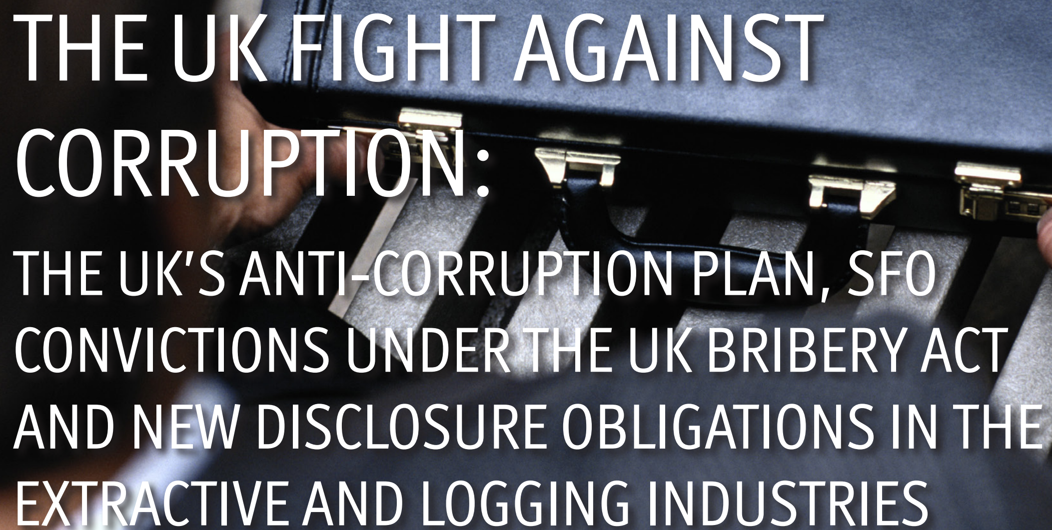
EU, Competition and Regulatory

December 2014



THE UK FIGHT AGAINST CORRUPTION:

THE UK'S ANTI-CORRUPTION PLAN, SFO CONVICTIONS UNDER THE UK BRIBERY ACT AND NEW DISCLOSURE OBLIGATIONS IN THE EXTRACTIVE AND LOGGING INDUSTRIES

This Briefing focuses on three important developments in the UK's fight against corruption: first, the announcement of a UK Anti-corruption Plan; secondly, successful prosecutions under the UK Bribery Act and thirdly, new disclosure obligations in the extractive and logging industries.

On 18 December, the UK Home Office released its Anti-corruption Plan. The plan discusses what is meant by 'corruption' and explains why it is a problem. The purpose of the plan is to demonstrate the breadth of the UK's current anti-corruption activities; to set out clearly the actions that government will take to tackle corruption; and to set out its priorities for raising international standards and leading the global fight against corruption in all its forms. It includes proposals for new actions, summarises recent changes already made to the law (whether initiated by the UK itself or by the European Union) and outlines a number of bodies which are either already in existence or which will be set up to help prevent corruption.

Some of the key action points are as follows.

The creation of additional bodies, teams and cooperation mechanisms

- A new role of Government Anti-Corruption Champion has been created, appointed personally by the Prime Minister. The current Champion is Mr Matthew Hancock MP. The Champion will take on a strengthened role in overseeing the Government response to both domestic and international corruption.
- The Cabinet Office will establish a new cross-departmental unit on international corruption, which will provide support to the Government Anti-Corruption Champion (from December 2014).
- The National Crime Agency (NCA) is to establish a national multi-agency intelligence team focusing on serious domestic and international bribery and corruption (by April 2015).

holman fenwick willan hfw

> The Ministry of Justice will examine the case for a new offence of a corporate failure to prevent economic crime and will also look at the rules on establishing corporate criminal liability more widely (by June 2015). In addition to bribery, there are likely to be other forms of economic crime for which it is appropriate to ensure that senior corporate actors are sufficiently accountable.
>
> ANTHONY WOOLICH, PARTNER

- The Department of Business, Innovation and Skills (BIS) is to evaluate the implementation of whistleblowing provisions introduced through the Enterprise and Regulatory Reform Act 2013. This is a five year plan, to conclude in 2018.
- The Chartered Institute of Public Finance & Accountancy (CIPFA) is to develop a new counter-fraud Centre of Excellence, working with the Department for Communities and Local Government (DCLG) (by December 2015).
- The NCA will work with regulators and professional bodies to combat money laundering.
- DCLG, in turn, plans to fund the development of a new Counter Fraud Strategy for local government. This will be delivered by the local authority network of counter fraud experts (Fighting Fraud Locally), including CIPFA (by March 2015).
- BIS plans to implement a central register of UK company beneficial ownership information as soon as practicable after the necessary primary and secondary legislation is in place (subject to a Parliamentary timetable).
- The Department for International Development (DfID) will develop proposals for establishing an international rapid reaction team to deploy to countries where regime change has taken place. The aim is to provide expert assistance in mutual legal cooperation and asset recovery (by June 2015).

New or amended criminal offences and government powers

- The Ministry of Justice will examine the case for a new offence of a corporate failure to prevent economic crime and will also look at the rules on establishing corporate criminal liability more widely (by June 2015). In addition to bribery, there are likely to be other forms of economic crime for which it is appropriate to ensure that senior corporate actors are sufficiently accountable.
- The Home Office plans to introduce a new offence of participating in the activities of an organised crime group (by March 2015).
- It will be an offence for a person to operate as a private investigator without a Security Industry Authority issued licence (this is subject to a Parliamentary timetable).
- The Home Office will seek to amend the Proceeds of Crime Act 2002, changing the legal test for a restraint order from one of ‘reasonable grounds’ to one of ‘suspicion’ in both domestic and international cases (by March 2015).
- The Home Office will also seek to amend the Proceeds of Crime Act 2002 to enable the use of investigative powers after a confiscation order has been made to facilitate the tracing and recovery of hidden assets (by March 2015).

Additional guidance

- Model contract terms were issued by the Cabinet Office in March and April 2014. As with previous model contracts, these have specific provisions to deal with corruption and related issues, including contract cancellation.

- The Cabinet Office is to consider what further steps are required to make information available on suppliers excluded from public contracts, including the feasibility, potential advantages, and disadvantages of a register of excluded suppliers (by August 2015).

Increased governmental transparency and reporting

- The Cabinet Office is to work with government departments, civil society organisations and academics to identify data held by the government which could be published to improve transparency and reduce opportunities for corruption (by June 2015).
- The Home Office and law enforcement agencies are to develop a model for a single reporting mechanism for allegations of corruption (by July 2015).

Will the UK government follow through with its good intentions? Recent developments certainly suggest that it will.

The Bribery Act bites: new convictions for Bribery Act 2010 offences

On 5 December 2014, the Serious Fraud Office (SFO) succeeded in obtaining convictions against three men for an investment scam. The convictions included conspiracy to commit fraud, conspiracy to furnish false information, fraudulent trading and, for two of the defendants, convictions for Bribery Act 2010 (Bribery Act) offences. This is significant because it is the first case in which the SFO has brought charges for Section 2 offences (accepting bribes) under the Bribery Act 2010, and it is the first case with significant funds involved. Previous successful prosecutions of individuals, of which there are three, were for low level bribes (for example, in one case a bribe was paid in order to pass a driving test).

The scam

Two directors of Sustainable AgroEnergy plc (SAE), and one independent investment advisor, sold investment products linked to “green biofuel” jatropha trees. Seeds from jatropha trees were once hailed as the answer to the biofuel question and jatropha trees looked to be a sound investment, although subsequent studies have shown that they are not as productive as initially believed and they have now fallen from favour. The fraud amounted to approximately £23 million and in many cases involved investors’ pension funds.

The three men successfully convicted for the scam were:

1. Gary Lloyd West: former Director and Chief Commercial Officer of SAE.
2. James Brunel Whale: former Director, Chief Executive Officer and Chairman of SAE.
3. Stuart John Stone: an independent financial advisor associated with the company.

Stuart Stone was sentenced to six years’ imprisonment for bribery and furnishing false invoices. Gary West was sentenced to a total of 13 years’ imprisonment, four years of which were specifically for his bribery offences. James Whale was sentenced to nine years’ imprisonment for conspiracy to commit fraud by false representation and for fraudulent trading. Mr Whale was not charged with bribery.

Between April 2011 and February 2012, investors were deliberately misled into believing that SAE owned land in Cambodia, that the land was planted with jatropha trees, and that there was an insurance policy in place to protect investors if the crops failed. There were no jatropha trees. SAE functioned as a pyramid scheme. The defendants used money from new investors to pay earlier investors.

Gary West and Stuart Stone produced false sales invoices which allowed Stuart Stone to obtain commission rates of 65% on investors’ funds. In exchange for Mr West and Mr Whale’s actions Mr Stone paid a bribe of £126,000. In addition, Stuart Stone used a number of offshore companies to siphon money from SAE. Gary West made payments to Stone’s companies for services already remunerated.

The Bribery Act came into force in July 2011 and is not retrospective. Accordingly, the period for which the defendants were charged for bribery was between July 2011 and February 2012.

The bribery offences

Gary West and Stuart Stone were successfully prosecuted for the offences of making and accepting a financial advantage contrary to section 1(1) and 2(1) of the Bribery Act.

Section 1(1) of the Bribery Act sets out the circumstances in which a person is guilty of the offence of bribing another person. Section 2(1) of the Bribery Act sets out the circumstances in which a person is guilty of the offence of accepting or requesting a bribe. This is the first time that charges have been brought for Section 2 offences.

This shows that the SFO are actively enforcing the Bribery Act, and are pushing for sentences which will make an example of the wrongdoer. The Bribery Act has been in force for over three years now, and more prosecutions can be expected.

Companies should be particularly mindful of their liability for the ‘passive’ bribery offences, which may be harder to monitor than the ‘active’ Section 1, 2 and 6 bribery offences. Section 6 of the Bribery Act sets out the offence of

bribing a foreign public official to obtain or retain business.

Under Section 7 of the Bribery Act, commercial organisations are liable where they fail to prevent bribery committed by persons acting on their behalf. Accordingly, a company will not only be liable for the actions of its employees, but it will also be liable for the actions of any of its agents or contractors. Section 7 is a 'strict liability' offence, which means that a company can be convicted even where it had no motive to commit a bribe. All that is necessary for a successful conviction is to prove that a person associated with a commercial organisation has committed an active offence under the Bribery Act on its behalf.

The only defence to a Section 7 offence is that the commercial organisation in question has 'adequate procedures' in place designed to prevent bribery from taking place. Procedures will be 'adequate' if they are proportionate to the risk. Measures should include, for example:

- A pervasive message from the top to demonstrate that corruption will not be tolerated by leadership teams.
- Thorough market-entry risk assessments.
- Codes of conduct and anti-bribery policies for staff and commercial counterparties.
- Formal anti-corruption training for front-line staff and key third parties.
- Clear whistle-blowing procedures and regular audits of higher-risk functions.
- Risk-based, proportional due diligence on key commercial partners and third parties.
- Monitoring and reviewing business practices and anti-corruption and bribery compliance.

The application of the Bribery Act is extraterritorial, which means that actions of an agent across the world, where payments which would constitute 'bribes' under the Bribery Act may well be common, could have very serious consequences for the company in the UK. Liability is criminal and individuals, if convicted, are likely to be imprisoned. It should be noted that under the Proceeds of Crime Act 2002, the government can confiscate all funds which are the 'proceeds' of an act of crime. For example, it could confiscate all the revenue received under a contract which was procured by a bribe, and not just the profits.

Commercial organisations should keep proper records of all steps taken to assess and control the risk of bribery. This will become increasingly important as the SFO flexes its muscles and starts to wield its new powers more regularly. Once nicknamed the "sleeping giant", it seems that the Bribery Act is now very much "awake". Commercial organisations should pay attention if they wish to avoid prosecution.

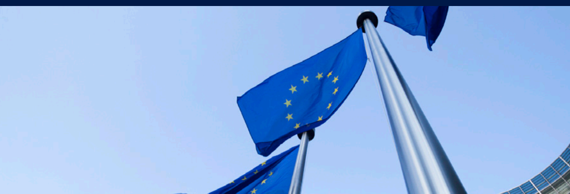
Transparent business: new disclosure obligations in the extractive and logging industries

The Bribery Act is only one of the UK Government's tools in combating corruption. On 8 December 2014, the UK Government published the Reports on Payments to Governments Regulations 2014 (the Regulations) which require large or listed UK registered undertakings active in the extractive and logging industries (the relevant industries) to report payments they make to government entities worldwide. The intention is to promote transparency in these industries and provide sufficient information to hold governments of resource-rich countries to account. The extractive and logging industries are a focus because these are industries in which the risk of corruption is perceived as particularly high.

Legislative context

The Regulations are an early implementation of Chapter 10 of EU Directive 2013/34/EU (the Accounting Directive). The Accounting Directive regulates the provision of financial information by all limited liability companies, partnerships and limited liability partnerships registered in the European Economic Area (EEA). Under Chapter 10 of the Accountancy Directive, companies in the extractive and logging industries will be required to report the payments they make to each government. Reports must be made for financial years which commence in the year beginning 1 January 2015, and for each succeeding financial year. The Regulations will make amendments to the Companies Act 2006 and the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009. The rest of the Accounting Directive is due to be transposed into UK law by 20 July 2015.

The Accounting Directive is complemented by EU Directive 2013/50/EU (the Transparency Directive), which must also be implemented into UK law by July 2015. The Transparency Directive applies to all relevant companies listed on EU regulated markets. These companies will not necessarily be registered or incorporated in the EEA. The Financial Conduct Authority (FCA) is responsible for implementing the provisions of the Transparency Directive in the UK. The FCA proposes to amend its Disclosure and Transparency Rules (DTRs), which apply to UK-listed companies. The amendments



will require issuers involved in the relevant industries to produce similar annual reports to those under the Accounting Directive. The FCA's goal is to coordinate the implementation of the Transparency Directive reporting obligation with the implementation of the Accounting Directive reporting obligation. Accordingly, changes to the DTRs are intended to take effect for financial years commencing on or after 1 January 2015, alongside the Regulations which implement Chapter 10 of the Accounting Directive.

The extent of the Regulations

The Regulations will apply to all of the UK including Scotland and Northern Ireland. They will apply to "large undertakings" and "public interest undertakings" that are active in the relevant industries. Being active in the relevant industries is defined as any activity involving the extraction of oil, minerals, gas or other materials, and the logging of primary forests.

A large undertaking is defined as having two of the following three elements: a balance sheet total in excess of £18 million; a net turnover exceeding £36 million; or an average of over 250 employees in the relevant financial year. Smaller undertakings may be affected if they are listed on the London Stock Exchange or are subsidiaries of an undertaking which is required to make a report under the Regulations.

The reporting obligation

For each financial year, companies need only report payments made to governments which are valued at over £86,000 per payment obligation. The disclosure must reflect the substance, not the form of the payments. Accordingly, a series of related payments spread out over the year which in aggregate meet the threshold must be disclosed as they are classed as falling under a single payment obligation. It is unclear to what extent payments must be closely connected in order to be classed as a 'single' obligation. However, artificial splitting, aggregation or re-characterisation of payments is expressly prohibited. The term "government" includes local authorities, agencies and their subsidiaries.

Payments which are required to be disclosed could take a number of different forms. "Payment" could mean: licence, rental or entry fees; production entitlements or royalties; taxes levied on income, production or profits; dividends other than as paid to the government on the same terms as other ordinary shareholders and not in lieu of royalties or production entitlements; signature, discovery or production bonuses; and payments for infrastructure improvements. Payments must be reported whether they are monetary or non-monetary (payments in kind). Where a payment in kind is made the asset volume needs to be reported, where possible, and a value needs to be attributed to the assets transferred. In addition, directors are obliged to provide supporting notes to justify how the value of the assets was determined.

The reporting undertaking must attribute the payments to a project or disclose it at the entity level. An entity level payment is a payment obligation imposed by the government on an undertaking which is made by that entity but which is not levied in relation to a particular project. A project is defined as operational activities governed by a single legal agreement (or multiple agreements which are substantially interconnected) such as a licence or contract and form the basis for payment liabilities to a government. Where a payment obligation is imposed on the company/entity level there is no requirement to disaggregate them by project and such payments can simply be reported at the entity level.

If an undertaking makes any of the above payments they must submit an end of year report to the registrar identifying the recipient government as well as the value and nature of the payment. Companies will have 11 months from the end of their financial year to submit an electronic report to the registrar. Partnerships and limited liability partnerships will have a deemed financial year of 12 calendar months ending on 5 April. Companies House will publish the information on the public register. This obligation to report cannot be waived by the UK government even if a company believes that the report will be unlawful in another country. A company is exempt from the obligation if it is subject to reporting obligations in another EU Member State.

Under the Regulations a parent company which has subsidiaries active in the relevant industries must make a consolidated report of the payments their subsidiaries make. Where a parent submits a consolidated report, its subsidiary is not required to submit a report. To be subject to this requirement, the undertaking must be a parent of a "large group". A large group is defined as a parent and subsidiaries which, on a consolidated basis, satisfy two of the following three criteria: its balance sheet exceeds £18 million net (or £21.6 million gross), its net turnover exceeds £36 million net (or £43.2 million gross), and it has on average over 250 employees. Furthermore, the subsidiaries must be included in the consolidated group accounts of the parent.

Therefore, a company which might normally be excluded from the reporting obligations may have its payments reported through its parent company. A parent company is exempt from making a consolidated report if it can show that it could not obtain the information necessary for the preparation of the consolidated report without disproportionate expense

or undue delay. The Regulations will impose a significant burden on parent companies which have subsidiaries active in the relevant industries. There may be considerable costs incurred to ensure compliance, including obtaining certified translations where necessary and collecting information from overseas subsidiaries. The reporting obligation will cover worldwide activity and exceptions are limited.

Non-compliance

Companies which submit incomplete reports or fail to submit their reports within the required timeframe will be given 28 days to remedy or justify their omission. The Regulations impose civil and criminal penalties for failure to comply. An undertaking that fails to comply with a request for information made by Companies House may be subject to a fine. An undertaking which fails to submit a report may be subject to criminal convictions and a fine. Its directors may also be liable and can face a fine, imprisonment for a term not exceeding two years or both. Individuals will be personally liable for knowingly or recklessly delivering, or causing to be delivered, false or misleading documents or making false or misleading statements to the registrar. This is particularly relevant to payments in kind as directors need to submit justifications for the values attributed to the assets.

Future developments

These disclosure requirements are part of a global transparency agenda. On 15 October 2014, the UK was accepted as a candidate to the Extractive Industries Transparency Initiative (EITI). This Initiative requires companies to publish the payments they make on a project level in the extractive and logging industries. Governments are also required to publish what they receive from these companies. The UK has until 15 April 2016 to publish its first EITI report.

Action points

Undertakings which fall under the ambit of the Regulations need to be aware of their reporting duties and ensure that internal procedures are in place to identify and collate information on relevant payments made after 1 January 2015. This obligation may be more onerous than it seems at first sight. Due to the 'substantially interconnected agreements' and 'series of related payments' tests, companies may need to keep agreements and payments under review as subsequent payments or supplementary agreements with additional fees may give rise to reporting obligations later.

Additionally, parent companies need to assess if the Regulations apply to them and the extent of their liabilities. They need to ensure that their subsidiaries also have appropriate procedures in place as the parent will need access to that information for its consolidated report. In addition, organisations subject to the Regulations must be cautious when assessing what constitutes a payment or what constitutes a 'government' as the Regulations, in line with the Directive, are drafted broadly to limit circumvention. The Regulations are a significant regulatory advance in the relevant industries which will undoubtedly have wider implications in areas such as anti-bribery and anti-corruption.

For more information, please contact the authors of this Briefing:

Anthony Woolich
Partner, London
T: +44 (0)20 7264 8033
E: anthony.woolich@hfw.com

Daniel Martin
Partner, London
T: +44 (0)20 7264 8136
E: daniel.martin@hfw.com

Robert Finney
Partner, London
T: +44 (0)20 7264 8343
E: robert.finney@hfw.com

HFW's London office is part of an international network of 13 offices in 11 countries. For further information about EU, Competition and Regulatory related issues in other jurisdictions, please contact:

Edouard Taÿ Pamart
Partner, Paris
T: +33 1 44 94 40 50
E: edouard.taypamart@hfw.com

Konstantinos Adamantopoulos
Partner, Brussels
T: +32 2 643 3401
E: konstantinos.adamantopoulos
@hfw.com

Jeremy Davies
Partner, Geneva
T: +41 (0)22 322 4810
E: jeremy.davies@hfw.com

Jasel Chauhan
Partner, Piraeus
T: +30 210 429 3978
E: jasel.chauhan@hfw.com

Ian Chung
Partner, Dubai
T: +971 4 423 0534
E: ian.chung@hfw.com

Brian Gordon
Partner, Singapore
T: +65 6411 5333
E: brian.gordon@hfw.com

Guy Hardaker
Partner, Hong Kong
T: +852 3983 7644
E: guy.hardaker@hfw.com

Julian Davies
Partner, Shanghai
T: +86 21 2080 1188
E: julian.davies@hfw.com

Aaron Jordan
Partner, Melbourne
T: +61 (0)3 8601 4535
E: aaron.jordan@hfw.com

Stephen Thompson
Partner, Sydney
T: +61 (0)2 9320 4646
E: stephen.thompson@hfw.com

Simon Adams
Partner, Perth
T: +61 (0) 8 9422 4715
E: simon.adams@hfw.com

Fernando Albino
Partner, São Paulo
T: +55 (11) 3179 2900
E: fernando.albino@hfw.com

Lawyers for international commerce

Lawyers for international commerce hfw.com

© 2014 Holman Fenwick Willan LLP. All rights reserved

Whilst every care has been taken to ensure the accuracy of this information at the time of publication, the information is intended as guidance only. It should not be considered as legal advice.

Holman Fenwick Willan LLP is the Data Controller for any data that it holds about you. To correct your personal details or change your mailing preferences please contact Craig Martin on +44 (0)20 7264 8109 or email craig.martin@hfw.com

São Paulo London Paris Brussels Geneva Piraeus Dubai Shanghai Hong Kong Singapore Melbourne Sydney Perth