors within the NHS is no easy task and rightly so as the consequences that can flow from a conviction are very serious as not only can liberty be lost but also the individual's livelihood.

Payment Problems The difficulty with investigating this type of fraud is that unless it is conducted on a fairly large scale it is rarely picked up mainly because the system is not subject to rigorous scrutiny. To give one example – a dentist in independent practice is paid in units by treatment administered rather than by the number of patients walking through the door. Therefore if a patient has a simple check up then fewer units will be charged compared to a patient who has root canal treatment. It gets more complicated in terms of a tooth extraction as these are categorised depending upon difficultly. This method of payment can be manipulated by inventing patients and treatment and/or exaggerating claims.

Referrals Referral to the CFS is usually through whistleblowing by employees or other professionals who take offence at the undermining of their profession. The NHS advertises their strong stance on fraud through posters and information on their website. Specifically they have a fraud hotline where the whistleblower is assured of anonymity.

If the case gets as far as prosecution, the reviewing lawyer and counsel instructed should be appraised on how the investigation commenced and whether a whistleblower played any part. If they did then the person's identity and relationship to the suspect should be readily disclosed to the prosecution team by the investigators. One should not wait until receipt of the Defence Case Statement in the hope that it will not be raised. Any competent defence advocate will raise this and prosecutors should be alive to this issue in line with their continuing duty of review and disclosure.

As with any informant, despite the fact that the whistleblower is very likely to be another professional, they may nonetheless have an axe to grind. Whilst policy dictates that the identity of whistleblowers in this context remain sacrosanct, where it is suspected that a whistleblower may have made false accusations against another individual then the information they give must be treated with a health warning. Where for example a referral is made by an ex employee or a former work colleague who was dismissed or left the practice on bad terms with the suspect, then, without compelling independent evidence of the suspect's guilt, prosecutor's should be very cautious about instituting proceedings.

James Thacker

Who should pass the sentence?

Judges, politicians or the administration?

In March this year Lord Justice Thomas sitting as a first instance judge at the Southwark Crown Court struck a blow for the independence of the judiciary. The case poses questions as to the balance to be struck between prosecutors and the judiciary and as to the future shape of efforts made by the Attorney-General and the Serious Fraud Office to encourage self-reporting by corporate offenders.

There is insufficient space here to do justice to the reasoning of the judge or to identify all the important issues raised. The full sentencing remarks are to be found at *www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-thomas-lj-innospec.pdf*

Innospec Incorporated was a Delaware Company. Corrupt behaviour was organised by the directing minds of its UK subsidiary, Innospec Ltd, based in Cheshire. Innospec had for many years manufactured an antiknock fuel additive containing lead (TEL).

It paid bribes estimated at $8 million to various officials in Indonesia, some of which was intended to block legislative moves to ban or enforce a ban on TEL on environmental grounds in Indonesia. It also paid bribes totalling $5.8 million in connection with its involvement with the UN Oil for Food Programme for Iraq. It also sold fuel additives to Cuba in violation of the US Trading with the Enemy Act.

Authorities of the US government (including the Department of Justice and the Securities Exchange Commission) commenced an investigation in 2005. They notified the SFO in 2007. The investigation proceeded with the full co-operation of the independent directors of Innospec. It sometimes happens that a "new board" or a faction on the board of directors see this sort of co-operation as the only way that the company might survive and, in return prosecutors in various jurisdictions conduct prosecutions or accept civil penalties designed to permit the company to continue to trade.

The investigation and negotiations proceeded until, in December 2009, Innospec offered $25.8 million plus a further $14.4 million if contracts to TFL to Iraq were performed. Both potential prosecutors investigated the means of the company and discovered that it could only pay a small fraction of the penalties that might properly be imposed. Eventually an agreement was reached whereby Innospec agreed to plead guilty in the UK to a conspiracy relating to the Indonesian corruption and in the US to offences relating to the corruption in Iraq. A division of the cash that Innospec could pay was agreed between the British and American authorities. It was further agreed that the courts in the two relevant jurisdictions would be invited to sentence on the same day so that an announcement could be made which would avoid a disorderly market in Innospec shares (which are traded on the Nasdaq exchange).

In the UK the procedure was followed as provided by the Attorney-General's guideline on Plea Discussions in Cases of Serious or Complex Fraud. A plea agreement was reached under which Innospec would plead guilty; there would be a joint submission of sentencing; Innospec would submit to and pay for a monitoring agreement. There was an agreed case statement setting out the facts. There would be a confiscation order in the sum of $6.7 million in respect of the Indonesian corruption. There would be a civil recovery order of $6m of which $5m would be paid to the UN development Fund for Iran. It was specifically accepted that it was for the court to determine the appropriate sentence, but the parties submitted that the approach upon which they were agreed should commend itself to the court as it was compatible with the approach being adopted in the US.

Lord Justice Thomas was having none of it. He reluctantly accepted the financial ceiling that had been agreed, partly because he accepted that the company "had put the past behind it" and partly because it would have been unfair to impose a greater penalty in view of "the protracted period of time in which the agreement had been hammered out." He imposed a fine of the Sterling equivalent of $12.7 million in place of the confiscation order and civil penalty that had been agreed.

More significantly for the future, the judge referred to paragraph IV.45.24 of the Consolidated Criminal Practice Direction, an amendment added on the same day as the Attorney's guideline referred to above. The judge stated that this provision "makes it clear that although sentencing submissions should draw the court's attention to any applicable range in any relevant guideline or to any ancillary orders that may be applicable, sentencing submissions should not include a specific sentence or agreed range, other than the ranges set out in the Sentencing Guidelines or authorities," Thus the judge concluded that it was "clear that the SFO cannot enter into an agreement under the laws of England and Wales with an offender as to the penalty in respect of the offence charged…Agreements and submissions of the type put forward in this case can have no effect."

Most judges and criminal lawyers will instinctively applaud this blow struck for the independence of the judiciary. There is no denying, however, that this will severely restrict the capacity of the SFO to follow its own guidance given earlier this year in an attempt to encourage self-reporting by corporate offenders. If more fraudulent and corrupt behaviour is to be brought to account at a cost which is affordable in the current fiscal climate, new boards and their advisers have to be encouraged to come forward and to co-operate with investigations. At least Lord Justice Thomas said in passing that Innospec would have been entitled to "a credit well in excess of 50% for its early guilty plea and its co-operation". That will be some encouragement to those contemplating a rather emasculated plea discussion process.

Andrew Baillie QC