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Blog - Commentary

SFO Airbus Investigation - the UK Bribery Act finally cleared for take-off?

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Khawar Qureshi QC reviews the key provisions and main developments of the Bribery Act since it came into force in July 2011 and considers the SFO's recent announcement of an investigation into Airbus.

English law relating to bribery and corruption (hitherto consisting of Statutes going back to 1889, 1906, 1916 and the common law) has been the subject of much criticism for being antiquated, inconsistent and inadequate.

Furthermore, the international political will to investigate large scale corruption allegations remains questionable. In the UK, the authorities were severely criticised following the decision (ostensibly of the director of the SFO) in

December 2006 to terminate the investigation into alleged payment of bribes to Saudi officials for the BAE arms deal known as "Al-Yamamah."

In 2008, the OECD (whose Convention on Combating Bribery of Foreign Public Officials was signed by the UK in 1997) produced a report which remarked "overall, the Group is disappointed and seriously concerned with the unsatisfactory implementation of the Convention by the UK." International criticism of the UK was the major catalyst for adoption of the Bribery Act 2010.

Much doubt persists in respect of the availability of resources and expertise within the SFO to properly investigate large scale corruption. Evidence is often hidden under layers of corporate/trust documents and located in a jigsaw manner across multiple jurisdictions.

Indeed, the success of such investigations can depend to a very large extent upon the mutual legal assistance process whereby states are supposed to gather evidence on behalf of foreign authorities to assist criminal investigations and prosecutions. There may be unwillingness or inability on the part of the authorities of a requested state to locate or collect what might be critical evidence. In some such situations, the UK authorities have deployed other legislation to overcome the difficulties in proving corruption, including the Proceeds of Crime Act 2002 (Part 5) to obtain asset freeze/civil recovery orders which entail a lower standard of proof.

As a parallel and often very effective track, a few states have used civil law claims for abuse of position/breach of trust against officials, backed by very powerful asset freeze and disclosure orders available from the English High Court to secure damages and findings of wrongdoing in circumstances where personal jurisdiction can be established.

Key provisions of the Act

The key offences (Sections 1-3) relate to an advantage being sought or obtained for the improper performance of a function or activity (which is not limited to "public officials").

Bribery of foreign public officials is prohibited by Section 6 of the Act. A very significant provision is contained in Section 7, which criminalises the failure of commercial organisations to prevent bribery – but (very importantly in terms of the reality of "bribe paying") provides a defence if "adequate procedures designed to prevent persons associated with the entity" from engaging in bribery are in place.

The results so far

The first successful conviction under the Bribery Act 2010 occurred in November 2011 and concerned a court clerk who took a bribe to alter driving offence records (and was sentenced to six years' imprisonment). In November 2014, Gary West (who took bribes of around US$2.2 million) and Stuart Stone were convicted under Sections 1 and 2 of the Act in respect of a sham investment fund and were sent to prison for four years. The SFO began an investigation after suspicious accounting had been brought to its attention. The investigation does not appear to have been unduly onerous as the "fund" was an obvious sham – as opposed to most corrupt transactions, which often relate to legitimate projects incurring inflated costs to include the disguised "bribe" element.

The SFO encourages "self-reporting" and is also able to avail itself of "Deferred Prosecution Agreements." The first was entered into in November 2015 with Standard Bank in respect of a Section 7 investigation that entailed, inter alia, disgorgement of a profit of US$8.4 million, a fine of US$16 million and compensation to the Government of Tanzania for the sum of US$7 million. In

addition, the terms of the DPA included independent review of internal anti-bribery controls.

Another self-report by an unnamed SME in the context of Section 7 of the Act yielded a DPA in July 2016 that required disgorgement of gross profit for the sum of £6.2 million and a fine of £352,000. Self-reporting leading to a DPA is likely to be the path favoured by commercial entities as well as the SFO, given reputational/damage control opportunities, SFO resource limitations and the results that DPAs provide.

The Airbus investigation

Recent media reports indicate that the investigation, which began a few weeks ago, concerns the involvement of "third-party consultants" in alleged "irregularities" related to fraud, bribery and corruption. Meanwhile, an investigation begun in August 2012 concerning alleged corrupt payments by an Airbus subsidiary to Saudi officials in the 1970s led to arrests and questioning of Airbus personnel in the first week of September 2016. This would indicate that the new Airbus investigation may take several years before any prosecutorial decision can be made.

Whilst it remains to be seen whether the SFO will ever achieve the "fear factor" its US counterparts are able to convey, the admittedly limited results under the 2010 Act should not engender any complacency in the commercial world, especially with regard to the use of "consultants" as enablers for international commercial agreements. Effective internal safeguards against facilitation of bribery and corruption are essential.

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