

Beyond the gold standard

How far have we come since the UK Bribery Act was introduced? And how far do we have to go?
asks **Leanda Mark-Ihama**

Often considered the 'gold standard', the UK Bribery Act (UKBA) has been instrumental in enabling a more cohesive approach in the fight against bribery and corruption. However, nearly a decade since its inception in 2011, it has begun to fall behind rapidly-evolving anti-bribery needs, calling into question its enforcement effectiveness and highlighting the need to equip the agencies responsible for its implementation with new tools and technologies.

In this article, we suggest that the greater use of Deferred Prosecution Agreements (DPAs), full disclosure, and self-reporting are key to improving the effectiveness of the UKBA, and that greater alignment with the US approach could foster a united front in the fight against bribery and corruption.

The UKBA in a nutshell

The UKBA contains several offences of bribery in its different forms. However, it was the 'commercial offence', contained in the section 7, that pushed the UKBA beyond its US counterpart, the Foreign Corrupt Practices Act (FCPA), and into the realms of focusing on the conduct of associated parties. This area was expected to cause companies the most angst and to enable the Serious Fraud Office (SFO) to 'show its teeth'.

The offence covers the failure of a commercial organisation to prevent bribery by a person associated with it. Broadly, an 'associated person' is defined as an individual/entity that performs services on behalf of an organisation. An organisation can defend itself by demonstrating clearly that it has implemented 'adequate procedures'.

The six principles in the section 9 guidance provide a good starting point for the building blocks of an anti-bribery and corruption (ABC) framework for 'adequate procedures', particularly for small and medium-sized enterprises (SMEs), which may lack the inhouse expertise of larger institutions.

Enforcement effectiveness

The limited number of enforcement actions brought under the UKBA has provided a source of criticism of both the legislation and the SFO. However, given its age, the need for law enforcement to adjust to the wider authority under section 7 and the generally slow judicial pace in the UK, this small number of enforcement actions is perhaps not surprising.

The four enforcement actions below highlight the key trends for the future, including the increased use of DPAs, the expectation of full disclosure, collaboration with international agencies, and the benefits of self-reporting.

Standard Bank (now ICBC Standard bank) 2015 provided the first use of a DPA in respect of bribes paid by the bank's sister company to secure favour with the Tanzanian government for business. The bank became aware of the payment by Stanbic, its associated party, and disclosed the conduct to the authorities. The 'statement of facts' said that the due diligence checks carried out by Stanbic fell below the expectations of Standard Bank, illustrating the extra-jurisdictional reach of the UKBA and the need for ongoing monitoring of key associated parties to ensure adherence to ABC standards.

Sweett Group 2016 provided the first conviction under section 7. Sweett Group was fined over £2.25m for failing to prevent the bribery of a UAE subsidiary. Sweett admitted the offence and was unable to mount an 'adequate procedures' defence. On the contrary it ignored the recommendations of consultants to strengthen its oversight and business justification for dealing with agents. At a minimum, when dealing with associated parties, conducting due diligence that includes a clear rationale for the relationship is paramount, particularly if a viable defence is ever needed.

Rolls Royce 2017 While not a UKBA enforcement, due to the conduct taking place prior to the Act's creation, this case warrants discussion as the largest bribery-related SFO investigation to date and for its further use of a DPA. The Rolls Royce investigation resulted in the company agreeing to pay £497.5m and covering the costs of the SFO as a result of its conduct relating to paying agents bribes across multiple jurisdictions to win new business.

The cooperation of Rolls Royce throughout the investigation was noted in the DPA as 'full and extraordinary'. The SFO was able to acquire investigatory material that it would not otherwise have been able to. The collaboration between international law enforcement agencies also drove the success of the investigation.

For large multi-jurisdictional organisations, the advantages of being fully cooperative go beyond a DPA. Rolls Royce was able to negotiate a 50% reduction in its financial penalty. Leveraging the disclosure of wrongdoing in managing the relationship ►

with law enforcement and actively implementing a comprehensive bribery and corruption programme is clearly beneficial.

Skansen Interiors 2018 was the first contested section 7 enforcement. The company self-reported the conduct of two employees who were subsequently charged. Skansen argued that its procedures were adequate and proportionate to its size and operation in the UK. However, a jury found that Skansen, which has ceased trading, was liable. For smaller organisations it is clear that, whilst proportionality is a key consideration, it is necessary to fully understand the inherent risks, conduct a risk assessment and apply controls sufficiently beyond ABC clauses in agreements, and have an ABC policy.

House of Lords Review

In May 2018 the House of Lords commenced its review of the UKBA, to assess its effectiveness since its inception and make recommendations to the government on enhancements for the future, including:

Centralised reporting of bribery – The Home Office agreed to investigate a way of ensuring that bribery can be reported, potentially online (e.g. through a similar reporting platform to Action Fraud, <https://www.actionfraud.police.uk>) with a view to improving the current rate of prosecutions under the UKBA.

Improving bribery legislation training – It was recommended that law enforcement should receive more training on bribery legislation to improve awareness and increase viable prosecution.

Speed of investigation – Legal proceedings (including bribery investigations) are time consuming. The Crown Prosecution Service (CPS) and SFO have been asked to look actively at ways to speed up investigations and improve communication to those subject to investigation. One of the innovations is the use of AI to sift through masses of documents.

UKBA Guidance – There was some criticism of the section 9 guidance, with the review recommending that it should be further enhanced around the use of corporate hospitality, providing SMEs with a greater understanding and examples of good anti-bribery practices to support the six principles.

Adequate vs Reasonable – whilst the Criminal Finance Act uses the term ‘reasonable procedures’ and the UKBA uses ‘adequate procedures’, it was recommended to clarify the guidance to ensure that it is understood that the UKBA requirement is not stricter.

International landscape

As the profile of bribery and corruption has risen up the agenda, several countries have made changes or introduced new legislation, often mirroring the UKBA but also providing different offences and potential corporate defences. This reinforces the need for companies to ensure a global approach in the management of their bribery and corruption risks and understanding of local legal requirements through the engagement of subject matter experts or legal counsel in the countries in which they operate.

France – The French legislation (Sapin 2) came into force in 2017 and while it imitates the UKBA in several ways it also creates an offence for failure to implement an effective anti-corruption programme, even in the absence of corrupt activity. It places an onus on companies above specific thresholds to apply an anti-corruption programme with eight clear measures

to comply with. Assuming compliance with the UKBA therefore does not translate into compliance with the French legislation.

Italy – Italy’s enhancements to its bribery laws provide commercial organisations that have committed some bribery offences with a new defence. This defence enables companies to limit disqualification sanctions to two years if they actively disclose information, expose other participants to the bribery and support the seizure of the profits generated from the breach. The organisation must also implement an effective compliance programme to qualify for the potential defence.

India – The amendments made to India’s Prevention of Corruption Act (PCA) 2018 expanded their existing offences to mirror the UKBA and include a section 7 style offence and ‘adequate procedures’ defence against commercial organisations and those parties it is associated with. The Act also explicitly prohibits facilitation of payments. The other amendments aim to focus on the conduct of middlemen and facilitators by criminalising the conduct of individuals who are enabling bribery by ‘taking undue advantage to cause improper or dishonest performance of duty’.

Future trends

Former US prosecutor and the director of the SFO, Lisa Osofsky, has made it clear that one of her priorities is to target the resources of the agency, and she has begun her tenure reviewing the caseload and closing those cases that have a limited chance of success.

She has been vocal when expressing her desire to pursue more section 7 offence cases and to continue the trend in the use of DPAs. Whilst she has acknowledged that companies may see DPAs as an easy way out, they are a useful and effective tool in encouraging more self-reporting.

With the renewed momentum that comes with a change at the top, the direction of UK enforcement is likely to follow a more US-style approach. This change, coupled with the recommendations from the House of Lords review and imitation in the international legislative landscape, presents an encouraging trend in maintaining the UK’s place in being at the forefront of the global bribery reduction agenda. ●



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