

Don't fail to prevent: how corporates can avoid missing bribery risk as they fight to survive the COVID-19 contraction.

As the lockdown persists and spare bedrooms or kitchen table corners continue to do double duty as office space, many businesses - particularly those whose trade has shrunk - will be aching for a return to normality.

However, normal may not return for a long time. Supply chains may shorten. Working practices may change. Long-settled business relationships may be sundered as partners may have ceased to trade. Battered businesses will be desperate for new deals as they seek to keep their staff working.

In other words, it's a perfect time to bribe someone – and the ultimate test of whether a business's anti-bribery programme will prevent it, or fail to do so.

[Fiona Horlick QC](#) and [Jeremy Scott-Joynt](#) look at the risks in more detail.

Why might the post-lockdown period mean more bribery and corruption?

Chaos and change always offer opportunities for corruption. A business suffering a cashflow crisis having lost suppliers and customers may not have long to find new ones. Counterparties may condition their responses on a sweetener or two, or a firm or its staff may look to "incentivise" a new partner into a deal.

Business leaders may even feel obliged to make deals which keeps things running regardless of the consequences, if it secures employees' and shareholders' interests for just a little longer.

But failing to prevent bribery, even at times like these, is not the easy option it may seem.

Short-term gains are likely to be outweighed by longer-term costs. Turning a blind eye or, worse, actively encouraging bribery may get a firm through the next few weeks but trouble is likely to build thereafter – trouble which may come from the widened set of tools at law enforcement agencies' and regulators' disposal.

The law on "failing to prevent"

For years, law enforcement has been frustrated in trying to hold corporates responsible for crimes financial and otherwise by the identification principle: the doctrine, arising from a line of cases starting with [Tesco Supermarkets Ltd v Nattrass \[1972\] AC 153](#) that an organisation is only liable for an employee's actions if that employee represents the organisation's "directing mind and will". The limitations this imposes appear most starkly in the High Court's decision in [The Serious Fraud Office v Barclays Plc & Anor \[2018\] EWHC 3055 \(QB\)](#) that Barclays was not criminally liable even for the actions of its own chief executive. (A Ministry of Justice "call for evidence" about the problems with the identification principle in 2017 has yet to get a government response, let alone concrete reform proposals.)

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The Bribery Act 2010, enacted to reform the UK's ancient and piecemeal statutes on bribery and corruption, found a radical way around the problem. In section 7, it created an offence of failing to prevent bribery. If someone bribes on behalf of a corporate - a term defined widely, to include partnerships and non-profits whose work includes business activities - then so long as the prosecution can show the bribe took place (although no discrete bribery charge is required), the corporate has automatically committed the failure-to-prevent offence. The only defence to such a crime is for a defendant to show, on the balance of probabilities, that there were adequate procedures in place - even if, in this case, they failed to stop the bribe from being offered or supplied. Given the imprecision of the word "adequate", the lack of any official guidance as to what it really means, and the fact that by definition, the procedures have failed to some degree if the bribe has taken place, the defence is not easy to advance.

There has only been one contested prosecution to date under section 7: *Skansen Interiors Ltd*, a small business whose procedures were found to have been inadequate in a Crown Court trial in 2018, because the firm (which admittedly had only 30 employees) had no bribery-specific procedures at all, and had failed properly to operationalise even those that it had. But a failure to prevent bribery has formed part of most of the bribery-related Deferred Prosecution Agreements to date, and cases such as that of *Sweett Group plc* in 2015-16 featured a tacit admission (implicit in its guilty plea) that the procedures in place had not sufficed.

There is one other failure-to-prevent crime on the statute books, the offence of failing to prevent the facilitation of tax evasion in the UK (section 45 of the Criminal Finances Act 2017) or overseas (section 46). Again, the offences are strict liability - this time with "reasonable procedures" representing the available defence. These offences are complex and have yet to be prosecuted, and the temptations to which the COVID-19 crisis gives rise are arguably less immediate in this sphere than under the Bribery Act. That said, as tax liabilities deferred by the Government during the crisis ultimately fall due, and companies or their advisers find themselves perhaps facing difficulties in paying - and given the rapidly-evolving nature of the rules for the various bailout schemes on offer - the risk in this space may grow, and tax and financial advisers in particular would be well-advised to consider whether their systems will ward off the risk that clients could land them with liability.

How might bribery come about?

Of course, you only fail to prevent bribery if active bribery has occurred. And your organisation is clean. Isn't it?

It may well be - or at least it may have been, so far. However, hard times test systems and cultures to their limits. If a firm's messaging hitherto has been ambiguous - proudly declaring its zero-tolerance policy for bribery while setting impossible "stretch" targets and

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2010 [Lissack and Horlick on Bribery](#) published by LexisNexis (3rd edition to be published in Autumn 2020)

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shaming those who don't meet them - this is the time when the culture that *actually* exists will come to the fore.

Staff may feel more pressure than ever to win deals and meet targets. So will their counterparts in other companies. Things can easily slip from "what does your company need to make this deal happen?", to "what do *you* need?". Those who have wondered idly in the past what loopholes they might exploit, if the need ever arose, may find those thought experiments suddenly inviting. And once one bribe is successfully paid, others will surely follow.

Investment in economies by governments around the world has already been unprecedented. But the amounts and the speed of release has the vultures circling already. Normal oversight mechanisms will be weakened and the potential for diversion through bribery, subtle or overt is equally unparalleled.

Don't be misled into thinking this is only a problem for organisations trading in places with spotty reputations. That has never been the case. The UK has always had its own corruption problems, and when the wolves are at the door, hard times tempt domestic partners just as much as they do overseas ones.

In addition, are your checks going to work, when half your compliance function - assuming you have one - and a third of your accounts department, are off sick or self-isolating? Culture is key to effective adequate procedure requiring a consistent top-down commitment, regularly and rigorously disseminated and enforced. When everyone's working remotely, and paper-based systems which you were *definitely* going to get round to upgrading next year are now effectively useless? Don't forget, an anti-bribery programme that only works when everything is fine is, by definition, inadequate.

Finally, this of course assumes you have a programme addressing bribery and corruption risks. PwC's latest global economic crime and fraud survey, released earlier this month, suggests that 60% of firms still don't have one. Furthermore, half do no formal risk assessment, if any at all. Half don't monitor or undertake due diligence on third parties, and a third say they've either been asked for a bribe, or think they have lost business to someone prepared to pay one.

Why should an organisation be concerned if bribery happens?

Assume for a moment that - whatever its situation prior to COVID-19 - your organisation now has a bribery problem. But you may ask: is it in fact a problem? Who, really, cares?

The principled answer is straightforward. Bribery is illegal. Every deal won by a bribe hurts businesses (and their employees, shareholders and customers) who won't or can't pay. Bribes help encourage a race to the bottom: if the biggest bribe wins, rather than the best fit on quality and price, bad products and services drive out good. Everybody loses.

As for the pragmatic answers:

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Jeremy has assisted clients in their dealings with the Financial Conduct Authority, the Serious Fraud Office, the Gambling Commission, the Maritime and Coastguard Agency, the Environment Agency and the Health and Safety Executive. He has also been seconded to the FCA.

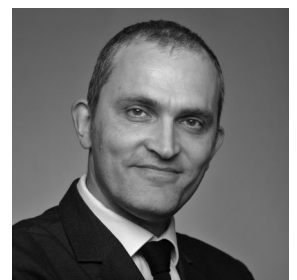
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1. Bribery undermines your organisation, by making success contingent on illegal behaviour. Word will get around. Some will learn the wrong lessons from it. Others, often your best staff, won't want to be associated with it. They may leave. Think who you will be left with.
2. The short-term gain may seem evident, particularly if your primary concern is whether you may be trading next quarter. But if you find yourself reliant on bribe-driven business, the quarter after that, and the next one, are going to get more and more expensive.
3. The cover-up will need to last for ever, and your safety relies on people in another organisation, who owe you no allegiance, staying quiet and below the radar. Are you sure that firm's controls are as poor as yours? Are you sure no-one will try to make you take the fall?
4. Think of your own staff. How confident are you that no-one will blow the whistle? If they do so internally, and their concerns are not taken seriously, they may well take their concerns elsewhere. If they are victimised – and under the Employment Rights Act 1996 section 47B, a firm may be liable for one employee victimising another even if the firm had no idea it was happening – they could take a claim to the Employment Tribunal, bringing the whole problem into the light. Also, you may have more disgruntled staff than usual. Staff who were reluctantly furloughed and lost pay. Staff who kept working, seeing themselves exposed while others sat back and picked up their 80%. Staff who, if they see someone being rewarded for doing the wrong thing, may not keep it to themselves.
5. If you're a financial firm in the regulated sector, of any size, remember that the Financial Conduct Authority takes financial crime controls very seriously. Particularly if a failure of those controls leads to any consumer detriment. The FCA's view is that poor controls – inadequate procedures, if you like – are enough to merit punishment, whether or not there has been an actual bribe.
6. Don't make the mistake of assuming that law enforcement isn't interested or has other priorities. The Serious Fraud Office, for instance, has had a rough time recently. It wants scalps, and if they can be shown to arise from COVID-related bad behaviour, so much the better. It constantly shares intelligence, including the suspicious activity reports which banks will continue to file through this crisis, with other law enforcement and with regulators including but not limited to the FCA.

And enforcement bodies have tools at their disposal which can cause a firm immense pain even months or years before a charge or a prosecution. To take one example: Account Freezing Orders, introduced into the Proceeds of Crime Act 2002 at Chapter 3B (sections 303Z1 to 303Z19) in 2017, allow a magistrates' court to freeze a bank or building society account for up to two years, without notice to its holder, if an applying officer can show "reasonable grounds to suspect" that it contains the proceeds of crime. A full description of how [Account Freezing Orders work can be found here](#). The critical point is that "reasonable grounds" are a low bar to clear. And a frozen current account is a cashflow killer.

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7. Directors put themselves at risk of liability under the Companies Act 2006 if they fail to prevent bribery. It is hard to see how even turning a blind eye to bribery could fulfil a director's obligation under s172 to promote the company's success in good faith. This is particularly the case, of course, if the business fails.

8. Finally, if a bribe happens, by definition your organisation has failed to prevent it. As we have discussed, adequate controls have to work on bad days, not just good ones. So if you are caught out, and you have done nothing to consider the effect of COVID-19 on your bribery risks, adequacy is going to be a tough sell.

What can be done?

You may be despairing at this point. Given the stress on finances, cashflow and staffing, not to mention the sheer drain on management attention of this crisis, how can any organisation possibly take the time to make sure its anti-corruption controls are working?

Assuming that you have some kind of anti-bribery programme in place, even a relatively rudimentary one, you have the time and the capability, so long as you stay focused. We would suggest the following:

1. Get the messaging right. Staff are scared – for their jobs, for their friends, for the firm. Make it clear that no-one will suffer for doing the right thing, that no-one will be rewarded for doing the wrong thing. That the organisation is dedicated to long-term survival, not just getting through the next few weeks by any means necessary.

2. Make sure your incentives align with that message. The words are important but if followed by an instruction to win a deal at all costs, they mean nothing. By all means celebrate employees' success but you may wish to avoid doing so on raw P&L metrics.

3. Review your risk assessment. You have already done most of the hard work by having one, so look through your findings in the light of your current situation. Which risks are unaltered? Which are heightened by lack of staff, or loss of partners? Where will your (inevitably limited) resources do the most good? What procedures, what processes, are most exposed?

4. Look at the controls you have in place. Not just for bribery purposes, but for fraud and regular accounting controls. Identify the bottlenecks: the points in a process through which payments or other benefits would have to pass for sanction or approval. Focus on making sure *those* are robust, staffed, and transparent. That is where you find the greatest effect for the least input. Consider using emerging technology such as detection data analytics.

5. Pay attention to due diligence. If you have it, scrutinise it, don't just pay lip-service to the process. Think about the critical things you need to know about a potential or current business partner: Who are they? Do they have the ability, the capacity, to do what you are paying them for? Is their function really something you need? How are they being

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compensated? Focus on the relationships you rely on most in the near-term first. Others can come later.

6. Pay attention to your people. Make sure concerns don't get stifled, and that whistleblowing channels continue to operate and work effectively. Look out for the usual signs of fraud or corruption: staff who keep relationships with third parties to themselves, who are reluctant to be transparent, who don't just complain about process – doesn't everyone? – but actively route around it.

Conclusion

Adequate procedures don't have to be perfect, although they need to be strong enough to withstand detailed scrutiny. They just have to fit the company's circumstances, and to evolve in response to the threats they address.

So the best defence against a charge of failing to prevent bribery, or facilitation of tax evasion, is to show that you take the problem seriously. In these difficult times, if you can show you have positively considered how this ever changing world affects your controls – however rough and ready the response may seem amid all the other challenges you are facing – your case for adequate procedures, should you ever need one, will be all the better for it.

Find Out More

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