Regulatory

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DAMAGING THE BRAND:
THE IMPACT OF BRIBERY BY ASSOCIATED PERSONS

Introduction

One of the main talking points when the UK Bribery Act 2010 (the Act) was first introduced was the new section 7 offence. This introduced corporate liability for failure to prevent bribery by an "associated person" and marked a novel approach under English law to the problem of bribery and corruption on behalf of corporates.

Much of the criticism of the Act and the Serious Fraud Office (SFO) since the Act came into force in July 2011 has centred on the lack of enforcement, and it has been said by many that both the Act and the SFO lack real "teeth".

While it is true that there has been limited enforcement activity under the Act in the four years since it came into force, the SFO has continued to investigate cases under the old law. It often takes six years or more for bribery offences to be brought to court, with offences committed before July 2011 being prosecuted under the pre-existing law rather than the Act. However, two recent enforcement actions, along with other cases, show that the Act is now being used.

The potential impacts of bribery concern both the way organisations operate internally and on an industry-wide basis. A recent civil case has illustrated the financial consequences for directors who engage in corrupt behaviour in breach of their company's Articles of Association, whilst activities in the shipping sector show how the Act, and other pieces of legislation elsewhere in the world, can trigger initiatives aiming to respond to the threat of enforcement by the SFO and its ilk.

Each of these recent developments are considered in detail below.

Enforcement action (1): Broad application of "Associated Persons"

Section 7 of the Act applies to any organisation carrying on a business or part of a business in the UK. It criminalises the corrupt practices of agents, even when acting overseas, whatever their nationality. It is a strict liability offence, with a defence available where the corporate can show that it had in place "adequate procedures" designed to prevent bribery by associated persons.


In September 2015, Brand-Rex Limited became the first UK corporate to be involved in a settlement with enforcement agencies (in that case the Scottish authorities) for a contravention of section 7 of the Act.

The facts

Brand-Rex is a supplier of IT network hardware, headquartered in Scotland. The company employed a rewards scheme for its independent installers who would sell Brand-Rex products to customers. Having achieved a certain level of sales, the installers would be entitled to various rewards from Brand-Rex, including vouchers for foreign holidays.

However, without Brand-Rex's knowledge, one of these installers offered his holiday vouchers to the decision maker of one of his customers, who was then alleged to have been influenced to purchase Brand-Rex hardware as a result.

Self-report (and fine)

Having discovered the scheme, Brand-Rex appointed solicitors and forensic accountants to perform a detailed investigation, following which it self-reported to the Scottish Crown Office. Brand-Rex avoided criminal prosecution and paid a civil recovery order of £212,800, a sum calculated on the profit the company had made as a result of the bribes.

Conclusions

Given the potential exposure under the Act, all businesses which are subject to the Act need to ensure that they have in place adequate procedures designed to prevent bribery by associated persons, which can include those who introduce work, like the Brand-Rex installers, other agents and employees.

Enforcement Action (2): The first DPA

In 2014 the SFO introduced US-style Deferred Prosecution Agreements (DPAs), whereby a prosecutor charges an organisation with a criminal offence but automatically suspends proceedings, whilst the company agrees to a number of conditions such as a fine and external oversight, before withdrawing them once compliance with the conditions has been evidenced.

The first DPA was approved by the English courts in November 2015 in a case resulting from corrupt payments in Tanzania.

The facts

UK based Standard Bank Plc, now ICBC Standard Bank Plc following a 60% equity sale earlier this year (the bank), entered into a DPA, having self-reported the activities of one of its former affiliates, Stanbic Bank Tanzania, which had paid bribes to secure fees relating to a debt placement by the Tanzanian Government.

Terms of the DPA

Under the DPA the bank will pay total fines of US$25.2 million, compensation of US$7 million to the Government of Tanzania and the SFO's costs of £330,000. The financial penalty will be borne by shareholders in the Johannesburg listed Standard Bank, which indemnified ICBC at the time of the 60% sale in February. ICBC had no direct interest in Standard Bank at the time and no involvement in the bribery.

Conclusions

The benefit of DPAs can be considerable for some organisations. For example, companies convicted of bribery face a public procurement ban under EU public procurement legislation, but debarment only occurs on "conviction by final judgment", so DPAs avoid this. Companies who think they may have committed a bribery offence should explore the option of self-reporting to the SFO.

Court oversight of DPAs distinguishes the UK regime from that of the US and avoids allegations that they are a soft option. In the UK, DPAs can only be used where there has been judicial consideration of the public interest in agreeing one.

The court's judgment in the case outlined in some detail the rationale for its approval of the DPA, and will be of interest to others who are considering agreeing a DPA. The relevant factors included the:

1. Speed with which the bank self-reported the bribery (three weeks after the publication of an independent report that had been commissioned by the bank with a firm of solicitors).
2. Cooperation extended by the bank in disclosing this internal report.
3. Fact that there was no evidence of the bank being complicit in the bribery by the associated person.

Impact of bribery: Consequences for Directors

DPAs are of course not available for individuals and the potential consequences for directors of being convicted of bribery include the following:

- Unlimited fines and up to 10 years' imprisonment under section 14 of the Act.
- Disqualification for up to 15 years under section 2 of the Company Directors Disqualification Act 1986.
- Civil recovery orders and confiscation of property under the Proceeds of Crime Act 2002.

- Payment of compensation to the victims of bribery.

In the recent Scottish case of *Gray & Ors, Re Braid Group (Holdings) Ltd*[1] a director, who was also an employee and shareholder, and who was complicit in bribery was dismissed under his employment contract for misconduct, and he also found that his shares were compulsorily purchased at a significant discount to the market value.

When he tried to sue the other shareholders for "unfairly prejudicial conduct" under section 994 of the Companies Act 2006, the court held that the company's board was entitled to rely on a provision in the company's Articles of Association which provided for a lower valuation, where the dismissed director was a "bad leaver", resulting in an £18 million loss for the director/shareholder.

UK Chamber of Shipping guidance

In September 2015 the UK Chamber of Shipping published guidance entitled "The Bribery Act 2010: Practical Guidance for the UK Shipping Industry". This guidance – which can be purchased from Witherby Seamanship[2] – aims to:

- Suggest corporate procedures for preventing bribery.
- Assist companies to develop policies, tactics and training to better equip Masters to resist demands for facilitation payments.
- Reduce the frequency of such demands by developing a reputation for resisting, using collective action across the industry and in concert with relevant authorities.

The guidance recommends that shipping companies should conduct a risk assessment to identify the areas where the business might be exposed to bribery and corruption risks, and suggests some helpful external and internal risk factors to weigh up as part of that risk assessment. The guidance also highlights some red flags which might indicate bribery and corruption risks, and also suggests ways to manage third party risks.

Of perhaps greatest interest to owners, operators and others is the UK Chamber's recommended approach to demands for facilitation payments, and their suggestion, explained in detail in the guidance, that Masters follow the three "R"s - Resist, Report and Record.

In essence, the Master should resist the request for a facilitation payments, for example by displaying the anti-corruption policy, and querying the legitimacy of the request, report any payment to the company head office and the company should record the payment in its accounts in an accurate and consistent way.

In the guidance the UK Chamber of Shipping makes clear that it is willing to collect information on demands for facilitation payments on a confidential basis. The guidance also discusses other types of collective action, such as the Maritime Anti-Corruption Network (MACN)[3].

BIMCO clause

On 24 November BIMCO, the world's largest international shipping organisation, launched an anti-corruption clause for charterparties.

One of the stated aims of the new clause is to give owners and charterers a contractual platform for cooperative action to resist demands for illegal payments from port officials and others, following other initiatives in the shipping sector such as the collective action discussed above.

The most significant elements of the clause include the following:

- Warranties from both parties that in performance of the charter they will comply with all applicable anti-corruption legislation.
- Warranties from both parties that in performance of the charter they will have in place procedures that are, to the best of their knowledge and belief, designed to prevent the commission of any offence under such legislation by associated persons.
- A mechanism for owners to issue a note of protest if an illegal demand is made and the demand is not withdrawn. This triggers a co-operative response by charterers and owners to the demand. A safeguard for the owners if they issue a protest to resist a demand and the ship is delayed is that charterers cannot place the ship off-hire.
- A provision that if Party A commits a breach of any applicable anti-corruption legislation in connection with the charterparty, then Party A must indemnify Party B.
- An additional provision that if such breach by Party A causes Party B to be in breach of any applicable anti-corruption legislation, then Party B may terminate the charterparty.

Use of the clause is entirely voluntary and it will be interesting to see the extent to which the market adopts the clause or variants.

1 [2015] CSOH 416

2 www.witherbys.com

3 www.maritime-acn.org

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