



Company: WilmerHale
 Name: Alison Geary
 and Michael Roach
 Email:
 michael.roach@wilmerhale.com
 alison.geary@wilmerhale.com
 Web: www.wilmerhale.com
 Address: 49 Park Lane
 London, W1K 1PS UK
 Telephone: +44 (0)20 7872 1000

Factoring in Bribery

By Alison Geary and Michael Roach of the UK white collar crime practice of international law firm, WilmerHale.

The passing of the Bribery Act 2010 was accompanied by widespread concern about its broad scope, worldwide reach, and novel approach with regard to the offence of a commercial organisation failing to prevent bribery by those acting on its behalf. The question that still arises is to what extent should a potential purchaser be concerned about bribery issues within its target?

For a UK purchaser to be liable for failing to prevent acts of bribery by its purchased target, the target must have acted intending to obtain or retain a business advantage for the purchaser. It is difficult to imagine a scenario in which this is likely to be the case if the bribery occurred before the acquisition had even been considered. However, a purchaser should not be concerned solely with whether it will be liable for any offence. To do so would be to fail to acknowledge the significant financial cost of a purchased entity being investigated or prosecuted for bribery as well as the reputational issues for purchaser of being connected with the investigation or prosecution of a group company for acts of bribery.

Bribery investigations are lengthy and frequently very public in their nature. The required focus of senior management, the reputational damage from the negative publicity, and the costs of addressing any failings are likely to be a significant burden. These costs may also be compounded by the authorities seeking recovery of any ill-gotten gains. Any benefit obtained from unlawful conduct, including bribery, is liable to be recovered by the UK authorities under the Proceeds of Crime Act 2002. This means that should it be found post-completion that the target entity is benefitting from a contract obtained through corruption, the UK authorities could seek to recover not only the benefit obtained by the subsidiary, but also any benefit passed, for example in the form of dividends, to the purchaser.

Beyond the potential financial implications for a purchasing entity, there is personal risk to officers involved in an acquisition if they are appointed as directors of the purchased entity. If the purchased target continues to commit acts of bribery after the officers are made directors, then they may become personally liable for acts of bribery.

Purchasers must therefore take steps to protect themselves and their officers in the pre-acquisition process and post-completion to avoid being associated with a bribery investigation in the first place.

Pre-acquisition due diligence is essential in order to flush out any bribery issues within the target. Transparency International (TI), an NGO that monitors corporate corruption, published guidance in May 2012, which sets out good practice principles

for anti-bribery due diligence in mergers, acquisitions and investments. Anti-bribery due diligence must be considered on a proportionate basis for all investments and should be commensurate with the bribery risks of the transaction.

A detailed risk assessment of target should be the start of the process. This risk assessment should focus on aspects such as the geographical location of the target; the sector target operates in; the structure of the transaction; the business opportunity risk (i.e. whether any elements of the transaction are not at market prices); and the business partnership risk (i.e. whether intermediaries are being used in the transaction).

TI provides an annual corruption perceptions index that can assist in determining whether the geographical location of target is perceived to be at a high-risk of bribery. Those regions that typically do not score well are sub-Saharan Africa (excluding South Africa) and countries in the Commonwealth of Independent States. Certain sectors are also typically associated with higher levels of bribery risk than others, for example the extractive industries (oil, gas and mining) and large scale infrastructure are perceived as high-risk. Other high-risk scenarios are where the target or seller is connected to a government official or where intermediaries are being used by target.

In addition, it is important that anti-bribery due diligence should start sufficiently early in the transaction and should be appropriately resourced.

As part of the due diligence exercise, it will be important to know the answer to questions such as who target's main customers and/or contractors are; the jurisdictions in which target has operations and sales; and who the ultimate beneficial owners are of target and the companies that target does business with. The UK has recently approved the establishment of a central register of beneficial ownership, which should become a routine part of the pre-acquisition due diligence checklist. This should assist in determining who the beneficial owners are in a transaction and in establishing consequent bribery risk.

Senior Management and members of the Board should demonstrate commitment to and oversight of due diligence reviews and, if necessary, approve any required remedial action. Importantly, due diligence should be extended to any persons that perform services for target such as agents, contractors and intermediaries.

Post-completion, the purchaser should ensure that it has adequate procedures in place to prevent bribery

within target and persons associated with it. The Ministry of Justice has provided guidance that should be considered when implementing procedures to prevent bribery. In summary, purchaser will need to demonstrate that it has procedures in place that are proportionate to the bribery risks that it faces and to the nature, scale and complexity of its activities.

If insufficient information was provided pre-acquisition (for example in the case of an acquisition of a public company, hostile takeover or auction), a full risk assessment should be conducted as soon as possible post-completion (based on the same principles set out above). Once the purchaser has been able to fully assess the risk, it will need to implement its proportionate anti-bribery procedures in an effective and practical way.

TI provides a helpful checklist of good practice in relation to implementing adequate procedures to prevent bribery. It is recommended that a corporate should adopt a public policy of zero-tolerance towards bribery, which should be approved by senior staff and communicated regularly both internally and

externally. This can take the form of a group board member regularly circulating emails to remind people of the corporate's stance on bribery. Such emails could also point to the firm's public anti-bribery policy. It is also recommended that an anti-bribery policy is put in place that contains guidance on the firm's policy towards gifts, hospitality and expenses, as well as political and charitable contributions. Those entities with which target has significant business relationships should also be asked to adopt an anti-bribery policy of equivalent standing.

Anti-bribery due diligence should continue post-completion on entities that perform services for target and on any entity who target enters into new business relationships with. These measures should be complemented by regular training for employees, so that they clearly understand the corporate's programme, expectations and sanctions in the event of a violation.

Further examples of good and bad practice can be found in the Financial Conduct Authority (FCA) guide to financial crime for firms, which includes the

findings of their thematic reviews into anti-bribery and corruption policies. Whilst dealing only with financial services firms, their findings are instructive for those outside the sector. For example, in the three thematic reviews into managing bribery and corruption risk that the FCA has conducted, they have found that, amongst other things, bribery and corruption risk assessments were based on a range of risk factors that were too narrow, there is often inadequate anti-bribery due diligence, and the oversight from senior management in relation to bribery issues is frequently weak.

Taking these steps pre-acquisition and post-completion, as well as drawing upon the appropriate guidance, they will help to ensure that a purchaser protects itself from liability arising from bribery issues within its target. In doing so, not only will the purchaser protect itself and its officers, but it will also help to ascertain the true value and viability of the deal. As such, bribery issues should not be treated as an afterthought or an inconvenience in the acquisition process, but should instead be factored into every deal.

