ANTI-BRIBERY LAWS: SOME COMPARISONS BETWEEN GERMANY AND THE UK

GILES DIXON[1]

Giles Dixon, Legal Consultancy, Richmond-upon-Thames, England

GEORG GOESSWEIN[2]

LL M, Attorney at Law, Kressbronn, Germany

DR OLAF HOHMANN[3]

Attorney, Eisenmann Wahle Birk, Stuttgart, Germany

Introduction

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[4] has been ratified by 38 countries. Germany was one of the first to introduce implementing legislation, in 1999, and the new law has had a significant impact on business, with some high profile cases—and a big shift in attitude for a country in which bribery was previously a tax-deductible expense for companies trading internationally. The UK, having made some amendments to existing anti-corruption legislation in 2002, has only recently implemented the Convention in full, with probably the most far-reaching statute of any of the Convention countries and even the US Foreign Corrupt Practices Act (FCPA). The UK's Bribery Act 2010[5] came into effect on 1 July 2011.

The UK legislation

In England, bribery is historically a common law offence, the law having developed over several centuries. Around 100 years ago three major laws were passed—under the Public Bodies Corrupt Practice Act 1889 bribery of

[1] Giles Dixon is an English solicitor with substantial international experience who has his own eponymous law firm—see www.gilesdixon.com He is a contributing author to *Schmitthoff's Law of International Trade* and recently wrote an Anti-Bribery Code of Conduct template in collaboration with the International Governance & Risk Institute (GovRisk) which is published by ContractStore: www.contractstore.com

[2] Georg Goesswein is an attorney-at-law, Kressbronn, Germany.

[3] Dr Olaf Hohmann is an attorney at the Stuttgart office of the law firm Eisenmann Wahle Birk. One of his specialist areas is compliance and prevention consultancy. He is a member of the committee of the Stuttgart Lawyers Association and the author of numerous publications in the field of criminal and criminal procedural law (including commentaries on commercial criminal law standards in the Munich commentary on the StGB; author and co-publisher of a commentary on the StPO).

[4] http://www.oecd.org/document/21/0,3746,en_2649_34859_2017813_1_1_1_1,00.html

[5] http://www.legislation.gov.uk/ukpga/2010/23/contents

a member, officer or servant of a public body was made a criminal offence, and Prevention of Corruption Acts were passed in 1906 and in 1916.

The Bribery Act 2010 is a short, clearly drafted law with a very wide reach. There are four key offences (the first four ''bribery offences''):

- Bribery of another person.
- Being bribed.
- Bribing a foreign public official.
- Failing to prevent bribery.

Bribery

A person is guilty of bribery, to summarise the wording of the Act, if he offers or gives a financial or other advantage to someone with the intention of getting that person or a third party to perform a relevant function or activity improperly or as a reward for improper performance.

He is also guilty if he knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity (which would cover ''facilitation payments'').

Improper performance

Improper performance may occur when, from the standpoint of a reasonable person in the UK, the person responsible for a function or activity is expected to perform it in good faith or impartially, or is in a position of trust and in each case fails to do so.

Being bribed

Being bribed is the counterpart to bribery, and occurs when a person requests, accepts, or agrees to receive a bribe.

Bribery of a foreign public official

Bribery of a foreign public official occurs when a person offers, promises or gives a financial or other advantage to such an official with the intention of influencing the official in their official capacity and intending to obtain or retain business or an advantage in the conduct of business. The definition of foreign public official is wide enough to cover anyone from a customs officer to a government minister anywhere in the world outside the UK as well as officials of international organisations such as the United Nations.

Failure to prevent bribery

Failure to prevent bribery is committed by a company or partnership where a person (an ''associated person'') who performs services for or on behalf

of the company bribes a third party intending to obtain or retain business or a business advantage for the company or partnership. The capacity in which the associated person performs services for or on behalf of the company does not matter, and examples include an employee, subsidiary company, and third party agent.

The international reach of the UK legislation

The offences under the Bribery Act have a wide international reach and they do not only apply to acts or omissions in the UK:

- A person can be prosecuted for a bribery offence if any act or omission occurs in the UK.
- A British national, a company incorporated in the UK or an individual who is ordinarily resident in the UK (as well as other defined categories) can be guilty of a bribery offence under the Act even if the act or omission which forms part of the offence takes place outside the UK.
- The offence of failure to prevent bribery will apply to English companies or partnerships, and to commercial organisations which carry on a business or part of a business in the UK (regardless of where the bribe is paid or whether the procedures are controlled from the UK).

Thus, a German company with offices in the UK could, at least in theory, be prosecuted in the UK for failing to prevent bribery if its Spanish agent bribes a public official in Spain.

The German legislation

In Germany various codes deal with bribery offences. Historically giving bribes to public officials is an offence under chapter thirty (''offences committed in public office'') of the German Criminal Code (*Strafgesetzbuch* or StGB). There is a distinction between ''Giving Bribes'' (section 333) and ''Giving bribes as an incentive to the recipient **[? to]** violating **[? violate]** his official duties'' (section 334). The basic offence is ''giving bribes'': An offence is committed if someone offers, promises or grants a benefit to a public official or a person entrusted with special public service functions for that person or a third party for the discharge of a duty.

If someone grants **[? gives]** a bribe to a public official or person entrusted with a special public service function not only for doing his job according to the rules but for performing an official act and thereby *violate **[? violating]*** his official duties the threat of punishment is higher than the basic offence of ''just'' giving bribes.

A crime is committed not only by the person who gives (or promises or grants) bribes to a public official but also—*vice-versa*—by the person who demands, allows himself to be promised, or accepts, a benefit.

Example: On 25 December 2011 the German citizen A transfers €2,500 to the bank account of public official B. Thus A wants to express his appreciation for good performance over recent years. Among other things B lawfully granted a construction permit to A during 2010.

Because sections 333 and 334 deal only with German public officials, when Germany signed the OECD Convention on Combating Bribery of Foreign Public Officials, section 334 was widened in 1998 by the Act on Combating Bribery of Foreign Public Officials in International Business Transactions (*Gesetz über die Bekämpfung der Bestechung ausländischer Amtsträger im internationalen Geschäftsverkehr—IntBestG*). Since then it has been a crime if someone for competitive purposes offers, promises or grants a benefit to a foreign official for the purpose that he will perform an official act and thereby violate his official duties.

In commercial practice a criminal offence is committed if someone for competitive purposes offers, promises or grants an employee or agent of a business a benefit for himself or for a third person in a business transaction as consideration for such employee or agent according him or another an unfair preference in the purchase of goods or commercial services (section 299). It is not only a crime for the person who gives (or promises or grants) bribes in commercial practice but also—vice-versa—for the person who demands, allows him or herself to be promised or accepts a benefit. Section 299 deals with bribery offences committed worldwide.

Can a legal person be guilty of an offence?

UK

Under the UK's Bribery Act, all bribery offences apply to companies as well as individuals—though the penalties vary as only an individual can be sent to prison.

In addition the offence of failure to prevent bribery is a new offence under section 7 of the Act—it applies to ''commercial organisations'' and, unusually, there is liability even in the absence of a criminal intent on the part of the organisation. The defence to a charge of failure to prevent bribery is to demonstrate that the organisation had in place ''adequate procedures'' designed to prevent persons associated with the organisation from undertaking such conduct. Government guidance[6] has been published on what is meant by ''adequate procedures'' and there are six principles to be observed:

- Proportionate policies and procedures.
- Top-level commitment.
- Risk assessment.
- Due diligence.

[6] http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf

- Communication (including training).
- Monitoring and review.

In other words, it is in effect necessary for any commercial organisation to have a code of conduct in place and to actively promote compliance if it is to avoid the risk of prosecution for failure to prevent bribery. Note that adequate procedures are a defence only to the offence of failure to prevent bribery, and not a defence to a bribery offence.

The person offering the bribe need not be an employee of the company. Indeed, section 8 expressly states that the capacity in which the person offering the bribe performs services for or on behalf of the commercial organisation does not matter. Accordingly he may (for example) be an agent or subsidiary. So, if a company's foreign agent commits bribery for or on behalf of the company, the company that appointed him could be charged with a section 7 offence. This makes it important for any organisation that may be subject to English law to have appropriate anti-bribery controls over its joint venture partners, agents, etc.

Germany

In Germany the Criminal Code deals with offences by individuals. Nevertheless companies, e.g., a GmbH (private limited company), AG (public limited company) or *Genossenschaft* (co-operative), could also be ''punished''. The German Administrative Offence Act (*Gesetz über Ordungswidrigkeiten* or OWiG) provides for fines which could be imposed on legal entities and associations.

If a person acting in the capacity of an agent authorised to represent a legal entity, or as a member of such an agency, has committed a criminal offence, e.g., giving bribes or embezzlement and abuse of trust, and, in consequence, violates duties incumbent upon the legal entity and the company gains or is intended to gain a benefit, a fine may be imposed on the legal entity. The fine could be up to €1m. (section 30). If the profit which the company has gained is higher than €1m. it is possible to confiscate the whole benefit (section 17 (4)). A fine could only be imposed upon a company if the owner of a firm or an enterprise wilfully or negligently fails to take the supervisory measures required to prevent contravention of duties in the firm or the enterprise which concern the owner in this capacity (section 130 (30)). Such a failing could occur if the owner does not install a compliance management system and one of his employees offers bribes. Also under the rules of the German Criminal Code it is possible to confiscate a benefit that a company has gained as a result of an offence by one of its employees.

Example: E, the employee of the A-GmbH pays €50,000 for the erection of a tourist information centre in the city of Rostock. The support is meant to

be a reward for granting planning permission for a factory outlet mall on the outskirts of the city to the A-GmbH.

This is rather more complicated than the position under English law and, as was seen in one of the most high profile bribery cases in Germany in recent years, involving Siemens, the legal person had to pay a fine according to the German Administrative Offence Act. The fine had to be paid because foreign agents acting for Siemens gave bribes to third parties and the management had not established an adequate compliance system. The natural persons, German employees, were found guilty of various crimes, e.g., embezzlement and abuse of trust (establishment of slush funds) and tax offences. In other words, there is one offence for which there may be two separate consequences—one for the natural and the other for the legal persons.

Corporate compliance procedures

The need to set up adequate procedures does not mean that a Chief Compliance Officer (CCO) must be appointed. There are various competing models in practical use in the corporate world, all of which have yet to be tested under the Bribery Act. Although the appointment of a CCO is widespread, an increasing number of companies are deciding against the appointment of an autonomous CCO and instead are choosing to assign responsibility for compliance to a group of employees. Such an organisational model, e.g., appointment of a compliance board (compliance council/compliance committee), makes it clear that conduct in accordance with the law and the principles of the company's ethics policy is not the job of just one person, i.e., the CCO, but of every single employee. In this way the ultimate objective of making compliance a natural part of the company's culture is promoted. One risk of appointing a CCO, if the person is not given proper support within the organisation, is that it might be seen to create a parallel organisation in which compliance is perceived to be somebody else's job (which is the CCO and his team, if any). Of course, companies may choose to effect a synthesis of both approaches.

As the right compliance culture is the basis of a successful Compliance Management System (CMS) together with appropriate, documented processes, it is crucial, when implementing an effective Compliance Management System in a company, to decide how best to approach this issue.

Advantages of a decentralised CMS are that the liability risks for the executive board members and/or the member with responsibility for the portfolio are substantially reduced even if, in contrast with the appointment of an autonomous CCO, the duties and responsibilities are not delegated to an individual but to a ''collective'' with overall responsibility. In any case, it would be beneficial for the required monitoring of proper fulfilment of duties by the senior executives to extend to all the members of a compliance committee and the members of the compliance committee, in

turn, can reduce their liability risks by further horizontal and vertical delegation of duties. Ultimately, the system constituted by the compliance committee enables further liability risk reduction by the fact that decisions of fundamental importance can be placed within the overall collective responsibility of the compliance committee.

UK

In the, UK as mentioned above, there is specific Government guidance for commercial organisations on adopting adequate procedures to prevent bribery. That guidance is not prescriptive as to the type of CMS to be adopted, but the six principles established by the guidance require a lot more than the appointment of a CCO. While Principle 2 emphasises the fact that those at the top of an organisation are in a strong position to foster a culture of integrity where bribery is unacceptable, it goes on to say that the purpose of this principle is to encourage the involvement of top-level management in the determination of bribery prevention procedures. Moreover, since a risk-based approach is recommended, this will almost inevitably mean that in anything other than a small company, employees at various levels should also be actively involved in bribery prevention through involvement in risk assessment processes, and the implementation of policies and procedures, including due diligence activities.

In addition Principle 5 deals with communication and training, ''the objective being to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training''.

Thus, while the board of directors have a crucial role, a decentralised CMS approach where appropriate supported by a centralised role will provide much-needed assistance for commercial organisations of any size that are subject to the UK legislation. And one of the critical areas for a company operating internationally is to establish procedures that extend to and involve the organisation's agents and partners and other external companies and individuals with whom they work. If any of their actions involve bribery, this could trigger a prosecution of the company back in the UK (or of the foreign company with a business or part of a business in the UK), the only available defence being that it had adequate procedures in place to prevent bribery. The appointment of a CCO can be a signal to staff and associates that the subject is being taken seriously by the company, especially if it is accompanied by the implementation of effective procedures, including a training programme, throughout the organisation.

Those involved in construction in the Middle East will know that there are laws requiring a foreign company to have a local agent or partner who is a national of the country in order to do business there. Since the agent does not always do a lot for his money, the arrangement is, in the view of some, a form of legalised bribery: pay a local a fee and you will get some

business. In such countries, especially if the agency agreement is registrable, the agency fees should not be caught by the Bribery Act, even if the agent is a company owned by a public official. But due diligence on the agent is needed as well as the terms of the agreement and level of fees. It is also advisable to include a duty on the agent to comply with the company's anti-corruption code of practice as well as the law.

Facilitation payments

US

The US Foreign Corrupt Practices Act is far-reaching in its application but it does have one exception: facilitation payments—i.e. small payments to a foreign official, political party or party official for ''routine governmental action'', such as processing papers, issuing permits, and other actions by an official, in order to expedite performance of duties of non-discretionary nature, i.e., which they are already bound to perform. The payment is not intended to influence the outcome of the official's action, only its timing.

UK

The UK Bribery Act has no such exception (and facilitation payments were already illegal before the Act). So, if an employee of an English company pays a bribe to a port official in another country to expedite the clearance of goods, he can be prosecuted for bribery and there is a risk that his company could also be prosecuted for failing to prevent bribery, and potentially also for the bribery itself if his state of mind can be attributed to the company. In practice, however, it is unlikely that small one-off facilitation payments will result in charges being brought. The Serious Fraud Office (SFO) has issued guidance which suggests that its focus may be on serious or systemic payments. The SFO has also indicated that it would prefer to have companies who have concerns to approach them directly and, in appropriate cases, the prosecuting authorities might contact their counterparts in a foreign jurisdiction to encourage them to investigate and take action to prevent the taking of those payments.

Germany

In Germany, small facilitation payments made in foreign countries are not always covered by the *IntBestG*. However, if those payments are made with the aim of getting the foreign public official to violate his official duties even small payments are covered by the *InBestG*. Under the German Criminal Code facilitation payments made in Germany are not allowed.

Example: Briitish citizen A is an employee of E Ltd, an English company. E Ltd. has recently implemented a CMS, however, employee C is declared

as the CCO. Members of the board are not responsible for compliance affairs. A invites public official B to an exclusive restaurant in order to discuss with him the latest developments in the field of wind energy. At the end of the evening A insists successfully to pay for the whole dinner.

The only exemption made is for those payments which are ''socially acceptable'' (less than €50). The OECD, in their third report on implementation of the Convention in Germany, published in March 2011, concluded that money paid to get a legal act that you are entitled to get is not generally seen as an offence and that small facilitation payments might also be tax-deductible.

Criminal prosecutions

Germany

In Germany, the public prosecution office is obliged to take action in relation to all prosecutable criminal offences, provided there are sufficient factual indications. This means if a prosecutor becomes aware of bribery offences he must start an investigation. For the past five years the pressure for prosecutions has been very high. If the prosecutor suspects bribery offences he will search the offices of the company as well as the private homes of the individuals involved (e.g., managers or employees) for documents and electronic data.

If a person is found guilty of bribery he could face imprisonment for several years. The company which benefited from the bribery offence must pay a fine. Furthermore, it could be blacklisted for three to five years in corruption registers. The consequence of being on the blacklist is that the company is not allowed to participate in public procurement tenders.

UK

In the UK a prosecution under the Bribery Act requires the consent of the Director of Public Prosecutions (DPP), the Director of the Serious Fraud Office (SFO) or the Director of Revenue and Customs Prosecutions. The DPP and SFO have jointly issued guidance on prosecution under the Act.[7] The Prosecution Guidance emphasises, among other things, the public interest requirement before prosecutions can be brought and makes it clear that investigating bribery of a foreign public official should not be influenced by considerations of national economic interest. The Prosecution Guidance also makes it clear that active engagement with businesses and ''self-reporting'' by companies is encouraged and states that ''the Act is not intended to penalise ethically run companies that encounter an isolated incident of bribery''.

[7] http://www.cps.gov.uk/legal/a_to_c/bribery_act_2010/

Penalties can be severe: in the case of an individual up to 10 years' imprisonment and an unlimited fine. For a commercial organisation, a bribery offence or an offence of failure to prevent bribery is punishable by an unlimited fine. In addition, a person who has received property which represents unlawful activity may be subject to a confiscation order under the Proceeds of Crime Act 2002, while a company director who is convicted may be disqualified under the Company Directors Disqualification Act 1986. The first conviction under the Act was in November 2011 when a court clerk pleaded guilty to accepting a £500 bribe to avoid putting details of a traffic summons on a court database. He was sentenced to three years under the Act and six years for misconduct in a public office, the sentences to run concurrently. It will be interesting to see whether the severity of the penalty in this case is replicated in commercial bribery prosecutions in the UK.