EDWARDS ANGELL PALMER & DODGE

Guidance Note

The Bribery Act 2010

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At a glance

- the law of bribery in England and Wales is widely regarded as outdated and uncertain
- the Bribery Act 2010 is intended to provide a consolidated scheme of offences, and to make "the law of bribery simpler and more appropriate to modern times and consistent with [the UK's] international obligations"
- the Act will be implemented in April 2011
- the Act applies to bribery in both the public and private sectors
- the Act criminalises offering, giving, requesting and receiving bribes
- there is a specific offence of bribery of foreign public officials
- criminalisation extends to bribes paid overseas
- directors and other officials could be personally criminally liable if they have consented to or connived at the commission of an offence
- a new offence of the failure of a commercial organisation to prevent bribery has been introduced
- that offence applies to UK companies and to companies that carry on business in the UK, and could apply to bribes with no connection with the UK business
- the Act requires companies to implement, maintain and enforce rigorous anti-bribery policies
- facilitation payments are criminalised, but it is suggested they will only rarely be prosecuted
- a company convicted of an offence of corruption or bribery faces permanent mandatory exclusion from public procurement contracts across the European Union
- it is possible that conviction for failure to prevent bribery may trigger the mandatory exclusion
- dealings with funds received as a result of bribery could constitute a money laundering offence

Introduction

The law of bribery in England and Wales is widely regarded as outdated and uncertain. The Government has been under significant international pressure to revise and simplify the law, in particular from the Working Group responsible for monitoring compliance with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, to which the United Kingdom is signatory.

In an October 2008 report, the Working Group stated that the UK's failure "to enact effective and comprehensive legislation undermines the credibility of the UK's [anti-bribery] legal framework and potentially triggers the need for increased due diligence over UK companies by their commercial partners or Multilateral Development Banks".

The Bribery Act 2010 (the Act) was passed on 8 April 2010. The Act followed an earlier consultation paper and a detailed review of the existing law by the Law Commission. It applies to bribery in both the private and public sectors, and to bribes paid overseas. It is intended to provide a consolidated scheme of offences: existing bribery and corruption laws will be repealed on implementation of the Act.

A bribe could be the payment of money, another financial advantage or a non-financial advantage, including, for example, lavish hospitality or gifts.

The Act includes the offence of "a failure by a commercial organisation to prevent bribery", applicable both to organisations incorporated or formed in the UK, and to organisations which carry on any business in the UK. Its implementation will undoubtedly create an obligation to implement, maintain and enforce effective anti-bribery policies, systems and controls, as an organisation will be liable for a bribe paid on its behalf unless it can demonstrate that it had implemented adequate procedures designed to prevent bribery.

On 20 July 2010, it was announced that the Act will be implemented in April 2011, following a consultation exercise on adequate procedure guidelines which is intended to lead to publication of the guidelines in January 2011.

The offences

The Act contains the following broad offences:

- offering or giving a bribe (**bribing another person**)
- requesting or receiving a bribe (**being bribed**)
- bribery of a foreign public official
- a commercial organisation failing to prevent bribery.

The general offences of bribing another person or being bribed

The general bribery offences can be committed only in relation to broadly defined functions or activities: any function of a public nature; any activity connected with a business, trade or profession; any activity performed in the course of a person's employment or any activity provided by or on behalf of a company, partnership or unincorporated association.

It will be necessary for the prosecution to demonstrate that the person performing one of these functions or activities was expected to perform it in good faith, or was expected to perform it impartially, or was in a position of trust by virtue of performing it; and had acted improperly by failing to meet that expectation. Improper performance is to be judged by whether it breaches the expectation of what a reasonable person, in the UK, would expect in relation to the type of function or activity concerned. In assessing that question, local custom or practice is to be disregarded, unless permitted or required by written law.

Unusually, the offences are expressed as scenarios, termed "cases" in the Act. There are two offences covering the payment of bribes, and four covering their receipt. The formulations of the offence are complex, and probably overly so, although when publishing draft legislation the Law Commission suggested that this is necessary to ensure that the offences cover all of the widely differing ways in which bribes are promised, made, demanded and received.

The proposed offences are expressed as follows:

Payment offences

- Case 1: the defendant offers, promises or gives a financial or other advantage intending to induce another to perform improperly one of the functions or activities, or as a reward for improper performance;

- Case 2: the defendant offers, promises or gives a financial or other advantage to another, knowing or believing that the acceptance of the advantage would itself constitute the improper performance of one of the functions or activities;

Recipient offences

- Case 3: the defendant requests, agrees to receive or accepts a financial or other advantage intending that one of the functions or activities should be performed improperly;

- Case 4: the defendant requests, agrees to receive or accepts a financial or other advantage, where the request, agreement or acceptance constitutes the improper performance of one of the functions or activities;

- Case 5: the defendant requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance of one of the functions or activities;

- Case 6: the defendant performs one of the functions or activities improperly in anticipation or in consequence of the receipt of a financial or other advantage.

Bribes paid through third parties, or provided for the benefit of third parties, are caught by the offences.

Bribery of foreign public officials

The Act contains a specific and stand-alone offence of bribery of a foreign public official. The offence will be committed if the defendant offers or pays a bribe with the intention of influencing a foreign public official, in his or her official capacity, to obtain or retain business, or an advantage in business. The Act includes a broad definition of a foreign public official. Again, the offence would catch both direct payments and payments made through third parties, and also payments made to third parties at the request or acquiescence of the public official.

It would be a defence to show that the foreign public official was permitted or required by written law to be influenced by the offer or making of a payment.

The offence inevitably overlaps with the general offences described above. This has been justified on the basis of the need for the UK to demonstrate and monitor compliance with its international obligations to deter and punish corruption transactions taking place overseas in accordance with the OECD Convention on Combating Bribery, and to make it easier for the courts to interpret the scope and nature of the offence against the 'evolving background' of the OECD Convention.

There is no requirement for the foreign public official to perform their functions improperly. The offence will be committed if the defendant intended to influence the decision of the foreign public official, but failed to do so.

Connivance by directors

Directors, managers, company secretaries or those holding similar offices will be personally criminally liable if they have consented to or connived at (i.e. ignored) the commission of one of the proposed general offences, or the offence of bribing a foreign public official. This is consistent with similar provisions in the Fraud Act 2006. The term "manager" is not well-defined in English law, and could apply to quite junior employees in large organisations.

Failure of commercial organisations to prevent bribery

A company or other entity could be liable for the proposed general offences outlined above, if committed by individuals representing its "controlling mind". However, it is notoriously difficult to prosecute companies on this basis and there has never been a successful prosecution in England of a company for bribery. The OECD Working Group, in its October 2008 report, stated that the UK had not effectively criminalised bribery by companies.

The Act introduces a new corporate offence of failing to prevent bribery. It will not require proof of dishonest or corrupt intent by the defendant company. The offence will be committed by a commercial organisation where:

- a bribe is paid by a person associated with the commercial organisation (note that the offence does not apply to the receipt of bribes);
- the bribe was paid with the intention of obtaining or retaining business, or an advantage in the conduct of business;
- the commercial organisation is unable to demonstrate, on the balance of probabilities, that it had implemented adequate procedures intended to prevent bribery by those associated with it.

Commercial organisations include UK companies and partnerships, or foreign companies and partnerships that carry on business in the United Kingdom.

A person is associated with a commercial organisation if he or she performs services, in whatever capacity, for or on behalf of the organisation. This is wide in scope. The capacity in which services are provided does not matter. The definition necessarily includes employees and agents, and employees are specifically presumed to be acting on behalf of their employer when paying a bribe unless the contrary is shown. It could also extend to subsidiaries, joint venture companies or partners and even sub-contractors.

The organisation could commit the offence even if no member of senior management was aware that an offence was being committed, and even if the company had done nothing to encourage or acquiesce in the payment of a bribe. Again, the offence applies to bribes paid domestically or overseas. A company can be prosecuted whether or not criminal proceedings are brought against the person responsible for the bribe.

The offence, in effect, requires companies to implement, maintain and enforce effective anti-bribery and anti-corruption policies, systems and controls, and to keep them under review. Criminal liability should be avoided if a properly trained but fraudulent employee found a way to circumvent adequate compliance procedures.

Ultimately, it will be for the courts to decide whether the procedures put in place for the relevant business are "adequate". The Act itself provides no definition as to what constitutes 'adequate procedures'. However, during consultation on draft legislation the Government accepted that it would be sensible and helpful for guidance to be published on what constitutes adequate procedures, and the Act specifically provides for this.

Publication of the guidance is awaited. The Government has stressed that it will not be an exhaustive list of procedures that should be implemented, but rather key principles with examples. It intends to publish the guidance in January 2011, following a consultation exercise that will launch in September 2010.

Helpful guidance can already be found in a number of existing publications such as the guidance published by the Serious Fraud Office on self-reporting of bribery, Transparency International's "Business Principles for Countering Bribery", the OECD's Business Approaches for Combating Corrupt Practices and the US Federal Sentencing Guidelines for Organizations published by the US Department of Justice. On 21 July 2010, Transparency International UK also published detailed guidance on what it regards as adequate procedures under the Act.

In formulating the offence, the Government has rejected automatically imposing criminal liability on companies for bribery by their employees or agents, as is the case, for example, in the United States. Such an approach has traditionally been taken only in relation to less serious wrongdoing. Doing so in relation to bribery offences in isolation was considered unadvisable, pending a broader review of the nature and scope of corporate criminal liability.

Elements of adequate procedures?

In broad terms, any compliance programme will contain a number of key elements, tailored to the particular circumstances and business of the company:

- board engagement, with a director or senior employee heading an adequately resourced programme and perhaps an anti-bribery committee including employees from higher risk areas;
- a culture that bribery and corruption is unacceptable;
- written and clear anti-bribery and anti-corruption policies, actively implemented and regularly reviewed and updated;
- systems, procedures and controls designed to identify warning signals and prevent bribery, and to identify bribery should it occur;
- a specific gifts and hospitality policy;
- possibly a specific policy on the use of third parties to obtain or retain business, and their payment;
- regular risk assessment, considering the risks that arise from the countries, business sectors and business practices of a company;
- training of staff;
- a whistle-blowing system which allows staff safely and confidentially to report suspicions or knowledge of bribery, and which ensures that all reports are investigated (and possibly a helpline on which advice can be taken);
- risk-based due diligence and review of third parties performing services on behalf of the company, such as agents and sub-contractors;
- ensuring third party representatives are demonstrably committed to preventing bribery and corruption.

Extra-territoriality application

The Act has wide extra-territoriality application, extending to bribes paid overseas by British citizens, UK residents and companies or partnerships incorporated in the United Kingdom , even where no steps in relation to those bribes are taken in the UK. The offence of a failure to prevent bribery could also be committed where the bribe, and all steps taken in relation to it, occurred outside of the UK, and applies to foreign commercial organisations which carry on business in the UK. There is no need for a connection between the bribe and the UK business.

Penalties

An individual found guilty of an offence is liable to ten years imprisonment or an unlimited fine. A company is liable to pay an unlimited fine.

Facilitation payments

Facilitation payments are payments made to induce a person to perform a duty which that person is obliged to perform, without resulting in preferred treatment, and where the payment exceeds that properly due. Such payments are typically, but not necessarily, of low-value. Payments made to obtain any kind of preferential treatment are not facilitation payments, for example payments made to obtain a licence where the criteria for issue have not been met.

The criminalisation of facilitation payments has been a matter of some debate. Demands for facilitation payments are customary in some countries, and the person from whom the payment is demanded is often the victim of extortion. Facilitation payments are not criminalised under the United States Foreign Corrupt Practices Act, although they are illegal in many jurisdictions.

The Act criminalises facilitation payments, both under the general offences and also under the specific offence of bribing a foreign public official. The Government has indicated, however, that it would only rarely be appropriate to prosecute the making of facilitation payments.

Gifts and hospitality

The Act does not provide contain provisions which govern the provision of hospitality. Unduly lavish hospitality or gifts could be considered bribes. The Government has stated that it does not wish to prevent or punish genuine hospitality. The difficulty is identifying the line where genuine hospitality stops. There will undoubtedly be a difficult grey area between legitimate and illegitimate gifts and hospitality, particularly when policies are applied across jurisdictions that differ in wealth and culture. A useful test may be whether the gift or hospitality is something the recipient would themselves be able or willing to buy. Timing will also be important. Hospitality or gifts during a tender process may prove difficult to justify. A gifts and hospitality policy is essential.

Money laundering offences

Money laundering offences may also be committed when dealing with funds received as a result of a bribe, for example payments made under a contract procured by bribery. Those funds are very likely to be regarded as criminal property, meaning the benefit obtained from criminal conduct. Any dealings with those funds, with knowledge or suspicion that they represent criminal property, would constitute a money laundering offence under the Proceeds of Crime Act 2002. That could include funds obtained through historic bribes, for example under previous management. Money laundering offences can be committed by anyone. The only defence to a money laundering charge, for example against directors, is for a report to made to the Serious Organised Crime Agency disclosing the payment of bribes. However, disclosure could lead to criminal investigation and prosecution.

It should be noted that the regulated sector, for example auditors, accountants or lawyers, have a duty under the Proceeds of Crime Act to report suspicions of money laundering, unless the information was obtained in privileged circumstances. A failure to report is a criminal offence.

Mandatory exclusion from public procurement

European Union procurement law, implemented in the UK, provides for mandatory exclusion (debarment) of a company from public sector contracts if the company, or its directors or certain other representatives, have been convicted of corruption or bribery or fraud or money laundering. This is a draconian provision: debarment is mandatory regardless of the seriousness of the offence and the presence of mitigating factors. There is a need for the existing law to be replaced with a system that applies fair and proportionate penalties, with mandatory debarment reserved for particularly serious or persistent cases.

It is unclear whether conviction for failure to prevent bribery would lead to mandatory debarment. On the one hand, it is an offence of strict liability which does not require dishonesty or improper intent on the part of the defendant company. Debarment in the absence of such intent would be particularly harsh. However, during pre-legislative debate the Government stated that active consideration was being given to whether conviction should lead to mandatory debarment. No further guidance has yet been provided.

Self-reporting

The Serious Fraud Office (SFO) is actively encouraging companies to self-report discovery of bribery or corruption. In July 2008, it published particular guidance in relation to overseas corruption: "Approach of the Serious Fraud Office to Dealing with Overseas Corruption". Self-reporting is a difficult decision for any company to make. The advantage is that the preferred approach of the SFO is to deal with self-referrals through civil penalties, at least for the company involved, rather than criminal prosecution. An exception could be where board members were personally involved in the wrongdoing, particularly where they had personally benefited. Civil penalties would not, for example, trigger mandatory exclusion from public procurement.

Conclusion

On some issues, the Bribery Act lacks clarity. Obvious examples include the meaning of adequate procedures (although this may be clarified by the intended guidance), the circumstances in which third parties such as sub-contractors could be said to be acting on behalf of an organisation, and the circumstances in which the making of facilitation payments would be prosecuted. However, the Act does make UK bribery law clearer and simpler, both in the private and public sector. It will also assist in demonstrating compliance with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

Robust and effective anti-corruption and anti-bribery policies, systems and controls are, effectively, a requirement of the Act. Vigorous enforcement by the US Department of Justice and Securities Exchange Commission of the US Foreign Corrupt Practice Act against both domestic and foreign companies already make this essential for any company trading internationally, and such companies will already be compliant with major elements of the Act. However, policies will need to be updated to reflect the differences between the US and UK legislation, notably the extension of the UK legislation to private sector bribery and the treatment of facilitation payments. Companies without existing compliance programmes will need to introduce policies as quickly as possible. UK law enforcement agencies are demonstrably prioritising the investigation and enforcement of bribery, and this can be expected to increase following the implementation of the Act.

It is important for all companies to carry-out a risk assessment to identify both the bribery risks faced by their business, and whether current systems, controls and procedures are adequate to prevent bribery.

Capability statement

Edwards Angell Palmer & Dodge has substantial experience and capabilities in assisting corporations confronting corruption issues in a wide array of contexts. Our offices in the US, London and Hong Kong can guide clients through almost any corruption-related issue, whether it be implementing effective training and compliance programmes, conducting multi-national internal investigations, or responding to government inquiries or enforcement actions. The Hong Kong office has attorneys experienced in compliance issues both in Hong Kong and China. We also have extensive experience in data protection, whistleblower protocols, and privacy compliance duties of companies in different countries arising from corruption enquiries, investigations and remedial compliance actions.

If you would like more information on any of the issues raised in this EAPD Guidance Note or would like us to present in-person on this topic at your offices, please contact any of the EAPD lawyers listed overleaf.

In-house presentations could take the form of a broad overview or we would be happy to work with you to focus the presentation on the issues you think would be most useful to your legal / business teams.

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This publication is for general guidance only and is not intended to be a substitute for specific legal advice. If you would like any further information please contact:

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