The UK Bribery Act 2010 in the UAE

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This Document is intended to provide some background on issues that will be discussed on 25 January 2011 by Andrew Mitchell QC.

Is Bribery and Corruption a Problem for the UAE?

1. Transparency International's Corruption Perceptions Index ['CPI'] 2010 ranks the UAE in the top 2 '**least corrupt**' countries in Middle East.

2. However, the 2010 CPI is compiled using this method:

   *"[It]…draws on different assessments and business opinion surveys carried out by independent and reputable institutions. It captures information about the **administrative** and **political** aspects of corruption. Broadly speaking, the surveys and assessments used to compile the index include questions relating to bribery of **public officials**, kickbacks in **public procurement**, embezzlement of **public funds**, and questions that probe the strength and effectiveness of **public sector anti-corruption efforts."***

3. What the Index fails to measure is the use of the UAE (Dubai in particular) as a jurisdiction to launder the proceeds of corruption from a third country or as a venue to broker, negotiate or agree the terms of any unlawful agreement to commit corruption elsewhere.

4. The CPI also does not consider "**private corruption,**" that being agreements in the commercial sector to provide preferential treatment in exchange for a personal or corporate advantage.

5. Countries in close proximity to Dubai are ranked "highly corrupt":

   a. Afghanistan – CPI score 1.4/10
   b. Iran – CPI score 2.2/10
   c. Iraq – CPI score 1.5/10
   d. Pakistan – CPI score 2.3/10

6. UAE investors and fraudsters[1] **both** enjoy the following advantages:

    a. Geographic location and access;

    b. A world-class banking system with most major international institutions present;

    c. Availability of high value assets to purchase;

    d. Free Zones with 'light touch' compliance[2].

7. Dishonest individuals find even more advantages:

    a. 'Youthful' AML regulation by the State (the DFSA has no supervisory jurisdiction outside the DIFC and no criminal powers),

    b. An inexperienced and much under used asset recovery mechanism,

    c. Fledgling mutual assistance,

    d. The use and acceptance of Hawala as a means of money transfers.

8. Our own anecdotal experience of UK fraud/money laundering litigation shows that Dubai is a hub for the off-shore placement of unlawful funds whether generated through fraud, illicit goods or corrupt payments.

What the UK Bribery Act Criminalises
(A Summary)

9. The Act creates four categories of offences which address the following:

    a. Offering, promising or giving a bribe to another person;

[1] UK Serious and Organised Crime Agency 'The United Kingdom Threat Assessment on Organised Crime 2009/2010 [paragraph 131] *"Dubai is a key financial centre, both for cash movements and money laundering. The UAE offers a luxurious, cash-based environment which is well served by transport and telecommunications."*

[2] Shah, Angela, New York Times November 10 2010, http://nyti.ms/aTkbQz

b. Requesting, agreeing to receive or accepting a bribe from another person;

c. Bribing a foreign public official;

d. A corporate offence of failing to prevent bribery.

10. Bribing another person and being bribed are linked to the 'improper performance' of an activity. This concept applies in both public and private functions. The Act provides that improper performance is performance (or non-performance) that breaches expectations of good faith or impartiality, or breaches a position of trust.

11. There is no requirement for an individual to act 'corruptly'. He is probably guilty even when he had no or little practical choice but to pay a bribe. (Although of course he may have a way out if he was being blackmailed!)

12. Of note, **bribing a foreign public official** operates on a different test (in line with the OECD's requirements):

a. It only covers the offering, promising or giving of bribes, not acceptance;

b. The person giving the bribe must intend to obtain a business advantage;

c. The written law of the relevant jurisdiction must not permit or require the payment in question for the purported service.

13. The most significant extension of the current law is the introduction of a new **strict liability** offence for **corporates** of 'failing to prevent bribery'. A company will commit the offence if an associated person performing services on its behalf bribes another person in order to obtain or retain either business or a business advantage for the company.

14. The only defence available to the company is **proving** that it had adequate procedures in place designed to prevent bribery from being committed by those performing services on its behalf.

15. The Act does not define what is meant by 'adequate procedures'.

Why The UK Bribery Act 2010 is Important

Jurisdictional 'Hook'

16. It applies to UK companies and to foreign companies with operations in the UK, **even if the offences take place in a third country and are unrelated to UK operations**.

17. **Operations**: simply having a UK presence (subsidiary, office or operations) will permit the UK authorities jurisdiction; any overseas entity, which carries on part of its business in the UK, is liable.

18. The Act has left the Courts to interpret the term 'part of its business'. No doubt adopting the more modern approach to legislative reach and interpretation this will be given a wide meaning – the purpose of the legislation is to counter bribery and corruption; there would be a wide interpretation in order to catch corruption rather than a narrow one which would allow corruption to escape sanction.

19. There is no requirement for a formal contract between an associate and the Defendant organisation, nor is there any requirement for any degree of control.

    a. For example, a joint venture entity can be caught under the term '**associate'**.

    b. There appears to be no reason why a subsidiary cannot be regarded as associated with each of its corporate shareholders, no matter how small the stake.

    c. The following may well be caught:

        i. Investment Funds
        ii. Special purchase vehicles
        iii. Agents
        iv. Sub-contractors

20. The Head of the UK Serious Fraud Office, Richard Alderman recently said:

> *"…At present I have no jurisdiction over those foreign corporates who commit offences in other countries. That will change when the Bribery Act 2010 comes into force. The new offence means that I shall have jurisdiction where a foreign corporation carries on a business in the UK and commits an act of bribery in a third country. This will be an offence even if the act of bribery has nothing to do with the UK business…"* (18 November 2010 speaking to the Anglo-Russian Business Federation, London).

21. To illustrate:

a. The corrupt acts (or failing to prevent such acts) of a UAE agent render its UK associated company liable.

b. Any UAE company who has a UK 'operational presence' is subject to liabilities in the UK Courts that are more draconian than UAE domestic law.

c. *Prima facie,* the act of giving or receiving a bribe (*i.e.* mere transfers in and/or out of UAE territory of that sum) by any company with a UK operation falls within the scope of the Act.

d. If a UAE company has a UK branch and engages in bribery anywhere in the world, that UAE Company may have liability under the Act and could be prosecuted in the UK for connivance in or failing to prevent bribery.

Personal Liability of Company Officers

22. Senior Company Officers are personally liable under the Act for offences committed by the organisation if they have consented to or connived in (turned a blind eye to) the commission of the main bribery offences, including bribing a foreign public official (but not that of failing to prevent bribery), if any part of the offence has taken place in the UK.

23. If the offence is committed outside the UK, those Company Officers will only be liable if they have a "close connection" with the UK (such as being a British passport holder or being ordinarily resident in the UK).

The Corporate Offence of Failing to Prevent Bribery

24. The offence of failing to prevent bribery is committed by a company when it fails to prevent any 'associated person' (an employee, agent or subsidiary) from offering, promising or giving a bribe.

25. The person offering, promising or giving the bribe has to be "performing services" for or on behalf of the defendant company.

26. The Act includes a presumption that an employee performs services for and on behalf of the company unless the contrary can be shown.

27. In all other cases (for example, where a non-UK parent company of a UK subsidiary is involved), the Act states that the court will have to determine liability by *"reference to all the relevant circumstances and not merely by reference to the nature of the relationship…"*

How does the UK Bribery Act differ from the US FCPA?

28. There are some significant differences:

    a. The UK Bribery Act makes it an offence to receive as well as give a bribe;

    b. Bribery of private individuals and companies is criminalised;

    c. There is no need to prove corrupt intent;

    d. There is a strict liability corporate offence for failing to prevent bribery;

    e. There is no exemption for facilitation payments;

    f. Extraterritorial reach has a broader impact for companies and individuals.

How does the UK Bribery Act differ from UAE Law?

29. The UAE federal Penal Code contains anti-bribery provisions under which an offence will be committed in the following circumstances:

    a. By a public official who seeks or accepts an advantage of any kind in return for breaching his/her duties (even if he/she does not proceed to do so);

    b. Where an employee or executive solicits or accepts a bribe for breaching his/her duties;

    c. Where a person offers a bribe to a public official to breach her/her duties.

30. Notably, **UAE law does not criminalise bribery of a foreign public official** (as opposed to a UAE based official). Also, UAE law does not criminalise bribery of a private individual: the offence is committed by the receipt of the bribe by a private recipient only.

What are the UK Act penalties?

31. The penalties under the UK Act can be severe:

    a. The maximum penalty for individuals will be 10 years imprisonment and/or a fine,

    b. The maximum penalty for a corporation will be an unlimited fine. There can also be damaging collateral consequences (see below).

The Confiscation Aspect (The Proceeds of Crime Act 2002)

32. A company convicted of bribery will be held to have benefited to the extent of the value of any contract received by the company as a result of the corrupt act. Those sums would include:

    a. The bribe itself.

b. The value of the contract obtained as a result of the bribe and therefore any profit earned and held following the bribe,

c. Part or all of the company's remaining income should it be established that the company was sustained by the corrupt income.

33. More than that, in certain circumstances, (for instance if the corrupt behaviour was committed over a period of six months or more) the Court must assume that all property held and/or transferred from the date the proceedings began to six year prior are also the proceeds of crime and must be confiscated unless such a presumption is proved to be incorrect.

34. In some circumstances, upon a successful prosecution, the English Court is compelled, pursuant to the State's application, to confiscate all assets held or transferred to and by the defendant (corporate or personal) from the date proceedings began until the current time, unless they have been proved not to be the proceeds of crime, applying what are called statutory assumptions.

35. It must also be borne in mind that the proceeds of any confiscation order after conviction is shared between Investigators, Prosecutors and the Treasury. The advantage to the UK State in pursuing bribery and corruption cases where so ever their wide-reaching jurisdiction allows is obvious.

36. Consequently, the financial implications can be brutal.

37. The following judicial decisions in England are vital in understanding the interplay between the State's asset recovery powers, bribery and corruption and corporate liability:

a. Innospec (A senior judicial ruling undermining Plea Agreements and re-iterating the prohibition on 'plea bargaining').

b. SFO v Balfour Beatty (Civil Recovery) where no prosecution proved possible.

c. Mabey and Johnson (Plea Agreements)

d. SFO v BAE (reduced criminal allegations to enable settlement).

38. All advisors ought to be aware of the important aspects of these decisions and:

a. The Serious Fraud Office's 'self-reporting' policy and how to use it advantageously.

b. Substantial financial penalties will be imposed, which may take priority over confiscation orders.

c. Compensation Orders might be imposed to return funds to victims.

d. Any Bribery and Corruption Prosecution will automatically disqualify a company from bidding on EU Contracts.

The UK Bribery Act is an UAE Issue

39. The UAE State authorities are dedicating an increasing amount of resources into tackling bribery, corruption and money laundering:

a. The UAE Central Bank continues to strengthen its The Anti-Money Laundering and Suspicious Cases Unit (AMLSCU);[3]

b. The UAE's National Anti-Money Laundering Committee (NAMLC) met every four months in 2010 and continues to play an active part in:

i. The Middle East & North Africa Financial Action Task Force ['MENAFATF'], its Financial Investigations Unit Forum, the Technical Assistance and Typology working group and Mutual Evaluation Working Group relating to current State Laws and Regulations;

ii. The Central Bank's Hawala Regulation system (Hawaladars);

[3] In October 2010, a new Memorandum of Association was signed with the Federal Customs Agency to tighten the rules on cash imports into the region.

iii. Amending primary legislation (Federal Law 4 of 2002 on Criminalisation of Money Laundering);

iv. Receiving legal opinion and draft strategies on UAE/GEC anti-money laundering preventions.

40. This work follows MENAFATF's mutual evaluation report in April 2008 which labelled the UAE's anti-money laundering efforts as **'basic'**:

> *"A basic legal framework for combating money laundering and terrorist financing is in place in the UAE, but that framework needs further strengthening in a number of areas. The AML law needs to be amended to expand the range of predicate offences and to provide greater powers for the financial intelligence unit. The FIU should also increase its own staffing so that it may operate as an autonomous unit, rather than relying on the resources of the Central Bank's Supervision Department and other regulatory agencies…"*[4]

41. As these criticisms are addressed, especially during a time of financial 'restructuring', instances of money laundering will surface, leading to investigations into the predicate offences of public and private bribery and corruption. Such investigations are likely to reveal and capture the role of offenders caught by the far-reaching jurisdiction of the UK Act.

42. There is no reason in law why the UAE authorities could not prosecute a UAE firm or individual under its domestic bribery laws followed by an English prosecution of the connected company caught by way of the UK Bribery Act's jurisdiction[5].

43. Anecdotally, we have been asked to advise multi-national corporations on how they might approach the SFO to make allegations of corruption by competitors who have secured unfair (and uncompetitive) advantages by corrupt means.

[4] Page 9, paragraph 5 Executive Summary: Key Findings.

[5] No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of **that State** [Protocol 7, Article 4, European convention on Human Rights].

44. Competitors are going to squeal under this new scheme in the same way that they do under the UK Competition Act. All is fair in the pursuit of corporate dominance.

45. In July 2009, the SFO issued guidance and declared that 'overseas bribery investigations are attracting significant resources'.

46. The UK's international, moral and political commitment to take a draconian and uncompromising stance on bribery and corruption explains the jurisdictional and behavioural scope of the new Act. It is clear that the UK authorities mean business. They expect any person or corporate with business that touches and concerns UK PLC to comply.

47. It is plain that more money will be spent on compliance than in pursuit of unlawfully won contracts; at least it will be legitimately spent on support and advice!

Using English Civil Law as a Victims' Solution

48. The jurisdictional reach of the English Civil Courts might be considered in private remedies of bribery and corruption. A claim form could be served on a company with a 'UK presence' and, in certain circumstances, may be served outside of the jurisdiction. The ability to recover consequent upon the corrupt act of competitors has been settled and recognised in English Civil Law for many years.

49. Advisors ought to consider whether:

    a. A Company ought to bring an action against a competitor who has secured a corrupt advantage ('Victims of External Bribery').

    b. A company who suffers bribery by one of its own agents ('Victims of Internal Bribery') ought to consider proceedings in the UK.

External Bribery

50. Such an action in the Civil Courts would be based on a claim for unlawful means conspiracy if it can be established that:

a. There was a combination or understanding between two or more people (e.g. the contract winning company and the corrupt individual involved in the tendering process);

b. The acts are aimed at or directed towards an individual or separate legal entity (e.g. the exclusion of the non-corrupt company);

c. There was a concerted action, consequent upon the combination or understanding;

d. Unlawful means were used as part of the concerted action resulting in damage being caused to the target of the conspiracy.

51. Advisors ought to consider using this remedy in the English Courts to "level the playing field" in favour of companies who have acted ethically and in accordance with the law in obtaining business.

Internal Bribery

52. Such a claim may be brought and there is no need to show that the payment has been made corruptly.[6] The cause of action has been described as a 'special form of fraud' where there is no representation made to the principal of the agent (let alone reliance).[7]

53. Damages can be against both the briber and the bribed agent. There is a strong presumption that the price is 'loaded against the principal at least by the amount of the bribe'[8].

Remedies Against the 'Bribed Agent'

54. Contractual damages: where there is a contract between principal and agent there is likely to be a remedy for damages arising out of the breach of the express

[6] Industries & Gen. Mortgage Co. Ltd. v. Lewis [1949] 2 All E R 573 at 575G-577A (per Slade, J).

[7] Petrotrade Inc. v. Smith [2000] 1 Lloyd's Rep.486 at 490 (per Steel, J.).

[8] Industries and Gen. Mortgage *ibid.* at 577B.

or implied terms of contract or (in the case of employment contracts) the duty of good faith and loyalty incumbent on the employee by reason of the employment contract.

55. Recoupment of the bribe from the bribed agent: The amount of the bribe may also be recoverable from the bribed agent. Such remedy is personal and does not require the claimant to show that there was a fiduciary duty owing from the bribed agent to him. Nor does it require the claimant to show that he has suffered loss by reason of the bribe.

56. If the bribed agent has a fiduciary relationship with the claimant at the time of the bribe, then on the basis that a person is in a fiduciary capacity that cannot allow a conflict to arise between his interest and duty, and cannot therefore make a profit from his position, the court will compel the bribed agent to 'disgorge' the amount of the bribe. This remedy does not depend on the claimant showing any loss.

57. In addition, the principal can claim for any further losses he has suffered. For example, if the principal can show that the agreement negotiated by his bribed agent is less advantageous to him than an agreement negotiated by an honest and prudent agent then he can claim damages to the extent he has been so disadvantaged.[9]

58. There is no defence of contributory negligence.[10] The mere fact that the claimant had the opportunity to discover the dishonesty and failed to take it would not serve even as a partial defence.

Remedies Against the 'Bribed Agent'

59. Rescission: In instances where the bribe is given in connection with a contract between the claimant and the briber the claimant may have an equitable right to rescind the contract and to recover any money paid or property transferred under the contract.

[9] Fyffes Group Limited v. Templeman and other [2000] 2 Lloyd's Law Rep. 643 at 660 (per Toulson, J).
[10] Corporacion National del Cobre de Chile v. Sogemin Metals Ltd [1997] 1 WLR 1396 at 1404E-d (per Carnwath, J.).

60. Recoupment of the bribe: A claimant may also seek the recovery of the bribe from the briber[11]; there is a presumption that the briber who sells the goods to the principal has inflated the price of the goods by the amount of the bribe and hence his wrongful profit is at least the amount of the bribe.

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[11] Salford Corporation v. Lever [1891] 1 QB 168 at 175 (per Lord Esher, MR).

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Ranked as a "Star Individual" in the first ever POCA Work & Asset Forfeiture section of the Chambers Directory, Andrew Mitchell QC is the "king of POCA" and "the godfather of the area".

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Previous editions have stated that he has an "excellent knowledge of law" and is "a fine advocate and an impressive performer". He combines a "forensic approach" with "tough, robust advocacy."

According to the Legal 500 he is a "heavyweight for the big cases and even bigger clients" and he "never fails to be on the money in restraint and confiscation matters, is hugely reassuring and exudes class."

Andrew specialises in civil and criminal asset forfeiture and is without doubt the pre-eminent barrister in the field of confiscation, restraint and receivership. He has advised and represented prosecuting authorities, defendants, receivers and third parties in the House of Lords, Court of Appeal (civil and criminal), High Court and Crown Court on all aspects of the restraint, management and confiscation of property.

He advises professionals and multi-nationals on the practice and procedure in relation to money laundering regulations and legislation. Andrew has acted in prosecution and defence of money laundering offences and advised internationally on all aspects of money laundering, fraud and corruption.

Andrew has been the principal speaker/lecturer in training programmes organised by the UN and the IMF.

He was a Consultant to the Pacific Anti-Money Laundering Programme and has been a consultant for training on money laundering related issues for the Anti-Money Laundering Office in the Australian Attorney General's Office. He has also trained the judiciary on these issues in Trinidad and Tobago, the Eastern Caribbean, South Africa, Palau and Papua New Guinea.