

The UK Bribery Act 2010: what you need to know

CMS Cameron McKenna

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Why was the UK Bribery Act 2010 (“the Act”) created?

The Act was created to replace the existing law in the UK (which still remains the law until the Act’s offences are brought into effect on 1 July 2011), 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 has not been without controversy and may still have worrying consequences not only for UK corporates but also for any corporates with operations in the UK.

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 giving¹, or requesting, agreeing to receive or accepting² 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 outside of the UK.

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

- Promising, offering or giving an advantage (financial or otherwise) to a foreign public official³ (“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;

1. An “active” bribery offence

2. A “passive” bribery offence

3. A public official of a country or territory outside of the UK

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.

What are "adequate procedures"?

The Act required the Government to publish guidance for corporates on putting in place adequate procedures to prevent bribery (the "Guidance"), so that corporates would have a better understanding of how they could prevent bribery and meet the defence to the Corporate Offence if necessary. This Guidance was published in March 2011 and, at the same time, joint guidance on prosecutorial decision-making under the Act (the "Prosecution Guidance"), was published by the Directors of the Serious Fraud Office (SFO) and Department for Public Prosecutions (DPP).

Although the Act only required the Guidance to cover procedures, the Government has taken the opportunity also to set out its interpretation of how the offences should apply, in particular with respect to corporate hospitality, facilitation payments, joint ventures, subsidiaries and supply chains. The Government has also commented in the Guidance on when it thinks a foreign corporate will be caught by the Act.

This interpretative guidance is intended to allay the concerns of the business community that the Act may inadvertently criminalise legitimate business practices or require unreasonable levels of supervision by corporates of their business partners and agents. It is unclear what weight the courts will ultimately give to these views, but they will no doubt at least be taken into account in appropriate cases.

The Guidance suggests that corporates, in setting up procedures designed to prevent bribery, should consider six broad principles when designing their procedures, which are not prescriptive and are not intended to be "one-size-fits-all":

- Proportionate Procedures – *"The action you take should be proportionate to the risks you face and the size of your business"*.
- Top-level commitment – *"Those at the top of an organisation are in the best position to ensure their organisation conducts business without bribery"*.
- Risk Assessment – *"Think about the bribery risks you might face. For example, do some research into the markets you operate in and the people you do business with..."*.
- Due diligence – *"Knowing exactly who you are dealing with can help to protect your organisation from taking on people who might be less than trustworthy"*.
- Communication (including training) – *"Communicating your policies and procedures to staff and to others who will perform services for you..."*.
- Monitoring and review – *"The risks you face and the effectiveness of your procedures may change over time"*.

The key element is proportionality. 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.

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.

Application to non-UK corporates

For a non-UK 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”. Any UK corporate can be liable under these principles, regardless where in the world the relevant acts occur.

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.

Application to non-UK corporates

Any corporates that are incorporated in the UK or carry on a 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. Non-UK subsidiaries of UK companies as well as other non-UK incorporated companies can be liable under the Corporate Offence if they carry on a 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 non-UK company has a branch office in the UK, for example.

A non-UK subsidiary of a UK corporate can cause the UK parent company to become liable under this offence where the non-UK subsidiary commits an act of bribery in the context of performing services for the UK parent. However, the non-UK 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 non-UK subsidiary is acting entirely on its own account in offering or paying the bribe it would not make the UK parent liable under the Corporate Offence – as it would not then be performing services for the UK parent. The Guidance indicates that this test would not be met simply by virtue of a parent company obtaining indirect benefit from the subsidiary’s bribery – e.g. the payment of a dividend. Nevertheless, 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).

Of course, any non-UK entity involved in acts of bribery may also face liability under local anti-corruption legislation as well as any liability it may face under the Act.

The Guidance seeks to give more clarity on this question and advocates “a common sense approach” so that “organisations that do not have a demonstrable presence in the United Kingdom would not be caught”. It would not expect, therefore, the mere fact of a company’s securities being traded on the London Stock Exchange as being sufficient to qualify that entity as “carrying on a business” in the UK.

The Guidance also states that *“having a UK subsidiary will not, in itself, mean that a [foreign] parent company is carrying on a business in the UK, since a subsidiary may act independently of its parent or other group companies.”* This approach is consistent with normal corporate law principles. However, it does suggest that the manner in which corporate groups structure themselves – through branches, subsidiaries or other corporate arrangements – may affect whether they are caught by the Bribery Act. UK prosecutors have indicated that they may take a more aggressive approach to jurisdiction. Only time will tell how the courts determine this issue.

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. Therefore, British nationals living or working abroad should be aware that they can be prosecuted under the Act for their activities anywhere in the world.

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 outside the UK, 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.

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 payments⁵ are illegal under the Act (as they were under the old law). 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.

The Prosecution Guidance looks closely at the public interest factors in favour of or against prosecution of facilitation payments; it advises that if there are large or repeated payments, they are planned for or accepted as a standard practice, or the corporate policy regarding facilitation payments has not been followed, this would suggest that a prosecution should be brought. On the other hand, if the wrongdoing was a single, small payment which came to light due to a genuinely proactive approach

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

involving self-reporting and remedial action, the corporate's policy was followed even though the payment was ultimately made and/or the payer was under duress in making the payment, these would be factors tending against prosecution. In other words, where it can be shown that reasonable steps were taken to try to avoid paying facilitation payments and they were not simply accepted as part of doing business, a prosecution is less likely to be in the public interest.

One of the case studies attached to the Guidance also looks at this issue and suggests a range of practical steps that businesses may take when faced, for example, with a demand by foreign customs officials to pay "inspection fees" on the import of goods. These include: questioning the legitimacy of the demands; requesting receipts and identification details of the official making the demand; asking to speak with more senior officials; trying to avoid paying "inspection fees" in cash and directly to the official demanding them; informing the official demanding those payments that this may involve the company committing an offence under UK law; and informing the official that it will be necessary to report his/her demands to the UK embassy.

Corporate hospitality

While there is no specific exception or defence for corporate hospitality, the Act does not prevent or discourage hospitality, provided that it is proportionate and reasonable relative to the type of business being conducted. For example, the Guidance suggests, "...an invitation to foreign clients to attend a Six Nations match at Twickenham as part of a public relations exercise designed to cement good relations and enhance knowledge in the organisation's field is extremely unlikely... to be evidence of an intention to induce improper performance of a relevant function." In his Foreword to the Guidance, the Justice Secretary indicates that corporates can "Rest assured – no one wants to stop firms getting to know their clients by taking them to events like Wimbledon or the Grand Prix".

As a general rule of thumb, the Guidance notes (in the context of hospitality given to foreign public officials): "the more lavish the hospitality... then, generally the greater the inference that it is intended to influence the official to grant business or a business advantage in return." Nevertheless, bribes can also be based on "relatively modest expenditure". Therefore, while consideration of what is normal or expected in a particular sector or country is relevant in assessing whether the hospitality falls the wrong side of the line, it is not conclusive, particularly if those norms are extravagant.

Like the Guidance, the Prosecution Guidance is very clear that hospitality which is "reasonable, proportionate and made in good faith" will not be penalised. However, if the hospitality had no clear connection with legitimate business activity or had been concealed in some way, this would increase the likelihood of an inference that it was a bribe. Transparency will be key.

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 contracts⁹ (although the Government have indicated that debarment for corporates will be discretionary where the offence is the corporate offence).

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.

8. Claire Ward, Hansard, 23 March 2010, Column 189 - 190

9. Public Contracts Regulations 2006 and Utilities Contracts Regulations 2006

What steps should you be taking now?

In light of the Act, it is now more urgent than ever that all corporates operating in the UK 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.

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