THOMSON REUTERS

REGULATORY INTELLIGENCE

The Bribery Act: a decade on

Published 06-Aug-2021 by
Neil Robson, Katten Muchin Rosenman

When the Bribery Act was introduced just over a decade ago, it was hailed as the landmark legislation to boost corporate and executive convictions. The Act introduced a new offence of "failing to prevent" bribery from taking place unless the company had "adequate procedures" in place. This introduction was largely seen as a nod for firms to set up their own internal audit and compliance functions. Ten years on, however, and there is still little case law to establish what either "failure to prevent" and "adequate procedures" actually mean in practice, and still very few convictions.

The UK Bribery Act 2010 came into effect on July 1, 2011 and significantly upgraded the UK's arguably outdated, inadequate, and archaic bribery laws, most of which were almost 100 years old. In copying principles from other advanced anti-bribery legislation, such as the U.S. Foreign and Corrupt Practices Act of 1977, and dragging the UK rules into the 21st century, HM Treasury put in place what appeared on paper as the toughest anti-bribery legislation in the world, particularly its corporate offence and extraterritorial effect.

The Act retains the UK's historical offences of offering and accepting bribes, but also created new offences (such as that of being bribed) and, significantly, introduced a corporate offence whereby a commercial organisation with part of its business conducted in, or from the UK, fails to prevent bribery that takes place for its advantage anywhere in the world. This is for any person associated with it and includes employees and third-party consultants and agents. The corporate offence also carries a defence of having 'adequate procedures' in place to prevent bribery.

Lessons learned

Since the Act's inception, training on anti-bribery alongside anti money laundering and other areas of compliance, such as market abuse, has rocketed in the professional and financial services sectors. This can only be a good thing and acts to prove how firms take the legislation seriously. After all, the threat and risk of not having 'adequate procedures' in place has meant that anti-bribery and detailed records of the training are now part and parcel of commercial training across the board.

The past decade's repeated anti-bribery training has, in this author's experience, resulted in firms and their employees taking a hard-line stance on anti-bribery and corruption (ABC) issues. Well, at least on paper. ABC clauses are now routinely added to contracts with suppliers, agents, consultants and other third parties so as to be able to demonstrate that the firm has a robust and no-nonsense attitude towards bribery, wherever the third party may be located.

Where a firm has effective policies and procedures, annual training and contractual clauses prohibiting any form of bribery, it should in theory be able to show that it has the defence of 'adequate procedures' if someone associated with it is accused of bribery. However, this has yet been widely tested and firms often find themselves wondering why they should bother with all these additional procedures.

Anti-bribery enforcement

Anti-bribery enforcement in the UK has so far generally been on a small scale. The first conviction under the legislation was when Munir Patel, a magistrate's clerk, was convicted of accepting a £500 bribe not to record a parking offence and received three years' imprisonment.

Subsequent cases brought by the Serious Fraud Office (SFO) have focused on a group of individuals making and accepting bribes in relation to the sale of biofuel investment products at Sustainable Growth Group and Sustainable AgroEnergy plc.

In recent years there have been numerous cases successfully prosecuted for the corporate offence of failing to prevent bribery – often in the aerospace sector. A key example being Rolls-Royce, which was fined more than £500 million for misconduct spanning over 30 years. There was also more recently Airbus's subsidiary GPT Special Project Management, which was ordered to pay more than £30 million in fines following a 10-year corruption investigation.

The role of DPAs in bribery investigations

The Airbus/GPT case is key in highlighting the rising use of deferred prosecution agreements (DPAs) by companies accused of offences under the Bribery Act. DPAs seem to have had a considerable impact on the SFO's bribery investigations, resulting in limited judicial guidance on how the corporate offence is interpreted and/or defended.

DPAs are a form of discretionary agreement that may be entered into between a prosecutor and an organisation. It allows for the prosecution of an offence to be suspended for a set period of time. Notably, if the organisation cooperates freely with the SFO, the offence may not be prosecuted at all. To obtain a DPA the organisation would need to convince a court that it is: (a) demonstrating

THOMSON REUTERS™

© 2021 Thomson Reuters. All rights reserved.

cooperation with the SFO in such a way that it is beyond reasonable expectations; and (b) the organisation has to some level also been 'confessing' – in other words, self-reporting.

Closing thoughts

There are few examples of enforcement of the Bribery Act 2010 in the UK but it is worth noting that firms are taking it seriously. The upscale in training across the board is not to be ignored. If the Act leads more to prevention of future criminality in this area rather than prosecutions of past offences, surely it can be viewed as a success.

Arguably, the SFO is under-resourced and is therefore usually reactive as opposed to active. There is also the issue of DPAs, which mean that cases often take years to investigate and may never lead to a conviction. Realistically, until there is a significant increase in cases being reported to the SFO (or self-reported), it is inevitable that numbers will remain low. The House of Lords' investigation into the efficacy of the Bribery Act may open things up but it remains to be seen whether this will result in meaningful change.

Neil Robson *is financial services and funds partner at Katten Muchin Rosenman (UK) LLP*

Complaints Procedure

Produced by Thomson Reuters Accelus Regulatory Intelligence 09-Aug-2021

THOMSON REUTERS™

© 2021 Thomson Reuters. All rights reserved.