

The UK Bribery Act 2010 and its Relevance for Dutch Corporates

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Introduction

Despite a number of high-profile cases, bribery and corruption is a topic that receives limited attention from most commercial lawyers. On the one hand, this is justified: while the Netherlands ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereinafter: OECD Convention) in 2001, there has been neither a single prosecution of, nor, to public knowledge, any significant investigation into any bribery or corruption offence. However, notwithstanding a lack of enforcement activity by the Dutch authorities, Dutch corporates can still be caught by legislation in other countries having extra-territorial application, including that of the UK, which has recently adopted probably the broadest and most far-reaching anti-bribery and corruption legislation in the world: the Bribery Act 2010 (hereinafter: UKBA).

The UKBA introduces four new bribery offences with extra-territorial application, including a strict liability offence for corporates which fail to prevent bribery. The legislation extends bribery offences to both the private and public sectors, providing for tough penalties of unlimited fines and up to ten years' imprisonment for those who are convicted. The UKBA is potentially relevant to any Dutch company and partnership with a subsidiary or business in the UK, and could see, for example, a Dutch company criminally liable for failing to prevent acts of bribery by an employee or intermediary in a far away country, by virtue of the company having an (unrelated) UK presence.

With increasing enforcement action and a growing interest in bribery and corruption at an international level (for example, at the last G20 Summit¹), an understanding of this risk and the key legal regimes is essential. After a brief overview of the key current regimes, this article provides a more detailed overview of the UKBA provisions, before making some suggestions for addressing bribery and corruption risk in due diligence, and finally, highlighting the importance of anti-bribery procedures.

Nature of bribery and corruption

In broad terms, bribery is the giving or receiving of something of value to influence a transaction (UK Serious Fraud Office definition²). Some examples include making improper payments, providing lavish gifts or entertainment, generously discounted or free products and making charitable or political donations or sponsorships for an ulterior purpose.

US and Dutch legal regimes

Apart from the UKBA, the legal regimes most likely to apply to Dutch corporates are the Dutch anti-corruption provisions, the UKBA and the US Foreign Corrupt Practices Act (hereinafter: FCPA). The FCPA is probably the best known and most vigilantly enforced legislation and prohibits the giving or offering of money, gifts or anything of value to a foreign government official to obtain or retain business (15 USC §§ 78dd-1, et seq.). The provisions apply not only to US persons and companies operating anywhere in the world, but also to non-US persons and companies with US-listed securities or SEC reporting obligations. It also applies to acts taking place in the US, such as the use of US banking or communication facilities. In addition, there are requirements to maintain adequate books and records and internal controls over financial transactions, which apply to US-listed companies.

The Dutch anti-corruption regime is found in the Dutch Penal Code (*Wetboek van Strafrecht*) (hereinafter: DPC) and reflects the minimum requirements under the OECD Convention, with some additions. The DPC prohibits the making of a gift or promise to a public official, with an intent to induce a public official from acting or refraining from acting in executing their duties (art. 177 and 177a). Unlike the OECD Convention and the FCPA, but similar to the UKBA, the Dutch regime extends to the private sector with an equivalent offence in relation to persons who are not public officials (art. 328ter).

Under the DPC, legal entities can be guilty of an offence committed by another person where the act in question is reasonably attributable to the legal entity, which will generally include employees or agents acting in their course of their employment or engagement. Similar to the UKBA, a legal entity that instructs or accepts bribery, or simply fails to prevent it, can be

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1. <www.g20.org/Documents2010/11/seoulsummit_declaration.pdf>.

2. <<http://sfo.gov.uk/bribery--corruption/bribery--corruption.aspx>>.

found guilty (art. 51.1) although the extra-territorial scope of the DPC provisions is not as broad as that of the UKBA. The DPC applies to acts taking place in the Netherlands and acts of Dutch entities and Dutch persons taking place outside the Netherlands, where the act is punishable in both the Netherlands and the foreign country.

UKBA

The purpose of the UKBA is to reform and consolidate the criminal law of bribery in the UK by introducing a scheme of offences for bribery committed in the UK and elsewhere.³ The legislation replaces current offences under common law and legislation, introducing four new offences, which are outlined below. The UKBA is expected to come into effect in April this year.

General bribery offences

Section 1 contains the general offence of 'active bribery', namely, offering, promising or giving a financial or other advantage to another person where the person intends to induce or reward improper performance of a 'relevant function or activity' or knows or believes that acceptance of the advantage itself constitutes improper performance. It does not matter whether the advantage is offered, promised or given directly or through a third party, meaning the use of agents and intermediaries will be caught (section 1(5)).

'Financial or other advantage' is not defined in the UKBA and is therefore left to be determined as a matter of common sense by the courts.⁴ A 'relevant function or activity' is defined in section 3 and includes, among other things, functions of a public nature and activities connected with a business, meaning private and public sectors are covered. It does not matter where the activity is performed or whether it has any connection to the UK (section 3(6)). However, there must be an expectation that the person performing the function or activity will do so in good faith, impartially, or is in a position of trust (sections 3(3), (4) and (5)), which will be judged by UK standards, without reference to local customs or ways of doing business. This means that anyone involved in bribery under the pretence that it is simply 'the way of doing things' in a particular country will not escape liability, unless that way is specifically reflected in the written law of the country.

The second general offence of 'passive bribery' is found in section 2. This involves a person requesting, agreeing to receive, or accepting a financial or other advantage in one of four circumstances, which include where the person intends that a relevant function or activity be performed improperly (or intends to reward such improper performance), where the request, agreement to receive, or acceptance itself constitutes improper performance, or where, in anticipation, or as a con-

sequence of the advantage, a relevant function or activity is performed improperly (section 2(5)).

Offence of bribing a foreign public official

Section 6 of the UKBA creates the separate offence of bribery of a public official, which includes anyone holding a legislative, administrative or judicial position outside the UK, officials of a public international organisation, and anyone exercising a public function for a public agency or enterprise. This last category is broad in scope, and could potentially cover bribery of any employee of a state-owned enterprise – which in countries such as China, will be many.

The offence is triggered where the person giving the bribe intends to influence the foreign official in that capacity. In addition, there must be an intent to obtain or retain business, or an advantage in the conduct of business (section 6(2)), and the officials must not be permitted or required by the law applicable to them to be influenced in their position by the offer, promise or gift (section 6(3)(b)).

Corporate offence: Failure to prevent bribery

Section 7 of the UKBA contains the corporate offence of failing to prevent bribery, which applies to UK companies and partnerships (i.e. body corporates and partnerships formed under the laws of England, Scotland, Wales or Northern Ireland), as well as foreign companies and partnerships that carry a business or part of a business in the UK (section 7(5)). These organisations will be guilty of an offence if a person associated with them (which includes employees, agents and subsidiaries and anyone providing services on their behalf) commits one of the active bribery offences under section 1 or 6 while intending to obtain or retain business, or an advantage in the conduct of business, for the organisation.

The scope of section 7 is very broad and means that, for example, a Dutch company with only a small connection to the UK – such as a UK branch, plant or distribution network – could, as a result of that presence, be liable under the UKBA for bribery taking place on its behalf somewhere else where it does business, such as Asia or South America.

Failure to prevent bribery under section 7 is a strict liability offence: it does not matter whether or not the organisation approved, consented to, or even had knowledge of the bribery. It also does not matter where the bribery took place, meaning businesses falling within the definition of a commercial organisation will be liable for acts committed on their behalf by employees, agents and subsidiaries anywhere in the world.

Defence: Adequate procedures

While the corporate offence will be of most concern to businesses, especially those with operations in high-risk countries, a defence is available where the commercial organisation can show that it had adequate procedures in place to prevent bribery offences (section 7(2)). The Secretary of State is required

3. UKBA Explanatory Notes, <www.legislation.gov.uk/ukpga/2010/23/notes/contents>, p. 1.

4. Ibid, p. 3.

to publish guidance on what are 'adequate' procedures and is expected to do so early this year. Based on the draft guidance published, adequate procedures will include those with regular and comprehensive assessment of bribery risk, a 'top-down' commitment to prevention, due diligence of business relationships (such as suppliers and agents), clear, practical and accessible policies and procedures, effective implementation, and monitoring and review.⁵ There are other best practice guidelines already available, such as the Business Principles for Countering Bribery, developed by leading multinationals, including Shell, General Electric and PricewaterhouseCoopers and published by Transparency International.⁶

Penalties and application

The UKBA provides for unlimited fines for the offence of failure of a commercial organisation to prevent bribery, and up to ten years' imprisonment for the other three offences.

In the case of the two general offences and the bribery of a public official, the UKBA applies to conduct taking place in the UK, or elsewhere in the world where there is a connecting factor with the UK (such as a UK company, UK citizen or person ordinarily residing in the UK being involved in any act or omission forming part of the offence) (section 12(2)(c) and (4)), making these provisions relevant to Dutch companies with UK subsidiaries. In the case of the corporate offence, however, it does not matter where the offence takes place and the only UK connecting factor that is required, is that the organisation be incorporated in the UK or have business there.

Risk factors

The types of businesses where bribery and corruption risk will be highest include those with government customers or counterparties, those dependent on government-issued licences or approvals, those using agents, distributors or other types of intermediaries, those operating in high-risk sectors (which are said to include oil and gas and government procurement), and those operating in countries perceived to have a high risk of corruption.⁷ While bribery and corruption risk can likely be excluded for purely Dutch businesses (i.e. those that have no activities or business relationships outside the Netherlands or other 'clean' countries⁸), bribery and corruption is a potential legal and business risk for any business with operations, customers, suppliers, agents, or any other type of business relationship in most other parts of the world.⁹

Addressing bribery and corruption risk in M&A

Apart from general compliance and risk management, the key area where bribery and corruption risk should be considered, is in acquisitions and joint ventures. The risks arising from acquiring or investing in a business that has engaged in bribery or corruption, or has a likelihood of bribery and corruption risk going forward, are serious and include the possibility of criminal prosecution and resulting penalties, confiscation of profits under proceeds of crime legislation (e.g., in the UK, the Proceeds of Crime Act 2002), reputational damage, loss of customers, undermining of financial assumptions and the business case generally, and a risk of civil claims from affected parties.

Warranties and indemnities are unlikely to be an adequate solution, therefore, bribery and corruption should not be overlooked in due diligence. This could involve first considering whether there is any evidence of 'general' risk factors, such as those mentioned in the previous section (perhaps also by reference to current information from government sources or monitoring organisations such as Transparency International) and which legal regimes could potentially apply (i.e. FCPA, UKBA, DPC). These findings could then be used to give an indication of whether or not bribery and corruption is a relevant legal risk to the business, and to facilitate a more effective review and questioning to ascertain compliance. However, due to the often 'financial' nature of bribery acts and the likelihood that they are done discreetly (or at least not overtly documented), actual evidence of offences is unlikely to arise in the legal due diligence.

Above all, it is important to investigate what procedures the target has in place (if any) to mitigate bribery and corruption risk. This is because the presence of adequate procedures is not only likely to decrease bribery and corruption risk, but means the company will have a defence to corporate offences, such as that under the UKBA. For other jurisdictions and offences, the absence of procedures is likely to significantly reduce the chance of any leniency from (or room to negotiate with) the authorities. For some organisations, having anti-bribery and corruption policies in place can be relevant for eligibility for government tendering, and accreditations, such as those for socially responsible investments (SRIs).

Conclusion

In addition to DPC and FCPA provisions already in force and of potential application to many Dutch corporates, the UKBA takes an unprecedented step in the regulation of bribery and corruption and covers any Dutch company or partnership with a UK subsidiary or business in the UK. Further, with an increasing focus on bribery and corruption in the UK and US, and at an international level, it is quite likely that the Dutch government will increase enforcement action in relation to the DPC, which has some aspects of commonality with the UKBA (including liability for failing to prevent bribery). Bribery and corruption risk therefore needs to be considered

5. Ministry of Justice, Consultation on guidance about commercial organisations preventing bribery (section 9 of the Bribery Act 2010), 14 September 2010.

6. <www.transparency.org/global_priorities/private_sector/business_principles>.

7. See, e.g., Transparency International, Corruption Perceptions Index (2010), <www.transparency.org/policy_research/surveys_indices/cpi/2010/results>.

8. Ibid.

9. Ibid.

in acquisitions and joint ventures, particularly in due diligence. Finally, for any business with potential exposure to bribery and corruption risk, adequate procedures will be one of the best protections available, assisting to both minimise bribery and corruption risk and ensure that a defence to corporate offences, such as that under the UKBA, is (where possible) available.