

## Anti-corruption provisions in loan documentation

This article considers the legal background to and usage of “anti-corruption” provisions in English law loan documentation from the perspective of both lenders and borrowers.

### Key points:

- European loan market participants are alive to the risk of being tainted by the corrupt action of a counterparty. This risk can be mitigated by the adoption of appropriate policies and procedures designed to facilitate compliance with applicable “anti-corruption” laws (the maintenance of which is in effect, a legal requirement for those subject to the UK Bribery Act regime).
- Lenders’ policies and procedures when applied to lending relationships, may extend beyond pre-contractual due diligence, and call for the inclusion of specific contractual provisions within the loan agreement. These representations and undertakings are designed to crystallise the results of their pre-contract investigations and to provide comfort that the borrower group will continue to comply with applicable laws to an appropriate standard on an ongoing basis.
- Such provisions often sit alongside representations and undertakings relating to compliance with sanctions, which are a feature of many loan agreements both in the European and in the US loan markets.<sup>1</sup>
- There is no standard position on the content of representations and undertakings in loan agreements relating to anti-corruption laws and financial crime, although a starting point exists in some of the LMA templates. As on the topic of sanctions, the precise text of such provisions tends to be negotiated on a case by case basis.

### Introduction

The web of anti-corruption laws in force around the world is complex and the consequences of non-compliance range beyond criminal and other legal penalties. The National Strategic Assessment of Serious and Organised Crime noted in 2014 that:

**the impact of corruption is disproportionate to the level and frequency at which it occurs and [it] often has serious ramifications in terms of public confidence across public and private sectors**

<sup>1</sup> See ‘Arms to Iran or a Cuban cigar: a risk sensitive approach to sanctions for the loan market’ [2014] 8 JIBFL 501.

Corruption offences carry serious reputational risks in addition to the financial implications of heavy criminal and civil penalties and the possibility of being excluded from public tenders going forward under procurement rules.

As countries around the world have enhanced their domestic legal and regulatory framework to provide a more effective means of tackling corruption in all its forms, lenders and borrowers have had to devote increasing levels of attention to their compliance obligations under applicable laws in all relevant jurisdictions. Prior to entering into a new lending relationship, the borrower group will be thoroughly investigated by lenders to ensure its past and present compliance with applicable “anti-corruption” laws.

In an increasing number of cases, the results of this investigation will be reinforced contractually by the addition of representations and undertakings on this topic to the loan agreement. This is a long-standing practice in certain sectors of the loan market, for example in emerging markets and project financing transactions, in particular in transactions involving multilateral institutions, which are particularly focussed on anti-corruption measures.<sup>2</sup> However, over the past half-decade or so, such provisions have reached the mainstream and appear in ordinary English law corporate loan agreements with more frequency. Further, some borrowers are starting to seek reciprocal assurances from their relationship banks.

The nature of and legal background to these developments is considered below.

### What are “anti-corruption” laws?

The phrase “anti-corruption laws” has no universal legal definition and therefore could be construed quite broadly. In practice, it is used primarily to describe laws designed to combat corrupt practices, in particular, bribery. In transactions where related areas of law such as anti-money laundering/anti-terrorist financing measures and procurement rules are of particular concern, rather than relying on general “anti-corruption” clauses, these topics are quite often the subject of specific representations and undertakings. The focus of this article is on contractual provisions relating to bribery and corruption, but it is noted that contractual provisions addressing these related areas tend to cover similar ground to those relating to bribery and corruption discussed below.

The sources of anti-corruption law that are relevant to the transaction will depend on the identity of the lenders and the borrower and its group. In the English law loan market, many contractual terms are designed to address the requirements of the anti-corruption regimes in the UK and the US, although most will include a sweeping reference to other applicable laws. The UK and the US regimes are heavily influenced by the OECD convention on Combating Bribery of Foreign and Public Officials in International Business Transactions. The key features of the UK and US regimes in the context of lending transactions are outlined briefly below.

### UK Bribery Act 2010

The UK anti-corruption regime is set forth primarily in the Bribery Act 2010 (UK Bribery Act), which came into force on 1 July 2011, creating new bribery offences and repealing many existing offences. The UK courts have criminal jurisdiction where any part of an offence takes place in the UK, or - if all acts are committed outside the UK - if the offender has a “close connection” with the UK. Accordingly, the Bribery Act applies to UK entities and UK nationals (in respect of their activities both in the UK and overseas or located within the UK or overseas) and also to foreign individuals and entities operating in the UK.

<sup>2</sup> See ‘Multilateral Development Bank immunity in the age of anti-corruption’ [2016] 8 JIBFL 481.

The Bribery Act establishes four key offences:

- *Bribing another person (s 1)*: This involves offering, promising or giving a financial or other advantage to a person either:
  - intending to induce them, or another, improperly to perform a public function or business activity, or as a reward for the same; or
  - knowing or believing the acceptance of the advantage would in itself constitute improper performance.
- *Being bribed (s 2)*: Receiving as well as giving a bribe is an offence under s 2, which proscribes requesting, agreeing to receive or accepting an advantage:
  - intending personally or through another, improperly to perform a public function or business activity or as a reward for the same; or
  - when the request or acceptance would itself constitute an improper performance of a public function or business activity.

It is also an offence under this section improperly to perform such a function or activity in anticipation of receiving such an advantage.

- *Bribing a foreign public official (s 6)*: Bribing a foreign public official is the subject of a specific offence, of offering or giving to a foreign public official (or to another person with the assent of the foreign public official) any advantage that is neither permitted nor required by the written law applicable to that official, intending:
  - to influence them in their capacity as a foreign public official; and
  - to obtain or retain business or a business advantage.
- *Failure to prevent bribery (s 7)*: Under s 7 it is an offence for a company or partnership to fail to prevent a bribery offence under ss 1 or 6 committed anywhere in the world by a person “associated” with it, where it does so intending to obtain or retain business or a business advantage for that company or partnership. A person is “associated” with the relevant company if he performs services for or on its behalf. There is a statutory presumption that employees are associated with their employer, but limited guidance beyond that. The definition could therefore potentially apply to a company or partnership’s agents, contractors, suppliers, subsidiaries and volunteers, as well as (conceivably, although by no means certainly) its credit providers.

The last of these four offences, the corporate offence of failure to prevent bribery often causes most concern in the context of lending transactions. Historically, prosecuting this type of offence was difficult, due to the challenges of attributing knowledge of the alleged wrongdoer to the commercial entity. Failure to prevent bribery under s 7 is a strict liability offence. It is therefore not a pre-requisite in committing the offence that the company or partnership failed to prevent bribery with the knowledge that it was doing so.

The only defence to s 7 is that the relevant entity had adequate procedures in place designed to prevent bribery. Accordingly, under the UK regime, the existence of a documented process for managing

anti-corruption laws is essential. The Bribery Act does not specify what would constitute “adequate procedures” and defers to official guidance published by the Ministry of Justice, which suggests they would include due diligence, risk assessment and top level commitment to tackling these risks. The guidance sets out six “outcome focused and flexible” guiding principles designed to allow each organisation to tailor its policies and procedures in a manner proportionate to the nature, scale and complexity of the organisation and its activities.

The Bribery Act offences carry severe penalties. They include unlimited fines for individuals and corporates, and imprisonment for up to 10 years for individuals.

### US Foreign Corrupt Practices Act 1977 (as amended)

The key plank of the US anti-corruption regime is the Foreign Corrupt Practices Act 1977 (as amended) (FCPA). Under the FCPA it is an offence corruptly to pay, offer, promise, or authorise to pay foreign officials for the purpose of influencing that official to obtain or retain business, or to secure an unfair business advantage. It is also an offence to make a payment to foreign officials indirectly, including payments made by intermediaries or third parties on a company’s behalf and payments made to intermediaries and third parties for a foreign official’s ultimate benefit. The FCPA extends to corrupt offers, so a corrupt offer to a foreign official would be a violation, even if no payment is ever made.

Like the Bribery Act, the FCPA has significant extraterritorial application, although its application to foreign activities and persons is not framed in quite the same way. The persons and entities within the scope of the FCPA comprise “US domestic concerns”, “US issuers” as well as any other persons or entities acting within US territory.

“US domestic concerns” include individuals who are citizens, nationals, or residents of the US and companies that are organised under the laws of the US or have their principal place of business in the US. US corporates and nationals can be prosecuted under the FCPA even if no actions/decisions take place within the US. Officers, directors, employees, agents or stockholders acting on behalf of a domestic concern (including foreign nationals or companies) are also included.

“US issuers” include both US companies and foreign companies that have securities registered in the US, or are otherwise required to file reports with the Securities and Exchange Commission (SEC). In practice, this means that any company with a class of securities listed on a national securities exchange in the US, or any company with a class of securities quoted in the over-the-counter market in the US and required to file periodic reports with the SEC, is an issuer. A company need not, therefore, be a US company to be an issuer. Foreign companies with American Depositary Receipts that are listed on a US exchange are also issuers. US issuers may be prosecuted under the FCPA for conduct both inside and outside the US. Officers, directors, employees, agents or stockholders acting on behalf of an issuer (whether US or foreign nationals), and any co-conspirators, can also be prosecuted under the FCPA.

Non-US persons and non-issuer entities that, either directly or through an agent, engage in any act in furtherance of a corrupt payment (or an offer, promise, or authorisation to pay) whilst in the territory of the US are also within the reach of the FCPA. Officers, directors, employees, agents or stockholders acting on behalf of such persons/entities are also covered. For example, a foreign national who attends a meeting in the US that furthers a foreign bribery scheme may be subject to prosecution, as might any co-conspirators, even if they did not themselves attend the meeting. A foreign national or company may also be liable under the FCPA if it aids and abets, conspires with, or acts as an agent of an issuer or domestic concern, regardless of whether the foreign national or company itself takes any action in the US.

To summarise, the FCPA has a broad reach, and as is the case in relation to the UK Bribery Act, enforcement action has increased dramatically over past years with notable actions against both domestic and foreign individuals and companies. Penalties for breach of the FCPA include large fines for both individuals and corporates (up to \$2m for corporates per violation) and (for individuals) imprisonment for up to five years.

### Regulatory obligations

Lenders' concerns with regard to the borrower and its group's compliance with applicable anti-corruption laws stem from their own compliance obligations both under applicable laws (for example, the avoidance of the "facilitation" offence in s 7 of the UK Bribery Act) and as a result of obligations imposed by their regulators.

For example, in the UK, firms regulated by, *inter alia*, the Financial Conduct Authority (FCA) must comply with the FCA's Principles for Businesses which require regulated firms to conduct their business:

- with integrity, which precludes the firm itself, or its employees or agents, from knowingly engaging in bribery and corruption (Principle 1); and
- with due skill, care and diligence, obliging them to "take reasonable skill and care to organise and control [their] affairs responsibly and effectively, with adequate risk management systems" (Principles 2 and 3).

The FCA expects firms to assess the risks of becoming involved in, or facilitating, corruption and bribery and has issued extensive guidance on this topic. Enforcement action can be taken by the FCA against regulated firms for failings in systems and controls even where there has been no actual incidence of bribery or corruption.

### The Lender's perspective

The UK legal and regulatory regime, the FCPA and similar regimes in other relevant countries, most of which are driven by international commitments made at UN and OECD level, mean lenders must seek actively to identify bribery and corruption risks and put in place and maintain policies and processes to mitigate them. These processes are aimed at ensuring the institution itself is not at risk of legal liability as a result of its lending relationships and, as already mentioned, to protect against the considerable reputational risk of being associated with corrupt activities. The potential for liability within the borrower group in this area is also relevant to a lender's credit assessment of the borrower group, given the size of the potential penalties and implications for the borrower's business of being convicted of (or even investigated for) a bribery or corruption offence.

As a result, lenders may take the view that specific contractual provisions are required to address anti-corruption laws and ensure that the topic receives proper focus. Specific provisions designed to reinforce the pre-contract due diligence are potentially helpful to demonstrate the robustness of a lender's policy and procedures (for example, in the context of the "policies and procedures" defence to offences under s 7 of the UK Bribery Act).

In a UK context, this is underlined by both the FCA's and the British Bankers' Association (BBA) guidance on anti-bribery and corruption measures. The FCA's guide to preventing financial crime points to the inclusion of specific anti-bribery and corruption clauses in the regulated entity's contracts with third parties as an example of best practice. The BBA guide gives examples of relationships which could be perceived as higher risk, which include syndicated lending arrangements. It goes on to recommend that:

**[to] the extent possible written contracts should be entered into with relevant associated persons and where appropriate should contain provisions in respect of adherence to relevant anti-bribery laws, regulations and, in some cases, the organisation's policies and procedures. The contracts should warrant that the associated person has not and will not breach relevant anti-corruption laws. Additional contractual provisions to consider include ... additional anti-corruption representations and warranties as deemed appropriate.**

### **What do contractual terms typically cover?**

The LMA's recommended forms of facility agreement for investment grade borrowers do not contain representations and undertakings relating to anti-corruption laws. However, such provisions (following the enactment of the UK Bribery Act) are included in most of its other forms of facility agreement, for example, its leveraged loan agreements and its suite of agreements for developing markets borrowers. These provisions are often used as a starting point for negotiations by lenders in various contexts, including in investment grade loans.

The LMA's representation and undertaking both address the areas recommended by the BBA guidance noted above, namely the borrower group's compliance with "applicable anti-corruption laws" in the conduct of its business and the adoption and maintenance by each member of the borrower group of policies and procedures designed to promote and achieve compliance with such laws.

The undertaking also addresses the use of the proceeds of the loan:

**No Obligor shall (and the Parent shall ensure that no other member of the Group will) directly or indirectly use the proceeds of the Facilities for any purpose which would breach the Bribery Act 2010, the United States Foreign Corrupt Practices Act of 1977 or other similar legislation in other jurisdictions.**

The practice of seeking an undertaking with regard to the use of proceeds of the loan is interesting because it does not necessarily stem from a direct legal requirement (at least under the UK regime). It does, however align undertakings regarding compliance with anti-corruption laws with undertakings on sanctions, where the parties are typically legally required to ensure the proceeds of the loan are not applied in breach of sanctions.

### The borrower's perspective

Many borrowers are comfortable to give lenders comfort with regard to their compliance with anti-corruption laws, in some cases, subject to appropriate materiality qualifications. Many borrowers may also be comfortable to give comfort regarding policies and procedures. As outlined above, criminal proceedings against a corporate for the offence of failure to prevent bribery can be defended if the company has adequate procedures in place to prevent bribery and corruption. Whilst there is no obligation on (unregulated) corporates to have adequate procedures in place, if they do not, they will not be able to use the defence in the event of criminal prosecution. In practice, there is much overlap with good practices and policies in other areas, in particular with anti-money laundering systems and controls. Many large UK corporates will therefore have anti-corruption policies and procedures in place.

Undertakings with regard to the use of proceeds of the loan are perhaps slightly less common notwithstanding the LMA language, most likely, as noted above, because this may not be a legal requirement. As in relation to equivalent undertakings regarding the use of proceeds of the loan in breach of sanctions, where included, knowledge qualifications (in particular with regard to the “indirect” use of proceeds) are negotiated reasonably often.

Other topics that might be discussed include limiting the scope of these provisions to the Bribery Act and/or the FCPA (rather than all “applicable” anti-corruption laws) and temporal restrictions on the borrower's assurances with regard to compliance. Lenders will be concerned to flush out historic breaches (from a reputational and credit perspective rather than from the perspective of its own potential liability). However, borrowers may be concerned about the practicalities of an unlimited look-back exercise, and may therefore try to limit the provision by reference to applicable limitation periods.

Some stronger borrowers may be able successfully to limit the scope of any contractual provisions to apply to the borrowers and guarantors under the facility agreement only, however in most cases, such provisions are applied (as under LMA terms) to all members of the borrower group. Representations on this topic, like representations with regard to sanctions, will normally repeat.

### Reciprocity?

The provisions of the UK Bribery Act, the FCPA and other similar laws are not of concern only to lenders. Borrowers must ensure that their service-providers and counterparties comply with anti-corruption laws to an appropriate standard, from the point of view of both legal liability, reputational concerns and performance risk, in the same way as lenders. Unsurprisingly many adopt similar techniques to lenders and some multinationals' policies and procedures therefore require them to seek reciprocal undertakings from their relationship banks with regard both to anti-corruption laws and sanctions.

## Conclusion

Anti-corruption provisions are becoming more common in loan agreements. This is the case in the US as well as the European loan markets. In 2014, the Loan Syndications and Trading Association (LSTA, the LMA's US counterpart), at the request of its members, published guidance on the key anti-corruption risks affecting US lending transactions which includes specimen representations and undertakings. The LSTA guidance underlines that lenders should manage these issues in a “risk-based fashion”, “bearing in mind the facts and circumstances of a particular transaction”, suggesting that anti-corruption risks may not need to be elevated beyond due diligence in all cases.

This remains the case in the English law investment grade market where such provisions are not included as a matter of course. However, where lenders or particular lenders do raise the issue (which in the authors' experience, now happens more often than not), as in relation to contractual provisions on sanctions, the focus of discussions, is often on the extent to which the borrower is able to accommodate lenders' requests, rather than whether contractual provisions on this topic should be included at all.

In general, it is suggested that as lenders' proposals in relation to anti-corruption laws are often less wide ranging than those relating to sanctions and are often formulated in a risk-sensitive fashion, this tends to be a less contentious topic. In most cases, it is reasonably straightforward to settle representations and/or undertakings that are acceptable to both parties.

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### Further Reading:

- **Arms to Iran or a Cuban cigar: a risk sensitive approach to sanctions for the loan market [2014] 8 JIBFL 501.**
- **Multilateral Development Bank immunity in the age of anti-corruption [2016] 8 JIBFL 481.**
- **LexisPSL: Corporate Crime: Bribery, corruption, sanctions and export controls.**

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