

COVER STORY

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# INTRODUCTION OF THE UK BRIBERY ACT



REPRINTED FROM:  
JUNE 2011 ISSUE

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# Introduction of the UK Bribery Act

BY MATT ATKINS

**D**escribed as ‘the toughest anti-corruption legislation in the world’, the UK Bribery Act is due to enter into force on 1 July 2011. It is without doubt one of the most significant pieces of criminal legislation to affect the corporate world since the Proceeds of Crime Act 2002. A result of much legal wrangling, debate and dispute, the Act is sure to alter the business landscape of the UK, forcing companies to re-evaluate how they conduct their own business and partner with others. And while not everyone is convinced by the new legislation, all businesses must act to avoid the risk of enforcement action.

## Offences

The Act has had something of a difficult birth, a first draft being announced and rejected as far back as 2002. A consultation paper published in 2005 examined the perceived

concerns, and while it was agreed that there was broad support for reform, the government could not see how this could be realistically achieved. A white paper followed in March 2009, preceding the Bribery Bill announced in the Queen's speech of that year. The bill received support from all parties, despite pressure from the Confederation of British Industry, which was apprehensive about its impact on British competitiveness. Despite the concerns, the Bill received Royal Assent in April 2010 and became the Bribery Act 2010.

When implemented in July, the Act will replace the UK's old anti-bribery law – an amalgamation of 'inconsistent, anachronistic and inadequate' legislation dating back to 1886. "The existing anti-corruption legislation is very old, comprising of three pieces of legislation dealing with public and private bribery separately, and overseas bribery of foreign public officials in a third statute" explains Elizabeth Robertson, a partner at Addleshaw Goddard. "The attempt under the Anti-terrorism Crime and Security Act to make the UK's corruption legislation apply overseas never truly satisfied criticism of the inadequacy of UK legislation as expounded by the OECD in particular, but also by other organisations, including Transparency International and other anti-bribery campaigners." The new, comprehensive anti-bribery statute attempts to tackle the criticism of the earlier legislation, providing a clearer legislative framework and enabling UK authorities to more effectively tackle global corruption. It aims to make it easier to indict commercial organisations, along with any individuals associated with them, who commit bribery on their behalf.

Primarily, the Act sets out to achieve this objective by implementing four main offences. First, the Act covers the two 'general offences' of paying and receiving bribes. Section 1 of the Act makes it an offence to offer, promise, or give a financial or other advantage with the intention of persuading an individual to perform a 'relevant function or activity' 'improperly' or to reward that individual for doing so. The Act also makes it an offence to receive financial and other advantages with a view to performing a 'relevant function or activity' 'improperly', as outlined in Section 2. In the language of the Act, the term 'relevant function or activity' covers any public or business function. The individual performing that activity must do so in good faith, impartially, or be in a position of trust. If the performance of this 'function or activity' breaches the expectation of what a reasonable person in the UK would expect, it will be judged as 'improper' performance.

The 'function or activity' in question need have no connection to the UK. Where a breach of the Act occurs outside the UK, local practices or customs should be disregarded unless they form part of the 'written law' of the jurisdiction – 'written law' meaning any constitution, statute or judicial opinion set down in writing. Understandably, these broad and complex definitions have fuelled speculation and concern that they will infringe on particular facets of normal business conduct. As such, there is a strong possibility that the UK will see an initial flurry of litigation when the Act is implemented. Although members of the business community may consider the vagueness of the Act as intentional, the government has been at pains to make it clear the objective of the Act is not to 'trip up' legitimate business activities. "The ultimate aim of this legislation is to make life difficult for the minor-

ity of organisations responsible for corruption, not to burden the vast majority of decent and law-abiding businesses," the Lord Chancellor, and Secretary of State for Justice, Kenneth Clarke, has explained.

The next offence covered by the Act is the bribery of foreign public officials, which is made a distinct crime under Section 6. An individual will be guilty of this offence if he or she offers or gives a financial or other advantage to a foreign public official, either directly or through a third party, with the aim of influencing the official and obtaining or retaining business. The Act defines a foreign public official as "an individual holding legislative, administrative or judicial posts or anyone carrying out a public function for a foreign country or the country's public agencies or an official or agent of a public international organisation". The inclusion of the 'third party' is intended to prevent individuals using go betweens otherwise known as "agents" or "intermediaries" to avoid committing a crime themselves. While the legislation falls into line with the OECD Anti-Bribery Convention, the section is distinguished by the absence of a requirement to show that the public official acted improperly as a result of bribery. The offence under the Act applies only to the briber, and not the official who receives or agrees to the bribe.

These new offences have raised a great deal of concern, and some confusion as to what actually constitutes an act of bribery. The wording of the Act is particularly broad, and businesses are not sure where the lines have been drawn. Of specific concern is the point at which everyday hospitality and courting of clients becomes an offence. In response to this issue, along with others, the Coalition Government chose to hold a number of public consultations, with the intent of exploring and allaying the concerns of business and industry. As a result of these consultations, the government revised its final guidance, aiming to soften the Act's impact on UK business and clarify areas of uncertainty.

Addressing the issue of hospitality, the Lord Chancellor has said the guidance "makes clear that no one is going to try to stop businesses getting to know their clients by taking them to events like Wimbledon, Twickenham or the Grand Prix. Reasonable hospitality to meet, network and improve relationships with customers is a normal part of business." However, despite the guidelines, confusion persists, and some find that the government's attempts at clarification have further muddied the waters. "On hospitality the Joint Prosecution Guidance is brief as to detail and it is novel to see the use of 'lavishness' as a concept used to judge the lawfulness of hospitality events," says Matthew Cowie, counsel at Skadden, Arps, Slate, Meagher & Flom. "Unfortunately the Ministry of Justice guidance conveys a different message and tone which does not clearly differentiate between hospitality with public officials and private-to-private hospitality. Different and stricter standards are applicable under the Foreign Corrupt Practices Act where you have to clearly show there is a business purpose nexus and there is bound to be confusion in seeking to apply this in global businesses caused by the differences in tone and substance".

#### **Associated persons**

The final offence of the Act, covered by Section 7, is that of the failure to prevent bribery. This statute has arguably given

rise to the most uncertainty and apprehension, making businesses responsible for the actions of their employees and associates. The offence is one of strict liability, and a commercial organisation can be guilty of the offence if the bribery is carried out by an 'associated person'. Vivian Robinson, general counsel at the Serious Fraud Office (SFO), explains the principle. "An 'associated person' is defined as one who 'performs services' for or on behalf of the organisation and it is stated in the Act that whether this is the case is to be determined by reference to 'all the relevant circumstances'. It is clear that it was Parliament's intention to give Section 7 a wide enough range to include all those persons connected to an organisation who might be capable of committing bribery on behalf of the organisation. To this extent, businesses will undoubtedly be more vulnerable to enforcement action and potentially to complaints by competitors. To protect themselves from falling foul of this rule, organisations need to be prudent about those whom they employ, and diligent in their enquiries with regard to agents, contractors, suppliers and joint venture partners."

While current law dictates that a company can be found guilty of bribery only if senior management figures are involved, under the Act, businesses may be guilty of bribery, even if nobody was aware of the offence. "A company will now be liable where it has failed to control its employees and certain third parties that are associated with it – the SFO will neither need to prove intention or reckless complicity in bribery by its associates, the offence is committed by not doing enough to satisfy, firstly, the regulator, and latterly a court, that the company did enough to prevent bribery," explains Mr Cowie. This statute means that businesses will be more vulnerable to bribery charges, as third parties such as agents, consultants and other business partners are difficult to control and monitor. Whether or not the individuals involved in transactions giving rise to a Section 7 offence can be convicted as an accessory, is a subject of debate.

In the event of discovering an offence, in order to avoid criminal proceedings companies must prove they have 'adequate procedures' in place to prevent bribery from occurring. Initially, fears were raised that this ruling of the Act would have a profound negative effect on small and medium-sized enterprises (SMEs) in particular. In response, the Coalition published guidance on what amounts to 'adequate procedures' on 30 March 2011, emphasising that the aim of the legislation is to ensure that corporate organisations have sufficient and robust anti-bribery procedures in place, not to trip them up. "What the guidelines are encouraging is proportionality. It is clear that UK authorities do not expect a small business to spend huge sums of money on external advisors to rewrite all its systems," says Ms Robertson. "What they're asking for is that the business analyses its risk, considers where it operates, and looks at its existing systems. Businesses that insist they have never had a problem in my view are the ones that should be most worried, because all businesses have problems from time to time, whether it is corruption or fraud or otherwise. The aim is to be able to identify issues when they arise and deal with them appropriately."

In order to comply with the Act, businesses will be required

to update their anti-bribery policies before it comes into force. But what measures, exactly, must they take? "It is accepted that organisations should be able to develop procedures appropriate to their own circumstances and business sectors, taking account of their size and the particular risks to which they might be exposed," says Mr Robinson. "As a broad rule, organisations should look carefully at the six principles set out in the Ministry of Justice Guidance, together with other helpful advice on this subject published by organisations such as the OECD and Transparency International."

Implementing such procedures will minimise exposure to risk, although it is unlikely to prevent rogue elements from committing offences. It is hoped, however, that the Act will help to foster a more responsible and principled corporate culture where corruption and non-compliant behaviour is more easily identified. "Management, starting at the top, must be seen as fully committed to not simply achieving compliance but endorsing a culture of ethical conduct within the business," says Richard Grams, a partner at Troutman Sanders. "As the Guidance makes clear, to take advantage of the defence available under Section 7, companies must prove the adequacy of their anti-corruption procedures in court and to do so it will be necessary to show not only that such policies and procedures exist on paper but that these were applied consistently in practice." Having a code of ethics and training staff accordingly is only part of the picture. Businesses need to ensure that their anti-corruption programme is not viewed by employees as a mere 'box ticking exercise'.

#### Competitive concerns

A further criticism of the Act is that it will make UK businesses less competitive than other international players, who are subject to less draconian laws in countries that often do not enforce the legislation anyway. The Act provides UK courts with a wide jurisdiction and all offences will be extra-territorial in their scope. Prosecution will occur if an offence is committed by a UK national, corporate body, or individual who ordinarily resides in the UK, whether or not the offence took place outside its borders. Non-UK businesses will be liable if any act or omission forming part of a bribery offence takes place in the UK. These provisions will undoubtedly have a major impact on foreign companies. Many still fear, however, that the Act does not create a level playing-field, and that non-UK companies may be handed an unfair advantage. These fears are supported by the fact that a number of multinational companies have already withdrawn from the UK in order to avoid liability for overseas bribes. "Concerns about extraterritorial reach are already having a negative effect on UK companies contemplating transactions involving foreign entities where corruption is or may be an issue," asserts Mr Grams. "The expanded range of liability – covering payments to individuals as well as government officials and making the company liable for all those who act for the company – means that UK companies will shoulder the costs of preventing third parties, as well as staff, from engaging in corrupt activities on their behalf. Regarding facilitation payments, in countries like China and India, where benefits of various kinds are routinely solicited, UK companies are very likely to be at a

disadvantage in competing for business because they will be held back from making facilitation payments or offering other inducements,” he adds.

The reach of the Act has been addressed in the guidelines, though for some the government has again failed to make the situation any clearer, and may be said to have given non-UK companies a greater competitive edge. “The more controversial issue fuelled by the government, partly in its guidance but also through the comments of the Justice Minister, is the suggestion that unless a business is listed in the UK, which is not the definition in the Act, it need not worry about the SFO pursuing it. In my view, that cannot be right,” says Ms Robertson. “Firstly, this is not what the Act says, and secondly, the SFO has responsibility for prosecuting overseas corruption. There seems to be a tension between what the SFO wants to do, which is to prosecute cases of international corruption as it sees fit, however loose the connection with the UK is, and the government, which is keen to express that unless a company is listed or very closely connected to the UK, it will not be prosecuted for corruption. I think that issue remains on the table.”

In tandem with this, comparisons between the UK Bribery Act and the US Foreign Corrupt Practices Act (FCPA) have raised questions over the extent to which the Act goes beyond US and other international standards. While some believe that the strict statutes of the Bribery Act will have negative implications for UK business, others take a softer view. “The two Acts are broadly comparable in many respects,” according to Mr Cowie, although the Bribery Act covers conduct not covered by the FCPA most importantly in the criminalisation of receiving bribes and private bribery. “Also the Act goes beyond the standard set by the US on facilitation payments but this is a line that most other countries have taken. The Act is less strict on hospitality than certain FCPA settlements. But most importantly the FCPA creates liability, including individual liability, for knowledge or reckless disregard to the activities of any third party – whereas the UK only creates corporate criminal liability for the actions of certain third parties – both have their advantages and disadvantages but neither can be said to be more onerous.” Despite this, it is difficult to say that UK companies will not be disadvantaged by the Act’s ruling on facilitation payments. Whereas the FCPA offers a ‘safe harbour’ for such payments, the Bribery Act does not. And considering that in emerging markets such as China and India these payments and similar benefits are regularly solicited, UK business may well find it extremely difficult to compete.

But, whether or not one piece of legislation or the other has more teeth is something of a moot point for some. The fact is that strong legislation is appearing globally, and eventually all businesses will be subject to comparative anti-bribery regimes. “I do not believe that the taking by the UK of an arguably tougher stance on bribery in these areas than that contained in the FCPA is likely to have an adverse effect upon the global competitiveness of UK companies. The international community recognises the need for major measures to tackle corruption and we are seen to be responding responsibly to that call. In reality, I think it unlikely that a reputable

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international concern would regard our approach to bribery as being a negative factor when considering a UK company in a competitive situation,” Mr Robinson says.

### **Prompt action**

The UK Bribery Act has stirred debate and sown confusion for a number of years now, and the resultant government guidance arguably raises as many questions as it answers. However, stepping aside from the discussion, the fact is that the Act comes into force in July, and the debate surrounding it will not deflect the government and legislators from enforcing the new legislation. Businesses must be prepared, taking steps to review current anti-bribery procedures, and to address any uncertainties. Companies must also take action on the employee level if they wish to avoid enforcement action under the new rules. “There needs to be trust, but also verification that staff are complying,” stresses Mr Grams. “Normally this is achieved through internal controls such as payment authorisations and appropriate monitoring. Businesses should seek to cultivate an anti-corruption culture pervading the entire organisation from the top down, and constantly re-assess their corruption risks and how effectively their programme addresses these. With the wider reach and scope of the new Act, and the vicarious liability provided under the Section 7 offence, companies can no longer afford to simply turn a blind eye to what their staff and those acting on their behalf get up to.” In light of the confusion that has characterised the Act, many of the concerns raised will only be addressed as case law surrounding the Act develops. Establishing adequate processes for compliance takes time, commitment and resources. Companies that have yet to implement an updated anti-bribery programme must do so now, or face the prospect of becoming a test case, with all of the consequences that may bring. ■

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