



Law Commission report on reforming UK bribery law

The Law Commission has proposed sweeping changes to the UK's law on bribery. This briefing outlines the problems with the current bribery law and how they may be resolved by the proposals. It also highlights the potential implications for businesses should these proposals be enacted and comments on probable next steps.

Background

The Law Commission published a report proposing sweeping changes to the law on bribery on 19 November 2008.

The current law on bribery is a patchwork of common law and statutory offences. The most important are the common law offence of bribing a public official and the statutory offences of bribing a public official and agent created by the Prevention of Corruption Acts of 1889 and 1906 respectively.

The current law is generally regarded as unsatisfactory. Many of the problems with it were highlighted by the Organisation for Economic Co-operation and Development (OECD) in its October 2008 report on the UK's application of the OECD Bribery Convention. The most significant are that:

- the law is complex and uncertain. For example, the statutory bribery offences require an advantage to be conferred or received 'corruptly', but there is contradictory case law on the crucial question of whether this means that dishonesty must be proved;
- bribery is committed in private sector transactions only if the recipient of a bribe is an agent;
- the jurisdictional scope of the current law is limited in certain respects. For example, the law does not generally catch arrangements whereby UK companies use non-UK intermediaries to pay bribes overseas (often to foreign public officials); and

- it is difficult to bring successful prosecutions against companies whose employees have paid bribes on their behalf, due to the difficulty of proving that senior managers have sufficient knowledge of the bribes.

The Law Commission's proposals

The report contains a draft bribery bill replacing the bribery offences discussed above with two general bribery offences: an offence of bribing a foreign public official and a corporate offence of failure to prevent bribery. The draft bill also simplifies and extends the extraterritorial application of the bribery offences.

General offences

The first general offence is targeted at recipients of bribes. In summary, it would criminalise requesting or accepting an advantage in connection with the improper performance of a public or commercial function. The second general offence is targeted at payers of bribes. In summary, it would criminalise offering or giving an advantage in connection with the improper performance of a public or commercial function. In neither offence would it matter whether the advantage was conferred for the benefit of or through a third party.

Improper performance of a public or commercial function would occur when (a) that function gave rise to 'expectations' that it would be performed impartially or in good faith, or that the person performing the function was in a position of trust and (b) one or more of those expectations were in fact breached.

Bribery of a foreign public official

The offence of bribery of a foreign public official would be committed, in summary, if a person offered or gave an advantage (directly or through a third party) to a foreign public official or connected third party in these circumstances:

- the person intended to secure a business advantage by influencing the foreign public official; and
- the advantage was not legitimately due. An advantage would be treated as legitimately due if local law required or permitted the foreign public official to accept it.

It would be a defence reasonably to have believed that the foreign public official was required or permitted to accept the advantage by local law.

Corporate offence of failing to prevent bribery

The corporate offence of failing to prevent bribery would apply to companies registered in England and Wales, with a penalty of an unlimited fine. In summary, the offence would be committed if a person committed a bribery offence in connection with a company's business and someone whose responsibilities for that company included preventing the relevant person from committing bribery was negligent in failing to prevent the bribe.

It would be a defence for a company to prove that it had in place 'adequate procedures' designed to prevent the commission of bribery on its behalf, unless the person who negligently failed to prevent the bribe was a director, secretary or member of the body corporate.

Extraterritorial effect

The draft bill provides that, in summary, the proposed new offences would be committed if a UK individual or company committed acts overseas that would constitute a bribery offence if they had been committed in the UK.

Evaluation

The report's proposals have generally been welcomed by lawyers, anti-bribery campaigners and business organisations on the basis that they address many of the problems with the current law. However, if implemented, the proposed new offences would have significant implications for UK companies and could give rise (at least initially) to new uncertainties about what constitutes bribery.

Implications for companies

The extraterritorial effect of the general offences proposed – and, in particular, the new corporate offence – would make it easier for bribery prosecutions to be brought against UK companies. If the proposals are implemented, companies (particularly those doing business in countries low in Transparency International's annual Corruption Perceptions Index) will need to review their bribery law compliance programmes.

The Law Commission has not attempted to define what would constitute 'adequate procedures' to prevent bribery for the purposes of the corporate offence. When assessing whether such procedures are in place 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 ('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.

Areas of uncertainty

The two proposed general offences require clarification through case law (or through amendments to the draft bill) for certainty about their scope to be achieved. It is unclear in precisely which circumstances a court would treat an expectation of good faith, impartiality or trust as arising.

If the proposals are implemented, firms will need to review arrangements or practices they believe to be permissible under current law. In the light of the difficulty of determining when expectations of good faith, impartiality or trust arise, they may need to seek advice about particular arrangements or practices.

Implementation

The proposals will be of purely academic interest if they are not given legislative effect. The Justice Secretary responded to the report by promising that 'the government will carefully consider the [Law]

Commission's recommendations and build on them to bring forward a draft bill for pre-legislative scrutiny in the next session'. The absence of a commitment to start the formal legislative process in the next session means it is unlikely that a bribery bill will receive royal assent before the next general election. Unless there is a cross-party consensus in favour of the bribery bill and that bill is given priority by the government in the 2009-10 legislative session, there is a risk that English bribery law will, in the short-to-medium term, remain in its current unsatisfactory state.

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