Baker McKenzie's response to the call for evidence by the House of Lords Select Committee on the Bribery Act 2010

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Introduction

Baker & McKenzie LLP makes this submission in response to the call for evidence by the House of Lords Select Committee on the Bribery Act 2010 to share our reflections on the operation and effectiveness of the UK Bribery Act 2010 (the "**UKBA**"). This response reflects our own extensive experience of the UKBA to date and the experiences of some of our clients.

Responses

1. Is the Bribery Act 2010 deterring bribery in the UK and abroad?

1.1 It is our experience that, for those companies that fall within the jurisdiction of the UKBA, the legislation has been fundamental in changing attitudes towards bribery and corruption, compliance and ethical conduct more generally. In particular, the awareness of, focus on and funding for anti-bribery and corruption compliance procedures and training have increased significantly, and the mechanisms through which concerns about bribery-related conduct can be raised internally have become more sophisticated and better understood. We have insufficient evidence to say whether bribery itself is being deterred as a result of these developments, although that outcome seems likely.

1.2 One client commented that the UKBA and the associated guidance are helpful in creating a global compliance policy because the law is sufficiently broad that Compliance Officers can feel confident that compliance with the UKBA will help towards compliance with other local anti-bribery and corruption requirements.

1.3 In our experience, the main driver behind this shift in attitude and approach has been the very broad jurisdictional scope of the section 7 "*failure to prevent*" offence. In particular, the broad definition of "*associated person*" has required companies to carefully review their engagement with third parties such as agents and consultants, especially those in overseas territories. It is apparent that such reviews are identifying bribery committed by those third parties on behalf of the companies they serve.

1.4 The section 7 offence has focused attention on corporate liability and caused a cultural shift in corporate culture. However, we consider it may take more time for that change in corporate cultural to filter down to individuals, particularly in some less developed jurisdictions. In other words, we consider there is a time-lag between the compliance improvements we have seen at a corporate level and the tendency of employees to comply with their employer's expectations. Until high profile individual prosecutions become more regular, there is a risk that individuals will view compliance with the UKBA as a "corporate" issue, rather than one for which they are personally responsible and, potentially, may be liable. Additionally, we consider there remains a gap between the practical implications of the UKBA and the realities for the operating companies which are seeking to achieve the objectives of the company. Bridging this gap will be an ongoing challenge for companies going forward.

Enforcement

2. Is the Bribery Act 2010 being adequately enforced? If not, how could enforcement be improved? Do the Serious Fraud Office and the Crown Prosecution Service have the right approach and the resources they need to investigate and prosecute bribery offences effectively?

2.1 Our view is that, to date, the UKBA is not being adequately enforced[1]. In large part, this is because of the duration of SFO investigations (which we understand, based on our experience and information in the public domain, still take an average of four and a half years). We consider that resourcing and funding are key contributors to this delay. This delay creates real uncertainty for companies and individuals involved in SFO investigations. Individuals and companies are entitled to justice within a reasonable time, which we fear they are being denied by the current length of SFO investigations. We appreciate that some aspects of an SFO investigation necessarily take time to progress, e.g. obtaining evidence from overseas authorities. However, there are many other aspects of SFO investigations for which the reasons for delay are less clear. In our experience, the delay in resolving SFO cases is acting as a major deterrent to companies self-reporting breaches of the UKBA.

2.2 Given the significant impact that bribery investigations have on companies and their stakeholders (e.g. employees, shareholders, suppliers and customers) and their ability to conduct business, particularly where the company is listed, the current delay in resolving cases can lead to a disproportionate adverse impact on a company's business and compromise the quality and efficacy of the investigation.

2.3 The length of time it takes to resolve cases also does not account for the evolution of companies (i.e. often, the individual wrongdoers have left the organisation by the time the investigation is concluded, the company has undergone a wholesale cultural change, compliance processes have improved and new management may have been appointed etc.). The delay can therefore call into question the public interest in prosecuting companies several years after an incident has first been brought to light and tainting their reputation, even though they may already have undergone wholesale improvements in their compliance policies and attitude to compliance.

2.4 We also have concerns about the level of guidance offered by the SFO during their investigations, particularly when the company is cooperating. We believe it would be in the public interest for the SFO to offer more guidance and input into an internal investigation which is being conducted in full cooperation with the SFO, to ensure that the SFO is provided with the information it requires to enable it to make decisions.

2.5 Some of our clients expressed frustration with a lack of enforcement activity under the UKBA, particularly because lack of prosecutions risk undermining the good faith work being undertaken by a number of companies to combat bribery in all its forms.

2.6 There have been significant developments in the cooperation between agencies and jurisdictions when it comes to anti-bribery enforcement. However, some clients expressed frustration that, in the case of multijurisdictional investigations, there is still insufficient communication between agencies, such that some of our clients face multiple investigations by multiple agencies in relation to the same conduct. This is unfair and inefficient for all concerned, and is something that has been recently recognised by the US Department of Justice. We would encourage the SFO to be a strong voice in any debate recognising and addressing these issues.

2.7 From a UK standpoint, some believe that one solution to the aforesaid challenges may be to have a single prosecuting body that is primarily responsible for bringing prosecutions for financial crime, similar to the US model. This would enable the single body to issue a clear statement of policy and resourcing without the risk of inconsistencies and uncertainties in approach between the different

[1] Our experience in this area mostly derives from interaction with the UK Serious Fraud Office (the "**SFO**").

agencies. However, others believe that a robust, properly-funded and resourced SFO is a better, more cost-effective means of enforcing the UKBA. Either way, resourcing, funding and better dialogue between the SFO and self-reporting companies are the keys to ensuring shorter investigations and, therefore, more effective enforcement of the UKBA.

Guidance

3. Is the statutory guidance on the Bribery Act 2010 sufficient, clear and well-understood by the companies and individuals who have to deal with it? Should alternative approaches be considered?

3.1 Responses to this question and opinions within our firm and our clients differ. Some view the guidance as perfectly adequate, helpful and clear.

3.2 Others felt that the guidance is not sufficiently clear and many questioned whether the result of this lack of clarity was a continued disconnect with the written procedures which are adequate on the surface, but which do not filter down to the front line business to become integrated into corporate culture.

3.3 Further guidance would also be of assistance as to the meaning of "*carrying on a business or part of a business*" in the UK for the purposes of section 7 of the UKBA. The guidance available on this at present is causing significant uncertainty for our clients, many of whom operate internationally.

3.4 Many clients are of the opinion that the current guidance is too theoretical and does not properly address concerns companies may have. Other clients are concerned at the lack of practical guidance on the need for a "*culture*" of compliance and the blend between culture and policies and procedures. There is also a concern that the guidance is already out of date and does not reflect current market practice or behaviours. A more responsive form of guidance should therefore be considered, for example working with industry to identify scenarios to form a "Q&A" style guidance. Comparisons can be drawn with the US system, which has taken a number of steps in recent years to provide greater clarity on what is required for a compliance programme to be viewed as effective. Ultimately, the guidance should be provided in a practically applicable way for companies to understand what they can do on a day-to-day basis.

3.5 This issue is particularly evident in the *Skansen Interiors* Judgment which elicited questions and concerns from our clients over what equates to "*adequate procedures*", and particularly whether there are genuine benefits to self-reporting. The guidance on adequate procedures is not sufficiently clear and the discrepancies in DPA judgments (discussed in response to question 7, below) have not helped companies determine the level of compliance procedures required of them.

3.6 In summary, updated and revised guidance on the UKBA would be appreciated by our clients, especially as to what amounts to "*carrying on a business or part of a business in the UK*" and "*adequate procedures*". This guidance should be drafted in collaboration with companies so that it can be as practical, effective and helpful as possible.

Challenges

4. How have businesses sought to implement compliance programmes which address the six principles set out in the Ministry of Justice's guidance on the Bribery Act 2010? What challenges have businesses faced in seeking to implement their compliance programmes? Are there any areas which have been particularly difficult to address?

4.1 We have seen companies significantly increase the funding and resourcing available for compliance professionals in response to the UKBA. The primary reasons for this are typically to: (a) enhance procedures, in line with the six principles and accepted international standards of best

practice; and (b) reduce risk. However, this is clearly an iterative and ongoing process and compliance programmes continue to be improved and changed in order to attempt to meet the requirements of the UKBA and "*adequate procedures*". This continued development of compliance processes is another reason why updated guidance on the UKBA would be helpful.

4.2 Challenges faced by our clients when implementing compliance programmes include:

(a) the costs associated with ensuring there are the resources necessary for implementation to be effective;

(b) the demand placed on existing resources to focus on and implement new compliance procedures;

(c) counterparty due diligence and testing responses provided by counterparties;

(d) the corresponding pressure put on counterparties with which companies transact or do business (in the form of due diligence procedures and questionnaires etc.);

(e) the challenges of integrating new subsidiaries and new businesses which approach compliance in a different way;

(f) the lack of clarity around what will be considered proportionate for different sized businesses; and

(g) the disconnect between what is considered a policy and what is practically and fundamentally implemented across the business (i.e. policy versus culture).

4.3 Some companies operate in jurisdictions where standards of anti-bribery compliance differ. In these jurisdictions, companies remain uncertain how to navigate around differing standards whilst remaining in compliance with the UKBA because of uncertainty about various aspects of it, including what constitutes "*adequate procedures*". Where there has been uncertainty, the response from the SFO is that companies should not operate in such markets. This is an unhelpful response for our clients, many of whom have no choice but to operate in certain markets either because of the products they produce, the sector in which they work or the contracts in which they are engaged. It is simply not feasible for our clients to just walk away from certain markets, which could have a dramatic adverse impact on the British economy. It would instead be more helpful for the government and the SFO to engage with companies to establish workable guidance that is effective in combatting bribery, but also gives our clients greater certainty as to what is expected of them.

5. What impact has the Bribery Act 2010 had on small and medium enterprises (SMEs) in particular?

5.1 The significant uplift in compliance overheads has a greater impact on SMEs than larger companies. Guidance on the procedures SMEs in particular are required to implement may assist in focusing attention and managing costs in a fair and proportionate way.

6. Is the Act having unintended consequences?

6.1 Some of our clients have not seen unintended consequences arising from the UKBA but have instead seen the intended, positive effect of companies conducting risk assessments and enhancing compliance programmes. However, some were of the view that the UKBA is acting as a disincentive to companies with a UK nexus to operate in high-risk jurisdictions due to the cost of implementing adequate compliance procedures in those jurisdictions. Clients are finding themselves losing out to overseas competitors, who are not perhaps subject to the UKBA and who are less likely to be prosecuted by their "home" prosecutors. One client thought that, post-Brexit,

when the UK will seek to do more business with the rest of the world, such disadvantages may become more acute.

6.2 There was also some uncertainty initially about how appropriate business practices, such as gifts and hospitality and structures which return value to customers (e.g. rebates), were going to be viewed by prosecutors. Additionally, concern was expressed that although compliance procedures are being implemented, there is a risk that some companies fall back on treating it as a 'tick-box' exercise and do not deal with the cultural aspects. This can create a false sense of comfort regarding accountability.

6.3 Some companies have found that the increased level of due diligence can create difficulties during procurement processes because of the compliance pressure placed on counterparties.

Deferred Prosecution Agreements

7. Has the introduction of Deferred Prosecution Agreements (DPAs) been a positive development in relation to offences under the Bribery Act 2010? Have DPAs been used appropriately and consistently? Has their use reduced the likelihood that culpable individuals will be prosecuted for offences under the Act?

7.1 It is our view that DPAs are a positive development. The use of DPAs has the potential to expedite the investigation process, save the costs of pursuing a prosecution and alleviate the burden on SFO resources. However, in our view this potential is not yet being reached and consistency in approach has only been shown to a degree. For example, concern was expressed over the difference in the approach taken to self-reporting in the *Rolls Royce* and *Skansen Interiors* cases, particularly in comparison to the approach taken in *Standard Bank* and the public statements made by key SFO individuals since the introduction of DPAs. More certainty is also required as to the benefits of self-reporting more generally, as fewer companies are seeing the overall benefits of it.

7.2 Steps should be taken to ensure that DPAs are seen as available for SMEs as well as large "too big to fail" corporates. It would be unfair and unjustified if DPAs only came to be associated with larger companies.

7.3 If the prosecutors' approach to DPAs is not consistent, companies will not be incentivised to cooperate and self-report and we are seeing this in our day-to-day practice. By way of example, precedent from cases to date suggests that companies that self-report currently have to wait several years before finding out whether they are eligible for a DPA. This does not serve to encourage cooperation. It would be far better if prosecutors would be prepared to indicate earlier in the process whether a DPA was going to be available (at least in principle). There is a fear that companies could be pressured into DPAs through the threat of prosecution, and concern that when considering whether or not to approve a DPA, the judge does not consider whether the investigation itself was fair.

7.4 Concern was also expressed in relation to the SFO's current approach to privilege, which is seen as threatening to undermine the fundamental principles of the protections which privilege provides. The uncertainty in the law around privilege, as well as the uncertainty around the extent to which, if at all, companies are expected to waive privilege in order to obtain maximum cooperation credit, is further dis-incentivising companies to self-report.

7.5 As set out above, in the context of a self-report and ongoing cooperation, it would be helpful if the SFO could provide more guidance on what is expected from organisations. General statements such as "*not doing anything that could prejudice any investigation that the prosecuting authority may wish to carry out*" are well understood. However, often there can be real uncertainty as to: (i) whether taking a particular step could prejudice an investigation; and (ii) if so, whether the perceived benefits of the step outweigh any possible prejudice to an investigation, such as conducting witness interviews with witnesses or suspects (particularly where they are external to

the company). The US offers clearer guidance on what is expected from organisations. Clearer and more committed guidance from the SFO would provide greater certainty for organisations and is therefore likely to result in more self-reports.

7.6 On the question of the prosecution of individuals, it is our view that the likelihood of this occurring has not been reduced. On the contrary, the cooperation necessitated by the use of DPAs grants the SFO access to information which increases the likelihood of individual prosecutions and, in fact, forces companies to provide information and co-operate with the prosecutor in relation to the prosecution of individuals. This appears to be happening in practice because, as we understand it, three of the four agreed DPAs have resulted in investigations and/or prosecutions of individuals allegedly involved in wrongdoing. Additionally, DPAs operate as a separate and corporate-focused tool, which does not negate the public and administrative pressure to hold individuals accountable where appropriate.

International aspects

8. How does the Bribery Act 2010 compare with anti-corruption legislation in other countries? Are there lessons which could be learned from other countries?

8.1 In many ways, the UKBA is seen as the gold standard for bribery legislation around the world. It sets the benchmark for stringent regulation, particularly with regard to the section 7 corporate offence of "*failure to prevent*". In response to this standard, a number of countries have or are adopting the UKBA and the DPA model used in the UK, including Ireland, Canada, South Africa and Bermuda.

8.2 That being said, there are key differences between the UKBA and legislation in some other countries. Notable differences are:

(a) the Criminal Justice Reform Act in Singapore determines that companies must have self-reported and have adequate compliance procedures in place for a DPA to be considered. It does not include any guidance on what "*adequate compliance procedures*" might be; and

(b) the Foreign Corrupt Practices Act (the "**FCPA**") in the US (in force some 30-plus years before the UKBA) has a more limited application than the UKBA and does not contain an equivalent defence to that provided under section 7.

8.3 It was the opinion of some that, if the aim of the UKBA is to increase prosecutions, its stringency (particularly in comparison to the FCPA) is beneficial. However, this can hinder business and increase the risk of companies operating in certain jurisdictions, such as MENA, sub-Saharan Africa and South Asia, where the risks of doing business are higher. For example, engaging an introducer, (which may be necessary in some jurisdictions in order for companies to participate in tenders), may now involve implementing sophisticated compliance procedures which hinder and delay the process.

8.4 For some of our clients, the stringency of the UKBA is a benefit as it allows companies to adopt a global policy which is of application to all entities within its group. It also assists companies with operations in emerging markets, which have shown appreciation for clear and strict anti-corruption policies. In markets where bribery is traditionally an issue, the credentials provided by complying with the UKBA operate to promote "clean" businesses.

9. What impact has the Bribery Act 2010 had on UK businesses and individuals operating abroad?

Our response to this question is covered in the responses to questions 6 and 8 above.

Baker McKenzie.

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