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The Bribery Act 2010: what you need to know

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Why was the Bribery Act 2010 ("the Act") created?

The Act was created to replace the existing law (which still remains the law until the Act's offences are brought into effect), a complicated and confusing combination of statutory and common law offences that is the result of piecemeal development over more than 100 years.

The need for reform was widely acknowledged by legal commentators and practitioners, and the Bribery Bill had cross-party support as it went through Parliament. However, the final result is not without controversy and could have worrying consequences for any corporates operating in the UK.

When will the Act come in to force?

Although the Act received Royal Assent on 8 April 2010, the offences it creates will only come into force when ordered by the Secretary of State for Justice. It is anticipated that, with the exception of the Corporate Offence discussed below, all of the offences under the Act will be implemented early in the next Parliamentary session.

The Corporate Offence is unlikely to come into force until at least the end of this year or early next year. The Government has promised to publish guidance concerning the "adequate procedures" defence at least three months before the Corporate Offence is brought into force.

The Act is not retrospective in effect. Therefore, the existing law will continue to apply where any act or omission forming part of a bribery offence took place before the relevant new offence is brought into effect. (For further information about the existing law, please refer to our publication, *A guide to existing bribery and corruption offences in England & Wales).*

What are the offences under the Act?

1. General offences

— Promising, offering or giving[1], or requesting, agreeing to receive or accepting[2] an advantage (financial or otherwise), in circumstances involving the improper performance of a relevant function or activity.

- **"relevant function or activity"** means a public or business activity, which a reasonable person in the UK would expect to be performed in good faith, impartially, or in a particular way by virtue of the fact that the person performing it is in a position of trust.
- **"improper performance"** means breach of that expectation.

These offences will capture public and private sector bribery and, in some cases as explained below, they will capture acts of bribery committed overseas.

1. An "active" bribery offence
2. A "passive" bribery offence

2. Discrete offence of bribing a foreign public official ("FPO Offence")

— Promising, offering or giving an advantage (financial or otherwise) to a foreign public official ("FPO") intending: (1) to influence the FPO in his capacity as such; and (2) to obtain/retain business or a business advantage.

— Unless the FPO is permitted or required by the written law of the FPO to be so influenced – custom or tolerance will not suffice.

3. "Strict liability" corporate offence ("Corporate Offence")

— A corporate is guilty of an offence where an active general or FPO Offence is committed anywhere in the world by someone performing services on the corporate's behalf in any capacity intending to obtain/ retain business or a business advantage for the corporate.

— It is a defence for the corporate to show that it had in place "adequate procedures" designed to prevent bribery on its behalf.

For all of the offences, it does not matter whether the "advantage" is offered, given, requested, or received directly or through an intermediary. This should have the effect of ending any practice of paying bribes through intermediaries while claiming not to know that this was going on.

How can a corporate be liable under the Act?

There are two ways in which a corporate can be liable under the Act:

1. Corporate criminal liability under existing principles

A corporate can itself be directly liable for any act of bribery, including soliciting or accepting a bribe, if the "directing mind and will" of the corporate (i.e. board members or senior executives with power to bind the company) was implicated in the wrongdoing.

This has proven to be a very high test for prosecutors to meet in practice and the Director of Public Prosecutions has described it as "almost impossible" to prosecute. This is one of the key drivers for the creation of the Corporate Offence.

Jurisdiction

Any UK corporate can be liable under these principles, regardless where in the world the relevant acts occur. For a foreign corporate to be liable, it must commit an act or omission forming part of the relevant offence in the UK – i.e. through its "directing mind and will".

2. Corporate Offence

The Corporate Offence is designed specifically to avoid the difficulties created by the existing test and provides an automatic form of liability where an act of bribery has been committed for the benefit of the corporate, as explained above.

Whether a person is performing services on behalf of the corporate is a question of fact to be determined from all of the circumstances, but it will be presumed to cover an employee unless the contrary is shown. It may also include subsidiaries, intermediaries, agents, distributors, joint venture partners etc. – if they were in fact performing services for the corporate and committed an act of bribery in that regard. It is not necessary for the person performing the services to have been convicted of the bribery offence for the corporate to be held liable.

Jurisdiction

Only corporates that are incorporated in the UK or carry on business or "part of a business" in the UK can be liable under the Corporate Offence. Therefore, it is not crucial where the acts of bribery occur, but where the corporate conducts business. Foreign subsidiaries of UK companies and foreign companies with no UK parent can be liable under the Corporate Offence if they carry on business or "part of a business" in the UK. No explanation has yet been given of what is meant by "part of a business", but it seems highly probable that it will apply where a foreign company has a branch office in the UK, for example.

A foreign subsidiary of a UK corporate can cause the parent company to become liable under this offence where the foreign subsidiary commits an act of bribery in the context of performing services for the UK parent. However, the foreign subsidiary will not itself automatically be liable under the Corporate Offence in this regard (although it could be if the relevant tests are met and it carries on at least "part of a business" in the UK).

Further, if the foreign subsidiary is acting entirely on its own account it would not make the UK parent liable under the Corporate Offence – as it would not then be performing services for the UK parent. In that case, the UK parent could still become liable for the actions of its subsidiary in other ways, depending on the facts and its knowledge of the subsidiary's wrongdoing. For example, the UK parent could be liable for false accounting offences (e.g. where the accounts of the subsidiary are consolidated with its own accounts) and/or money laundering under relevant legislation (as bribes, together with any business obtained through bribes, may amount to the proceeds of crime).

What are "adequate procedures"?

The Act requires the Government to publish guidance on what will constitute "adequate procedures" before bringing the Corporate Offence into effect. The Government has promised to give businesses at least 3 months to put their procedures in place once the guidance is published. However, the Government has made clear that its guidance will be in the form of broad principles, with illustrative examples, rather than detailed, prescriptive standards.

During the Parliamentary debates on the Bribery Bill the Government representatives anticipated that the guidance would cover, among other things "the responsibilities of an organisation's board of directors; the identification of a named senior officer with particular responsibility for combating bribery; risk management procedures; gifts and hospitality policy; facilitation payments; staff training; financial controls; and reporting and investigation procedures … The guidance will also be designed with businesses of all sizes in mind"[3].

What procedures will be "adequate" for any particular corporate will vary, according to considerations such as the organisation's size, sector and the countries in which it operates. So, for example, a small firm in a low-risk sector may be doing enough simply to have a clear set of relevant anti-corruption principles in place that it has communicated to its workforce. However, for bigger organisations operating in high-risk jurisdictions or high-risk industries, far more will be expected.

Some industry bodies and anti-corruption organisations have already published guidance on what will be expected. The Serious Fraud Office has also produced guidance on what it would expect to see from corporates seeking to rely on the adequate procedures defence[4]. This may be useful as a pre-cursor to what we may expect from the Government's guidance and businesses should consider the SFO's guidance and any other relevant industry guidance in reviewing their existing procedures.

3. Lord Tunnicliffe, Hansard, 7 January 2010, column GC52
4. Approach of the Serious Fraud Office to dealing with overseas corruption, 21 July 2009

How can an individual be liable under the Act?

Any individual within a business (including any officer of a company) who commits acts or omissions forming part of a bribery offence may be liable for a primary bribery offence under the Act or for conspiracy to commit the offence with others (including, for example, his employer company).

If the individual performed the act or omission in the UK, it would not matter what nationality he or she was for the Act to apply. However, where the offence takes place entirely outside the UK, broadly speaking only British nationals and those ordinarily resident in the UK can be liable.

In addition, any senior officer (which includes directors, company secretaries, managers or those purporting to act as such) who "consented or connived" in any general (i.e. active or passive) bribery offence or an FPO Offence committed by the corporate, will be liable together with the corporate for that offence under the Act.

In this case, where the company itself is only liable because it is a UK corporate, but all the acts relating to the offence occurred overseas, only those senior officers who had a "close connection" to the UK could be liable. "Close connection" means, broadly, any British national or anyone else who is ordinarily resident in the UK. Therefore, it would seem that a foreign director resident abroad could avoid liability on this basis if all the elements of the offence committed by the corporate took place outside the UK.

Are facilitation payments and/or corporate hospitality permitted under the Act?

The Act adopts a "zero tolerance" approach and provides no specific defences or exceptions to allow facilitation payments or corporate hospitality if they would otherwise fall foul of the offences.

Facilitation payments

Facilitation payments[5] are illegal under the existing law and will remain illegal under the Act. As the Government representative in the House of Commons noted in the debate on the Bribery Bill, "We recognise that many UK businesses still struggle with petty corruption in some markets, but the answer is to face the challenge head-on, rather than carve out exemptions that draw artificial distinctions, are difficult to enforce, and have the potential to be abused. Providing exemptions for facilitation payments, as the US does, is not a universally accepted practice, and not something that we consider acceptable"[6].

However, while facilitation payments are technically illegal, it does not follow that their payment will be prosecuted in every case. It is part of a prosecutor's duty when deciding whether to prosecute to consider not only whether there is a realistic prospect of a successful conviction, but also whether it is in the public interest to prosecute. In that regard, "Each case must be considered on its own facts and merits, but the more serious the offence, the more likely it is that prosecution will be needed in the public interest"[7].

Therefore, businesses and individuals will have to rely on prosecutorial discretion not to prosecute them in individual cases where they felt compelled to make such payments in order to conduct business overseas.

5. i.e. payments to low-level officials to ensure performance of a non-discretionary function, such as the granting of a visa where there is no discretion allowed to the official in the process.
6. Claire Ward, Hansard, 3 March 2010, Column 981
7. Claire Ward, Hansard, 3 March 2010, Column 979

Corporate hospitality

Perhaps more concerning is that prosecutorial discretion will also have to be relied on in respect of corporate hospitality and promotional expenditure that may technically fall foul of the offences in the Act. This is particularly worrying given that in some cases, the general offences can be committed without the wrongdoer even realising that what he was doing was illegal. In the case of promotional expenditure involving foreign public officials, while the FPO Offence requires a certain intention on the part of the bribe-payer, it does not require any form of any impropriety for the offence to be triggered; almost any form of hospitality could trigger this offence, unless it was permitted by the written law of the FPO (which is unlikely).

During the Bribery Bill's passage through the House of Commons, the Government's representative said: "Corporate hospitality will invariably be provided to make potential customers, whether foreign public officials or anyone else, more favourably disposed to the provider of the hospitality in the hope that that will lead to a future commercial opportunity or advantage. To the extent that reasonable hospitality is a normal part of business, we are not seeking to discourage such practices… If a case involving corporate hospitality came to the attention of the investigating and prosecuting authorities the public interest might not be best served by a prosecution unless… the hospitality was excessive or unreasonable".[8]

This means that UK corporates are left in the uncomfortable position of having to guess what level of "advantage" provided by way of corporate hospitality is "reasonable" and what may result in a prosecution. In this regard, it is worth noting that the Government does not intend to give any assistance on this issue in its guidance on "adequate procedures".

What are the consequences of being found guilty of an offence under the Act?

The penalties under the Act are severe – there is a maximum penalty of 10 years' imprisonment and/or an unlimited fine for individuals. Corporates face an unlimited fine (including in respect of the Corporate Offence).

In addition, where a person (including a corporate) has been convicted of a corruption offence they face automatic and perpetual debarment from tendering for EU public contracts[9].

There are other possible serious consequences of being found guilty of an offence under the Act, including confiscation under proceeds of crime legislation, which seeks to take away the entire benefit obtained by the wrongdoer as a result of his offences. By way of example, and depending on the facts, in the worst case a conviction for a bribery offence could result in a business being ordered to pay a sum equivalent to its entire revenue for the previous 6 years. That payment would be in addition to any fine levied under the Act.

What steps should you be taking?

In light of the Act, it is now more urgent than ever that corporates review their anti-corruption procedures and policies to ensure they will be effective in preventing corruption from being committed on their behalf and to be able to rely on the "adequate procedures" defence in appropriate circumstances.

By doing so, Boards will be complying with their corporate governance and other obligations by seeking to protect the company, so far as possible, from potential liability under the Act.

8. Claire Ward, Hansard, 23 March 2010, Column 189 - 190
9. Public Contracts Regulations 2006 and Utilities Contracts Regulations 2006

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