

A BRIBE IS A BRIBE BY ANY OTHER NAME

New legislative proposals will have a far-reaching effect on British nationals and companies operating in countries where bribery and corruption are a regular part of doing business. Seven-year jail terms and unlimited fines await anyone convicted under the new law.

There is an old saying – popular in certain parts of the world – that it is not dishonourable to offer a bribe; it is only dishonourable to accept one. However, the Corruption Bill, a draft of which was published in March for consultation, has a more symmetrical approach to ethics. If passed by Parliament in its current form, it would make it illegal for any UK individual or corporation to corruptly receive or confer an advantage.

Moreover, the new legislation would give the UK courts jurisdiction over acts of corruption committed by British individuals and companies anywhere in the world: ie, bribing a Saudi Arabian oil company executive in Saudi Arabia would be an offence. The draft law also goes much further than the comparable US legislation, the Foreign Corrupt Practices Act 1977.

This is the first time in English law that the word ‘corruption’ has been defined. The UK was, in effect, compelled to legislate as a result of being a signatory to the 1997 OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions but, having enacted some legislation in 2001 – the Anti-Terrorism, Crime and Security Act – the government is now going even further than its treaty

obligations require. The proposals follow on from a 1998 Law Commission report and a government white paper, published in June 2000.

PricewaterhouseCoopers’ fraud investigations partner, Will Kenyon, makes clear that this proposed law could have serious repercussions for UK businesses that do business “in parts of the world where ‘facilitation payments’, or even bribes, are part and parcel of commercial life”. Kenyon says, “Directing, condoning or even turning a blind eye to corrupt acts committed by overseas subsidiaries or agents is no longer – if it ever was – a wise policy.” Conviction of a corruption offence may attract a jail term of up to seven years and an unlimited fine. “The excuse that you are operating in a country where everybody’s at it and you won’t get far without greasing a few palms is conspicuous by its absence as a defence under the bill,” he adds.

Definitions

The law would make it an offence “to confer an advantage corruptly”, say the explanatory notes to the draft legislation. Moreover, it will be an offence even if the advantage is not yet handed over but is simply agreed, or even just offered. This is known as “active bribery” in international law.

Similarly, it is an offence to obtain an advantage corruptly and, as above, a person can be guilty even if the advantage has not yet been handed over, or even if it’s just solicited. In international law, this is known as “passive bribery”.

Added on to this is a provision that makes it illegal to perform

functions as an agent corruptly. The draft bill’s explanatory notes set out that this is to cover the eventuality where someone, for example, awards a contract even if it’s only *in the hope* of a later reward, which he doesn’t, in the event, receive.

An advantage can mean not just cash, but a free holiday, or even the omission of an act such as non-enforcement of a debt. Neither is it necessary for the person performing his functions corruptly to receive the benefit: the offer of a work permit for that person’s son would also fall foul of the law, as Kenyon points out. But the explanatory notes set out that even if a person requests another to make a contribution to charity, he obtains an advantage.

The essential test as to whether something is being done corruptly is whether someone is acting primarily in return for the advantage obtained or expected.

There are a number of somewhat confusing exemptions in the legislation so as to ensure that the payment of salary to an employee isn’t caught by the law, nor is the proper and legitimate payment of a premium price for express or superior service.

Large or small

Kenyon says there are no ‘*de minimis*’ exemptions: it doesn’t matter if an “advantage” is very small as corruption is measured qualitatively, not quantitatively.

There is no specific provision for intermediaries in the draft legislation. Depending on the circumstances, an intermediary may be charged with aiding and abetting or as a principal offender, say the explanatory notes.

Kenyon adds that, unlike the US legislation, there is no specific exemption for facilitation payments – payments made in order to facilitate or expedite “routine

government action” such as granting licences or permits, provision of utilities or other services *to which the payer should be entitled in any event*. “Under the bill, such payments could be deemed corrupt,” he says.

Kenyon advises that companies must ensure there is clarity within the organisation as to what is appropriate. “Guidelines and codes of conduct, reinforced by regular review and effective action where rules are breached, will help to avoid the pitfalls,” he says. “There are no grounds for complacency.”

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- PricewaterhouseCoopers is at www.pwcglobal.com/uk
- The draft legislation and explanatory notes are available from www.homeoffice.gov.uk/docs/cm5777published.pdf