

The Bribery Act 2010

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Summary

The Bribery Act 2010 comes into force on 1 July 2011. The Act, which is wider in scope than the US Foreign Corrupt Practices Act (FCPA), revolutionises English law on bribery by:

- providing a new corporate offence where companies will be criminally liable for bribes paid by employees or agents unless 'adequate procedures' are in place;
- expressly criminalising bribery of foreign public officials;
- re-defining the nature of bribery itself;
- widening UK jurisdiction over offences committed abroad; and
- increasing sentences to a 10 year maximum.

Who does the Act apply to?

The Act applies to:

- any person committing an act or omission forming part of a bribery offence which occurs in the UK, regardless of their nationality;
- companies or partnerships incorporated in the UK even if the act or omission occurs abroad;
- companies or partnerships incorporated abroad but carrying on part of their business in the UK;

- people resident in the UK, whatever their nationality, even if the act or omission occurs abroad; and
- citizens of the UK or British Overseas Territories, whatever their residency, even if the act or omission occurs abroad.

So a German company which pays a bribe to a foreign official through a London bank will be subject to the Act.

A UK company whose employee pays bribes abroad will be subject to the Act even if the employee is not a UK citizen. Similarly, a UK citizen who lives abroad and works for a foreign company is also subject to the Act.

Further, a US Incorporated company which fails to prevent bribery by one of its associates or agents outside of the UK will also come within the Act if it carries on business, or part of its business, in the UK.

The Act also applies to UK subsidiaries of foreign companies.

New corporate offence

This is contained in section 7 and is the most radical innovation of the Act. Although there are specific exceptions, such as health and safety law, companies are usually only guilty of criminal offences when a person identified as the 'directing mind' of the company is also personally guilty. The Act creates a further exception to this principle in circumstances where an employee or agent pays a bribe in connection with the company's business.

The offence (which only applies to commercial organisations) can be simplified as below.

The organisation commits an offence if:

- an employee, director or agent of an organisation pays a bribe in connection with the business of the company; but
- it is a defence to show that the organisation had 'adequate procedures' in place to prevent bribery.

Imagine Britco which sells services abroad. Its sales director promises a personal 'commission' to a director of Foreignco, and thus wins a new contract. The board of Britco approves the payment, though it is recorded as 'miscellaneous expenses'.

The sales director knew of the bribery and can be personally charged with an offence. Britco, as a company, may have also committed an offence, depending on whether it had adequate procedures to prevent bribery at the time of payment.

The individual directors on the board who approved the payment may also be guilty depending on whether they knew that the payment was for illicit purposes. The company may also be guilty of accounting offences under companies legislation and there are various other ways in which criminal liability might be established, including a charge of conspiracy.

Adequate procedures

The Act does not define 'adequate procedures'. The Ministry of Justice has published updated guidance as to what it believes will constitute adequate procedures. Some have found the guidance somewhat vague, but it refers to six principles which are relevant to adequacy of procedures.

Proportionate Procedures

The procedures should be relevant to the nature, scale and risk-profile of each business. They should be clear, practical, and accessible.

Top level commitment

The top level management of a business must commit to preventing bribery and to fostering a culture in which it is not tolerated.

Risk Assessment

This should really be the first step, involving a proper consideration of the risks of bribery being committed on behalf of the business, including risks associated with certain territories, business partners and practices. The risk assessment should inform the other procedures.

Due diligence

Involving checking up on the background and honesty of parties you do business with so that bribes are not paid on your behalf.

Communication

Making sure that the policies are communicated to staff and others and providing training.

Monitoring and review

Making sure management, auditors and others in the company check up on bribery and review internal controls regularly.

There is a growing body of expertise in the design of anti-corruption procedures often as part of wider 'ethics, integrity or governance' policies. Some accountancy and law firms (including Lawrence Graham) provide services in this area. The general counsel, chief executive or another senior figure should take responsibility for initiating and operating the procedures.

As important as detailed policies is the question of whether they are actually followed. It is highly dangerous for a company to have anti-bribery procedures on paper which are not observed, or which produce evidence of wrongdoing which is ignored.

Foreign public officials

The Act specifically outlaws paying bribes to overseas public officials. Although the purpose of the advantage must be to influence the official in his official capacity, there is a further requirement that the advantage is made so as to obtain or retain business or a business advantage. These concepts are generally close to those of the FCPA, although there are important differences, for example:

- the FCPA allows payments which are lawful under local law, whereas the UK exception is narrower - only payments in circumstances where the

official is allowed to be influenced by such a payment are lawful;

- there is no specific exception for bona fide expenses connected to promotional activities or performance of contracts, although normal and justifiable promotional expenses and corporate hospitality which is not over-lavish is unlikely to be of concern to the UK authorities; and
- facilitation payments are not excepted - see below.

Facilitation payments

Unlike the FCPA, the Bribery Act does not make any exceptions for 'facilitation payments' (i.e. payments to expedite or secure the performance of a routine governmental action). A \$50 payment to expedite customs clearance of perishable goods is as illegal as a \$5 million bribe to a defence minister. However, the UK Government has stated that minor one-off facilitation payments are unlikely to be the priority of enforcement authorities.

Re-defining bribery

As well as introducing the new corporate offence and foreign public official offence, the Act re-defines general bribery offences. The main elements of what is known as the 'payment' offence now are:

- provision of a 'financial or other advantage';
- intending either to induce the recipient or another person to perform functions improperly or reward him for doing so, or paying in circumstances where it is improper for the recipient to accept any such advantage; and
- the functions in question include functions in both the public and private sectors which should be performed in good faith, or impartially, or take place by the exercise of a position of trust.

This widens the scope of the offence, taking it away from the model where the recipient has to be in a specific public role or defined as the agent of a specific principal. Similar provisions apply to the 'receiving offences', ie people seeking or receiving bribes.

Both these offences are likely to apply to anyone in a business with knowledge, or even constructive knowledge, of a bribe. Directors or others turning a blind eye to

illicit payments are at significant personal risk. This is in addition to the risk to the company itself under the corporate offence.

The approach of the SFO

In July 2009 the Serious Fraud Office issued important guidance on its priorities in pursuing bribery offences. The gist is that:

- overseas bribery investigations are a priority and are attracting significant resources;
- the SFO will consider imposing only civil penalties in cases of self-reporting of bribery by the company; and
- such leniency depends on all the facts of the case, including whether the company has committed to reform and whether senior people were personally culpable. If so, they can expect prosecution personally.

The recent case of R v Mabey & Johnson is illustrative. The UK company pleaded guilty to bribing officials in Ghana and Jamaica. Fines and penalties of the order of £6.5 million were imposed. The penalties on the company were lower to reflect the guilty plea. Individual directors have recently been sentenced to significant terms in prison.

However, the UK system does not permit plea-bargaining as seen in the US. A senior judge has made it clear in R v Innospec that sentencing remains a matter for the courts alone and that civil penalties alone will usually be inappropriate for serious cases. This may mean that companies are at risk of criminal convictions even if they self-report and commit to change. Although the government has committed to clarifying that a conviction of a commercial organisation will not automatically result in debarment from public procurement contracts, the consequences may still be serious, especially outside the UK. Companies should obtain legal advice before taking any steps which might involve legal liability.

The SFO will consider the public interest before prosecuting any alleged bribery and has also published guidance as to the principles which will be considered. In minor cases there may not be a public interest in prosecuting, but the default position is that evidence strong enough

for a conviction is likely to cause a prosecution.

Latest status and implementation

It would be fair to say that the Act has become something of a political football, with questions being raised about the difficulties of compliance, especially with the corporate offence. However, with the publication of the final guidance from government and the prosecuting authorities, the Act will now come into force from 1 July 2011. Detailed investigations and prosecutions will follow. Events prior to that date will be governed by the previous law.

Next steps for businesses

Businesses should now be developing or updating their compliance procedures.

In-house counsel in UK businesses should therefore, as a minimum:

- assess the risk bribery and corruption may pose to their business;
- commit to implementing or amending policies to prevent bribery by the business or its agents in accordance with the existing guidance;
- monitor compliance actively; and
- in case of suspicion that something has gone wrong, seek early, expert legal advice.

The last point is close to our hearts. Recognising our bias, it is still worth emphasising that situations with such serious legal consequences need legal expertise, and quickly.

Feel free to contact me or your usual LG contact if you would like to know more.

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