



The Bribery Act 2010: how will it affect your business?

On 8 April 2010 the Bribery Act 2010 (the Act) was given Royal Assent. The Act will be implemented after a three-month notice period once the Ministry of Justice has published guidelines on the Act. These guidelines are now expected to be published later this year and it is therefore important for all companies to consider the implications of the Act on their business now. The Act is a significant piece of new legislation which no company doing business in the United Kingdom can afford to ignore.

The Act obliges any company operating in the United Kingdom to review its policies and business procedures to ensure that it is not dragged into costly and potentially damaging bribery proceedings. In addition, the Act sets out a catalogue of penalties, including fines which in certain cases can be unlimited.

The Act is the result of committee work that was initiated in 1995 with the Nolan Committee and pressure from the OECD to adopt rules which deal with bribery more effectively. It introduces 4 new offences as follows:-

- bribing another person;
- being bribed;
- bribing a foreign public official; and
- a corporate offence of failing to prevent bribery.

Application

Companies affected and territorial implication of the Act

The Act applies to a) all United Kingdom companies and foreign companies doing business in the United Kingdom and b) to all UK businesses trading overseas. The Act covers therefore companies set up in the UK such as subsidiaries of overseas companies or companies set up in the UK with shareholders residing in the UK. It also covers foreign companies doing business in the UK, for example by way of an established office in the UK.

The Act applies to offences committed in England and Wales, Scotland or Northern Ireland, if any act or omission which forms part of the offence takes place in that part of the UK. An offence is also committed if the act or omission does not take place in the UK, but the person's act or omission would be an offence if carried out in the UK and the person has a close connection (such as British citizenship or being a resident in the UK) with the UK.

The scope of the Act is therefore very far reaching indeed

Main provisions of the Bribery Act 2010

1. Bribing another person and being bribed

The Act sets out two principal offences. Firstly, it is an offence to offer, pay or give a bribe, ie. bribing another person. Secondly, it is an offence to request, agree to receive or accept a bribe, ie. being bribed.

1.1. Bribing another person

The Act states that a person (P) is guilty of an offence where P offers, promises or gives a financial or other advantage to another person if:

1. P intends the advantage to a) induce the other person to perform a relevant function or activity improperly; or b) reward the other person for the improper performance of such a function or activity; or
2. P knows or believes that the acceptance of the advantage offered, promised or given, in itself constitutes the improper performance of a relevant function or activity.

It does not matter whether the person to whom the advantage is offered, promised or given by P is offered, promised or given that advantage directly or through a third party. Accordingly, P will be guilty of an offence if the advantage is offered, promised or given through an agent.

The Act also introduces a separate offence relating to the bribing of foreign public officials. A person is guilty of such an offence if his intention is to influence the official in the official's capacity as a foreign public official. Officials include government officials and those working for international organisations.

1.2 Being bribed

The Act also criminalises receiving a bribe. The recipient (R) of a bribe will be guilty of an offence if:

1. R requests, agrees to receive or accepts a financial or other advantage, where R intends that a relevant function or activity is performed improperly;
2. R requests, agrees to receive or accepts a financial or other advantage, where the request, agreement or acceptance itself is the improper performance by R of a relevant function or activity;
3. R requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance of a relevant function or activity carried out by R or by another person;
4. A relevant function or activity is "improperly performed" by R (or another person, where R requests, assents to or acquiesces in it) in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage.

It does not matter whether a) it is R or a third party, who requests, agrees to receive or accepts the advantage; or b) the advantage is for the benefit of R or another person.

2 "Relevant function or activity" and "Improper performance" to which bribe relates

The provision of a financial or other advantage must be made with a view to bringing about a "relevant function or activity" being carried out "improperly". In other words the intention of the provision of an advantage is for someone to carry out his duties in an inappropriate way. The Act defines "Relevant function or activity" and "Improper performance" and these concepts will be dealt with below.

2.1 "Relevant function or activity"

This is defined as:

1. Any functions of a public nature.
2. Any activities connected with a business.
3. Any activity performed in the course of a person's employment.
4. Any activity performed by or on behalf of a body of persons whether they are incorporated or unincorporated.

In addition, a "relevant function or activity" must also carry an expectation that persons performing the functions or activities:-

- are expected to do so in good faith and impartially; and
- are in a position of trust.

A “Relevant function or activity” also includes functions/activities which have no connection with the UK or is performed in a country or territory outside the UK. The activities include payments in both the private and the public sector. This means that companies will also have to ensure that their behaviour in relation to other companies does not violate the Act.

2.2 “Improper performance”

A relevant function or activity is improperly performed if a) the relevant function or activity is performed in breach of a relevant expectation; or b) the failure to perform the function or activity in itself is a breach of a “relevant expectation”.

To determine what is meant by “expectation” the Act states that it is what a reasonable person in the UK would expect in relation to the performance of the type of function or activity concerned.

If the performance of the relevant function or activity is not subject to the laws of the UK, the Act specifically states that any local custom or practice should be disregarded unless those are permitted or required by the written law of the country or territory concerned. The Act defines “written law” as law contained in any written constitution or provision made by or under legislation, or any judicial decision applicable to the country or territory concerned and which appears in published written sources.

This means that if an English company operates in an area outside the UK, where it is the local custom that “facilitation payments” are made to government or local officials in order to obtain licenses, contracts and the like, the expectation test above entails that unless that particular local custom is stated in written law as defined above, that particular custom must be disregarded for the purposes of deciding whether making a facilitation payment is a breach a relevant expectation and thereby means that the relevant function or activity has been performed improperly.

From a practical point, the Act has thus taken away the defence that a company was only “complying” with local customs, because actions such as making facilitation payments (or other bribing offences) are very rarely included in written laws anywhere in the world.

2.3 Practical implications – corporate hospitality

Some provisions of the Act contain very vague expressions. It will therefore depend on the specific circumstances of a matter whether a particular behaviour is an offence under the Act.

Some instances are relatively easy to ascertain. For example, if a company forwards a payment to an employee of a public body with the intention that the employee is to grant a contract to the company, an offence will almost certainly have been committed under the Act. However, it becomes more blurred when for instance public employees are treated to corporate hospitality. Does corporate hospitality constitute bribery for the purposes of the Act? The Government Minister, Lord Tunnicliffe, said during the debate before the Act had been passed that

“We recognise that corporate hospitality is an accepted part of modern business practice and the Government is not seeking to penalise expenditure on corporate hospitality for legitimate commercial purposes. But lavish corporate hospitality can also be used as a bribe

to secure advantages and the offences in the Bill must therefore be capable of penalising those who use it for such purposes”.

It seems that the decisive factor will be whether the hospitality is for legitimate corporate purposes. On the one hand, if a company has invited members of a public institution to the company's premises to demonstrate that it has the capability and/or experience to carry out a particular contract with the public authorities, it seems unlikely that the company will contravene the Act by for example a) paying a contribution towards transportation costs of the public employees; or b) serving refreshments during the meeting; or c) paying accommodation costs for a standard room if the employees of the public institution are required to stay overnight.

On the other hand, lavish corporate hospitality where there is absolutely no technical content or any business discussion is more likely to violate the Act.

3 Corporate offence of failing to prevent bribery

3.1 The offence

The Act introduces an offence whereby a commercial organisation (C) is guilty of an offence if a person (A), associated with C, bribes (within the meaning of the Act) another person, intending to obtain or retain business or a business advantage for C. This offence can be committed in the UK or overseas.

For these purposes, a “commercial organisation” includes:

1. A body which is incorporated under the law of any part of the UK and which carries on a business anywhere (whether there or elsewhere).
2. Any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the UK.
3. A partnership which is formed under the law of any part of the UK and which carries on a business whether there or elsewhere.
4. Any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the UK.

“Commercial organisation” therefore includes:-

- private limited companies incorporated in the UK;
- companies incorporated in Europe which carry out business in the UK; and
- partnerships.

For the purposes of the Act a person is associated with C if he/she is a person who performs services for or on behalf of C. It does not matter in what capacity A performs services for or on behalf of C, so A may for example be C's employee, agent, subsidiary or joint venture partner.

The practical implication of this provision is that for example a parent company (incorporated in the UK or for elsewhere in the EU) may be liable if its subsidiary in the UK violates the Act. This further underlines the need for parent companies to monitor the behaviour of their subsidiaries.

3.2 The defence

If C can show that it has put in place “adequate procedures designed to prevent bribery”, C will have a defence against a bribery allegation. This means that if C can demonstrate that it has put in place measures to counter bribery and that these measures are “adequate”, C will not be liable for any bribery offences which its employees, agents or subsidiaries have

committed. The practical effect is therefore that C's directors must put in place adequate measures against bribery.

The Act imposes on the Secretary of State an obligation to publish guidance as to what measures commercial organisation can put in place. The Ministry of Justice has issued a guidance note for consultation in this regard. The Ministry of Justice will later this year publish the final version of the guidance. The Ministry of Justice has indicated that the guidance will not be regulatory in nature. Organisations must be able to develop procedures appropriate to their own circumstances and business sectors which take into account, for example, their size and the particular risks to which they might be exposed. The note sets out a number of principles. These are

- *Risk assessment.* An organisation must regularly assess and understand the risks of corruption that it faces. It can then consider the suitability and effectiveness of anti-bribery measures and determine the resources necessary to implement them.
- *Top level commitment.* It is the board of directors, owners (that is, the owner managers of a small organisation, rather than the shareholders of a large or listed company) or equivalent body who should establish a culture in which bribery is never acceptable. They should make appropriate statements to that effect, setting out the consequences of breaching anti-corruption policies and procedures, and publicly communicate these to subsidiaries and business partners.
- *Due diligence.* Carrying out risk-based due diligence on an organisation's business partners is an essential aspect of managing the risks of bribery. Such background checks should help identify bribery risks and enable the organisation to take preventative measures.
- *Clear, practical and accessible policies and procedures.* The policy and procedures document could include: a clear prohibition of all forms of bribery; guidance on making political contributions, charitable contributions, gifts, hospitality and expenses; advice on relevant laws; action to take when faced with extortion and blackmail; an explanation of whistleblowing; and information on anti-corruption programmes in the relevant sector.
- *Effective implementation.* Policies and procedures are required to be properly implemented and connected to the organisation's management framework.
- *Monitoring and review.* Organisations could consider internal processes needed to review anti-bribery policies. Smaller businesses could support the anti-bribery regime by having effective financial and auditing controls and larger organisations might include financial monitoring, bribery reporting and incident management procedures.

In view of the above, companies could put in place policies and measures such as: -

- prohibition on bribery in any form whether direct or indirect and by or for the organisation;
- commitment to implementing systems to counter bribery;
- a statement of values and code of conduct with a clear anti-corruption and anti-bribery element;
- detailed policies and procedures including, for example, policies on gifts, corporate hospitality, facilitation payments, vetting of employees, agents and advisers, lobbying and political contributions;
- risk management procedures, for example, regular auditing of compliance.
- Internal controls;
- monitoring employees', agents' and subsidiaries' compliance with anti-bribery measures;
- implementation of whistleblowing procedures to counter bribery;

- constant review the adequacy of internal procedures to prevent bribery;
- staff training and guidance to ensure that written procedures are available to staff and contracted consultants;
- incorporate compliance with anti-bribery measures into contracts of employment and consultancy contracts, including enabling the employer to terminate employment or engagement in the case of breach;
- consider including standard clauses in commercial contracts prohibiting bribery and corruption;
- carry out due diligence before entering into arrangements with other parties; and
- ensure that appropriate checks are carried out during the processing of payments (This could be done at the same time money laundering checks are carried out).

Conclusions

The practical implication of the Act in 2011 for companies operating in the UK is that they must review their business procedures to ensure that they have a defence to any non compliance with the Act when it comes into force later in the year.

Companies should implement effective anti-bribery measures, including policies on gifts, corporate hospitality, establish procedures to vet employees and business partners and make sure that their standard terms include provisions and adequate measures against bribery. The good news is that companies have a little time now to identify the risks facing their business and to put in place measures designed to counter bribery.

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