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Courts Likely To Decide Reach Of UK Bribery Act

By **Hilary Russ**

Law360, New York (February 3, 2011) -- As attorneys continue to wait for guidance on the U.K.'s new Bribery Act, a key phrase that will determine which companies fall under the law's jurisdiction is likely to be hashed out in the courts, regardless of how the government ultimately defines its reach, lawyers say.

Critics have been hounding the U.K. government to more clearly define certain terms in the law, but in late January the U.K. Ministry of Justice delayed for the second time the release of additional guidance on the law, which was to have gone into effect in April.

Even when guidance is released, it may do little to clear up perplexity over the vagaries of the jurisdiction phrase, which applies the anti-bribery restrictions to any company that "carries on a business or part of a business" in the U.K.

"It may be that in one of the bits of guidance they will put their gloss on what they think that phrase is likely to mean, but ultimately it will be a case for the courts to decide," said Barry Vitou, a partner at Pinsent Masons LLP and the co-author of a blog called thebriberyact.com.

When the bill was still being drafted, legislators debated whether to include a more specific definition of that phrase, according to Andrew Legg, a senior litigation partner at Mayer Brown LLP in London.

But lawmakers decided instead to maximize flexibility and let the meaning of the phrase play out though court challenges and case law.

That will likely lead prosecutors to bring a spectrum of cases, through which jurisdiction will be decided by a combination of factors pertaining to the overseas company, he said.

"Each case will be determined on its particular facts, but you're going to have this bedrock of cases in the middle which will lead to challenges," Legg said.

"Somebody will be the guinea pig," he said.

In steering a path through the murky phraseology, British courts may also look to language in other existing U.K. laws.

For instance, the U.K.'s Financial Services and Markets Act of 2000 directs organizations not to "carry on a regulated activity by way of business" in the U.K. without authorization by the Financial Services Authority.

But as with the Bribery Act, the FSMA itself offers little guidance about exactly what "carry on a regulated activity by way of business" actually means.

Because the FSMA is unclear on that point, the FSA issued some guidance of its own on the test for what that phrase could mean. The FSA said that a foreigner could be engaging in activities in the U.K. "even if he does not have a place of business maintained by him in the U.K.," including through Internet sales or other telecommunications, or by occasional visits, Vitou said.

Even U.K. Serious Fraud Office general counsel Vivian Robinson has said that under that approach to long-arm jurisdiction, courts could conclude that an Internet retailer based outside the U.K. who ships products into the U.K. could amount to "carrying on business" under the Bribery Act, according to Vitou. The SFO prosecutes foreign bribery in the U.K.

That potentially long reach and low bar for prosecutors, coupled with the uncertainty of the exact meaning of the phrase, has led some companies to wonder whether all of their operations couldn't somehow become subject to the Bribery Act.

Then too, the SFO has consistently said it would "come down heavily on those who use corruption to gain a business advantage" and that, in relation to corporations, it would "take a robust approach to jurisdiction," Legg said. "The message could not be clearer."

That has led to consternation by overseas companies, which was heightened by the Ministry of Justice's announcement that the implementation of the act would be further delayed.

"There is just a strange amount of mass hysteria surrounding this," said Michael Koehler, an assistant professor of business law at Butler University, who studies foreign bribery laws in the U.S. and abroad.

The hubbub is overblown for several reasons, he and others have said.

U.S. companies may be thinking of the Bribery Act in the context of the U.S.'s Foreign Corrupt Practices Act, which has been aggressively prosecuted in the past several years and under which cases tend to be resolved through nonprosecution and deferred-prosecution agreements, giving the courts little chance to weigh in on whether prosecutors have pushed the law too far.

But the U.K. and U.S. courts are different in that regard, experts said.

"Even with some of the SFO prosecutions under their existing [bribery] law over the last year, we've seen substantial judicial pushback," Koehler said. "I just don't think you're going to see the U.K. Bribery Act 'law' develop in the very troubling way FCPA 'law' has developed."

He also said that the SFO had no other choice than to say it would come down hard on foreign firms, but that prosecutors would likely enforce the new law in a measured and disciplined way.

"This is not going to be the runaway train that the FCPA enforcement has become," he said. "The English courts ... are going to be playing a meaningful role in this and serve as an adequate check of prosecutorial discretion."

British courts have already put their stamp on existing bribery law following challenges against prosecutors in a few cases.

Nongovernmental organizations, for instance, challenged the SFO's initial decision not to charge BAE Systems PLC with bribery in a massive deal to provide arms to Saudi Arabia, attorneys noted. The groups also contested a settlement in the case.

Then too, the mere fact that a company based in the U.S. or elsewhere has a subsidiary in the U.K. "is not enough in my view to get the U.S. parent into difficulty," Vitou said. "We have a very clear legal concept in the U.K. of corporate personality."

A foreign corporation's position under English law is more favorable than the position under the U.S.' FCPA, he said.

Whatever the definition of the phrase "carry on a business or part of a business," the SFO is not likely to be interested in bringing "convoluted prosecutions that have got a marginal chance of success," Vitou said. "It's too tenuous."

Instead, the SFO will either go after lower-hanging fruit or the really big, solid cases, and it will likely contact the U.S. Department of Justice in cases in which jurisdiction would be too much of a stretch to go after a U.S.-based company, experts said.

The current hysteria "is largely being created by law firms in the U.S. and the U.K. that are trying to push their compliance services," Koehler said.

"If you're a large multinational company who has been living under, so to speak, the FCPA and already have robust FCPA compliance policies and procedures in place, I truly don't think you have much to worry about," Koehler said.

--Additional reporting by Evan Weinberger. Editing by Greg Ryan.