

## Client Alert: COVID-19 and Corruption FAQs

Date : May 18, 2020

### Introduction

*We first published this note on 12 May 2020 and have updated it to take into account more recent developments.*

The current pandemic affects all aspects of the compliance world. In previous alerts we have looked at the effects of the pandemic on data protection (see <http://bit.ly/gdprvirus>) and modern slavery (<https://bit.ly/corderyms19>). But what are the likely effects on the fight against corruption?

### Background

It is important to remember that for most organisations they will need to take into account different anti-bribery laws around the world. In many jurisdictions paying bribes to both public and private people is criminalised and you need to take into account local laws where you do business in addition to the law in your home country. Tables like this might help <https://bit.ly/BAVFCPA>.

There are also differences in the way in which the delivery of goods and services is structured around the world – for example we have seen conflicts in the past with some US corporations failing to understand that the largest procurer of health services in many European countries is the state. We can also expect more changes as the economic consequences of the pandemic make it more likely that some private enterprises will be, at least temporarily, be brought under state ownership or control.

### Is bribery risk higher in the pandemic?

There is at least anecdotal evidence that bribery goes up in a crisis. We're currently at a time of greater risk since:

1. Some public officials may make greater demands for money to supplement their incomes.
2. Many organisations are trying to procure scarce supplies – for example to keep production going or to provide PPE for staff. Some are also trying to expedite deliveries and use different suppliers in different countries which increases the risk of corrupt payments to shippers, customs officials etc.
3. The return to work could equally cause issues – for example in buying in testing for staff or when negotiating occupancy levels with landlords and public officials.
4. There's evidence that bribery can increase in countries where there are multiple levels of bureaucracy – in many countries issues involving health, building occupancy and permitting can fall into that category.
5. Some criminal gangs specifically target times of uncertainty as a time to increase their activity. We've seen that with increased ransomware (see <https://bit.ly/cvransom>) but we've also seen reports of more direct corruption and money laundering schemes being promoted during the pandemic (for example here <https://bbc.in/2L3kq99>). There are examples of some of the other scams doing the rounds here <https://bit.ly/dojc19scams>.
6. Some individuals including employees may feel that the compliance team isn't around to watch them. This feeling of being safe to do bad things might be compounded by any organisation which has suspended anti-bribery training or messaging. The pressure to hit numbers in a declining market can also increase the chances of corruption. Individuals further away from the reach of HQ might be a special risk (as in the Airbus case here <http://bit.ly/airnumbers>). Our chat in February with Richard Bistrong (filmed just before the lockdown) gives an eye-witness view of some of those issues - <http://bit.ly/bistronghead>.
7. Lobbying activity might be unusual – some organisations may be engaging with public officials more than usual, for example to make representations about lockdowns being lifted, business assistance schemes etc. Make sure that you are comfortable with the way those interactions are being handled.
8. Some countries have relaxed some legal requirements which might make bribery more likely. In Indonesia for example specific regulations have been introduced by Presidential decree which critics say effectively turn a blind eye to bribery during the pandemic.

Some investigations have already commenced into COVID-19 related corruption. For example, on 30 June, authorities in Brazil said that they had opened an investigation called *Operation Sangria* into alleged corruption relating to COVID-19 related purchasing, including respirators. It was reported that more than 20 search and seizure warrants had been executed. Reports suggested that the respirators were purchased from a wine importing organisation at an inflated price, involving money transfers to overseas accounts belonging to sham organisations.

### **Is there any guidance from regulators?**

Currently we're not seeing as much guidance from regulators as we've seen in other areas such as data protection. That may be since some agencies believe their role is to prosecute rather than to offer advice. We've mentioned already some advice from the DoJ in the US. There's a more pragmatic statement from the French Agence-Française-Anticorruption here on how COVID-19 is affecting their work <https://bit.ly/2Wa9wor>. In the UK The Serious Fraud Office says it is still investigating cases - <https://bit.ly/sfocovid>.

Last month the OECD said that it remained committed to the fight against bribery even in these challenging times. *"The high risk of corruption poses a major challenge to tackling this global health crisis,"* said Drago Kos, Chair of the OECD Working Group on Bribery. *"It is vital that countries remain actively engaged in anti-corruption efforts and work together to ensure their efforts to overcome this crisis are not weakened by corruption".*

In the US the Office of Foreign Assets Control (OFAC) has hinted at some future possible leniency if a company, *"as part of its risk-based approach to sanctions compliance, to account for [COVID-related] challenges by temporarily reallocating sanctions compliance resources consistent with that approach, OFAC will evaluate this as a factor in determining the appropriate administrative response to an apparent violation that occurs during this period."* It's difficult to rely on statement like this however when actions taken now will be judged in the future and its also important to remember that compliance is a global game – any leniency given in one country may not be reflected in another.

### **What about facilitation payments?**

Facilitation payments (small payments to Government officials to do something) are prone to rise during the pandemic. We're hearing anecdotal evidence of additional requests. As a reminder whilst facilitation payments may be permitted under the laws of some countries there's no exception in the UK Bribery Act 2010 and facilitation payments can and will be prosecuted. Often memories of bad things fade in the minds of prosecutors so you'll need to make sure that you stay focused on your policies and procedures and, in those rare cases where you are satisfied that you can make a payment lawfully, you'll need to make sure you can justify this robustly and that you record that justification.

There are similar concerns with Government care, aid and stimulus packages. For example if an official or third party suggests there might be an initial payment to be considered for these schemes exercise real caution.

### **What about charitable donations?**

Charities and good causes will also need to be cautious at this time and maintain their normal checks on the sources of funds. It is rumored that one charitable donation to fight COVID-19 for beneficiaries in China is already under investigation after a payment was traced back to a corrupt African politician.

More generally every organisation needs to be alert to bribery risk in payments being made. As we know from cases like Airbus, bribes can often be disguised. For example in the Airbus case, bribes were referred to as "medicine". There are fake charities being advertised, some of which are under investigation by the US authorities (see <https://bit.ly/dojc19scams>). There are many who will regrettably seek to exploit the current situation and organisations need to maintain appropriate levels of diligence.

In addition donations can often be used to mask bribes. Again this was a feature of the Airbus case. Make sure that the compliance team knows exactly why a particular good cause was selected and who is behind it. You'll also make sure there's no covert association with an ongoing tender or business arrangement.

Some NGOs have also expressed concern about possible misuse of funds intended to address the emergency. On 9 April 2020 for example Global Witness and 8 other organisations asked the US Congress to pass anti-corruption legislation as part of future Coronavirus response packages. On 12 May 2020 the World Bank called for specific auditing and compliance measures to be put in place to help minimise corruption risks. We have already seen similar scandals in the Ebola crisis where funds in Africa were diverted from essential healthcare to fund the lavish lifestyles of corrupt politicians. Saddam Hussein's government diverted millions of pounds worth of crisis funding to corrupt endeavours. In the US, the Mayor of New Orleans was found guilty of bribery after accepting money, holidays and services in exchange for contracts awarded in the wake of the Hurricane Katrina disaster.

### **Will alleged bribery be used as a reason to reduce liabilities?**

Yes. We have already seen examples of this. For example today Sir Stelios Haji-Ioannou the founder of EasyJet offered a £5m 'reward' for information that triggers the cancellation of a £4.5bn order EasyJet placed with Airbus. Airbus' corruption issues are well documented (see for example our summary here <http://bit.ly/busbribe>). He claims that the order for more than 100 new aircraft may have been secured by bribery and that the order must be cancelled to ensure EasyJet's survival. He also offered smaller payments of £10,000 for examples of lavish hospitality or unexplained wealth.

Many businesses will be reviewing their contractual obligations at this time. Some will argue that there has been corruption when seeking to avoid their liabilities. Again businesses will need to be able to investigate any credible allegations robustly to protect their position.

### **Are there any other management responsibilities?**

For those in senior management positions in companies, it is important to remember that not only are they likely to have responsibilities under anti-corruption legislation but other corporate governance laws could be relevant too. For example, in the UK under s.172 Companies Act 2016, directors of companies have to consider the success of a company and they have to have regard to (amongst other things);

1. the likely consequences of any decision in the long term;
2. the interest of the company's employees;
3. the impact of the company's operations on the community and the environment;
4. the desirability of the company maintaining a reputation for high standards of business conduct.

Duties like this are not suspended in times of crisis. In fact with volatile share prices and greater public attention corporate governance becomes even more important. For some of our clients, particularly those with UK subsidiaries, we have helped them prepare for special board meetings to look at these risks in a defensible manner.

### **Training**

Some organisations seem to be reducing the amount of compliance training they are doing. That is unlikely to be the right decision. Our experience from the training that we have been doing in the pandemic is that in some respects you have a more receptive audience at this time – people are more used to remote conference platforms (like Zoom, Webex or Microsoft Teams) than they were. In addition some of the sales channel in particular, whilst they are not travelling, have a bit more time to devote to training and compliance. You can still do quality compliance training remotely, although in our view it does require a slightly different approach. You should tailor examples to the current crisis and look out for the risks that the next few months present.

Conversely, think how reducing training would look objectively in a time of greater risk. It sends the wrong messages to employees and those you engage with. It is also likely to attract severe regulatory criticism (or worse) if there is an incident.

It is important not just to concentrate on procurement. Some laws (including the UK Bribery Act 2010) also criminalise the receipt of bribes. You will need to make sure that your people are not soliciting bribes and that they

know how to respond quickly and decisively if a bribe is offered. There's a special danger here if you are supplying scarce products. We have already seen how the supply of goods has become a political issue and it is likely that both supply and payment terms will come under scrutiny.

### **What is happening to existing bribery cases?**

In many countries around the world there have been disruptions to the court process. In the UK the UK's Justice Secretary has said it was "virtually impossible" to conduct jury trials remotely although trials will start with 'socially distanced' juries present in selected court rooms on 18 May 2020. The issues with the pandemic have meant that a number of large corruption trials are in limbo, including the Unaoil prosecutions relating to alleged bribery in Iraq. Clearly the longer these delays go on, the greater the likely consequences. Bribery cases by their nature take time to reach trial and additional delays can put doubts in the mind of jurors about the accuracy of distant recollections.

Some authorities are prioritising new COVID-related cases. For example, it has been reported in Germany that Interpol are coordinating international law enforcement authorities in connection with a corruption scheme relating to facemasks which allegedly involves organisations in Nigeria, Spain, The Netherlands and The United Kingdom.

### **What practical steps can I take to reduce risk?**

The main practical step that organisations can take will be to ensure that their existing policies and procedures are robust and that they continue to be used at these challenging times. In addition, organisations may want to consider:

1. Try and get a handle on risk. This will be particularly important if for example you are sourcing goods or services from different countries or different providers, and it will be especially important if your business model has changed.
2. Making sure that their training is fit for purpose. Many off the shelf training packages will not do the job in the current climate. Consider COVID-19 specific training to match your risk assessment.
3. Make sure that the "tone from the top" is consistent with good behavior. We have looked already at the statutory responsibility for leaders of organisations. In situations like these, sales people often "follow the money" unless the senior management tells them that integrity is still essential.
4. Keep investigating incidents. Investigations might have to be structured differently whilst travel is challenging, but we are not likely to see 'normal' any time soon. We have had experiences of conducting investigations remotely. You can change the design of the investigation to adapt in these circumstances and we have had success in getting to the bottom of issues despite the challenging circumstances. Naturally the investigation will still have to be conducted in a proper manner and you will want to maintain the integrity of the investigation, take steps to preserve evidence etc. but a properly structured investigation is still possible in most circumstances and that is likely to be a better option than waiting for perfect.
5. Remind those you deal with (called associated persons in the UK Bribery Act 2010) that you still expect them to behave properly and that your policies and procedures still apply. This will be particularly important as a reminder to your suppliers and to your sales channel. Most bribery investigations feature third parties and it is important to remind them too what you expect of them.
6. Due diligence is key. Some organisations are struggling with due diligence as those responsible for checking work remotely but again short circuiting the system is likely to be unwise. In many cases the new suppliers you use have a higher risk than those you have got an established relationship with who you check regularly. Due diligence continues to be important. Be especially alive to the risk of organisations controlled by Politically Exposed Persons (PEPs) and do sanctions checks too especially if you're procuring from countries which are higher risk such as Russia. In some parts of the world the organisations that can function with the least impact in a crisis are connected to the state.
7. Focus on what you are buying. It is well documented that corrupt deals often include unsatisfactory products – for example, the OECD talked about the dangers of "out of date, harmful or ineffective" medicines and medical equipment. We have also seen reports that even government procurement departments have been duped into buying PPE which did not meet relevant standards. For those who are interested there is an interesting study by Professor Robert Barrington at the University of Sussex about the rise of black market goods in a crisis. It is important to remember that black markets are easier to operate

now with the rise of the internet.

### More information

There is more information about bribery and corruption including films with leading commentators here <https://www.corderycompliance.com/category/bribery-corruption/>.

If you'd like a copy of our FAQs on the UK bribery regime or our tips on doing business in new markets please just let us know.

The following resources may also help:

1. The OECD statement is here <https://bit.ly/2WyROtT>
2. The OFAC statement is here <https://bit.ly/2SKu8lg>
3. The World Bank statement is here <https://bit.ly/3dXOKhU>
4. There is up-to-date information on health measures being taken around the world on the Elsevier portal - <https://www.elsevier.com/connect/coronavirus-information-center>.
5. John Hopkins University has figures on the current number of infections around the world - <https://bit.ly/39kctX3>
6. Details of Professor Barrington's black market study are here <https://bit.ly/3fvKOGl>

Please note that we're trying our best to keep this note up-to-date but to state what should be obvious: Events are moving quickly and you should not act or refrain from acting on the basis of anything in this note. Proper legal advice should be taken. For more information please contact Jonathan Armstrong or André Bywater who are lawyers with Cordery in London where their focus is on compliance issues.

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