

THE BRIBERY ACT 2010 – AN OVERVIEW

The Bribery Act 2010 (the “Act”) came into force on 1 July 2011. The main four offences under the Act are:

1. bribing another person (section 1);
2. being bribed (section 2);
3. bribing a foreign public official (section 6); and
4. failure by a commercial organisation to prevent bribery (section 7).

Offences 1-3 can be committed by an individual or a commercial organisation (e.g. company, partnership etc.). Offence 4 can only be committed by a commercial organisation.

The Act has far-reaching implications. The UK regime is, in general, stricter and broader in scope than the US anti-bribery and corruption legislation (the Foreign Corrupt Practices Act 1977). Businesses (especially those involved in overseas trade) need to:

- identify key areas of risk in their trading practices;
- keep under review the adequacy of their anti-bribery procedures; and
- train sales staff to ensure they understand what they can and cannot do under the Act.

Internal anti-corruption and employment policies also need to take account of the Act’s provisions and be reviewed and updated on an on-going basis..

The offence of bribing another person

A person is guilty of the offence of “bribing another person” if they offer, promise or give (whether directly or indirectly) a financial or other advantage to another person:

- with the intention to induce that person to perform improperly (or reward them for the improper performance of) a relevant function or activity; or

- knowing or believing that the acceptance of the advantage would itself amount to the improper performance of a relevant function or activity.

In the first scenario, the person receiving the advantage does not have to be the same as the person who performs the relevant function or activity.

What constitutes a “financial or other advantage”?

- The Act itself provides no further guidance – it

could be interpreted to include not only cash inducements but also gifts and other advantages (e.g. lavish hospitality).

- The Serious Fraud Office (“SFO”) has issued statements of policy which confirm that in relation to facilitation payments (for example, where a government official is given money or goods to perform, or expedite the performance of, a routine or necessary action), such payments remain illegal under the Bribery Act (as they were before the Bribery Act came into force). They are illegal regardless of their size or frequency.
- Applying the Bribery Act prosecution guidance, companies are more likely to be prosecuted if they make large or repeated payments. If a company has a clear policy setting out what an individual should do if faced with a request for a facilitation payment, and those procedures have been followed, this is likely to be in the company’s favour.
- As to business expenditure, the SFO has recognised that there is a place for genuine hospitality expenditure by businesses. However, where bribes are disguised as legitimate business expenditure, action may be taken. Lavish hospitality or gifts are more likely to attract attention, particularly if not clearly connected with legitimate business activity. If there is a realistic prospect of conviction on the evidence, the SFO will prosecute if it is in the public interest to do so.

As to a “relevant function or activity”, the Act broadly defines this to include any function of a public nature or business activity including any activity performed by a person in the course of their employment.

The offence of being bribed

A person is guilty of the offence of “being bribed” in a number of scenarios but, generally, the offence is committed if they:

- request, agree to receive or accept
- a financial or other advantage
- for the improper performance of (whether by themselves or another person)
- a relevant function or activity.

The person requesting the advantage does not have to be the one receiving it. The advantage may be received by another person. The person requesting the advantage also does not have to know or believe that the performance of the function or activity is improper.

The offence of bribing a foreign public official

A person is guilty of bribing a foreign public official if they:

- offer, promise or give
- a financial or other advantage
- to a foreign public official (or another person at the request, assent or with the acquiescence of the foreign public official)
- with the intent to influence the foreign public official and to obtain or retain business or an advantage in the conduct of business.

A “foreign public official” means any individual who:

- holds a legislative, administrative or judicial position of any kind (whether appointed or elected) in a country or territory outside the UK;
- exercises a public function for or on behalf of any country or territory outside the UK or any public agency or public enterprise of such a country or territory; or
- is an official or agent of a public international organisation.

The offence of failing to prevent bribery

A commercial organisation is guilty of the corporate offence of failing to prevent bribery if:

- an associated person
- is, or would be, guilty of the offence of bribing another person or bribing a foreign public official
- with the intent to obtain or retain business or an advantage in the conduct of business for the commercial organisation.

A person is “associated” with a commercial organisation if they perform services for or on behalf of the commercial organisation (this could include an employee, subsidiary, supplier, agent, consultant,

distributor, service provider).

This is a strict liability offence and no element of negligence needs to be proved. The only defence is if the commercial organisation can show that it had in place “adequate procedures” to prevent bribery. The Act does not define “adequate procedures” but requires the Government to provide official guidance as to what these might be. This guidance was published in March 2011. The content of the guidance is set out in further detail in our separate briefing note “The Bribery Act 2010 – Government Guidance for Businesses on Adequate Procedures”.

Company directors, managers and officers

A senior officer who consents to or connives in the commission by a commercial organisation of either of the general offences of bribing or being bribed, or the offence of bribing a foreign public official, may be found personally liable for the offence. A “senior officer” includes any director, manager, corporate secretary or “other similar officer” of the commercial organisation.

Jurisdictional reach

The scope of the Act is wide, with implications not only for individuals / commercial organisations resident in the UK but also for those located elsewhere. Individuals / commercial organisations (wherever located in the world) can be prosecuted in the UK courts if any part of the offence is committed in the UK.

As to the general offences and the offence of bribing a foreign public official, any individual / commercial organisation that has a “close connection” with the UK (e.g. a British citizen, someone ordinarily resident in the UK, a UK incorporated company) can be prosecuted in the UK courts, even if the bribery takes place wholly outside the UK and the benefit or advantage to the commercial organisation is intended to accrue outside the UK.

More far-reaching still, with regards to the offence of failing to prevent bribery, the UK courts are able to prosecute not only any commercial organisation incorporated in the UK (e.g. a UK company) but also any commercial organisation (regardless of where incorporated in the world) that “carries on a business or part of a business” in the UK. Again, this applies

even if the bribery takes place wholly outside the UK and the benefit or advantage to the commercial organisation is intended to accrue outside the UK. The Act does not define what constitutes “part of a business” although the Government guidance suggests that a common sense approach should be applied. Even so, the scope of this provision is wide and could include a subsidiary or potentially even a UK representative or agent. Until the UK courts provide further clarification, it is prudent for commercial organisations to exercise caution.

Penalties

A commercial organisation found guilty of an offence may receive an unlimited fine. An individual found guilty of an offence may face imprisonment of up to 10 years, an unlimited fine, or both.

There have been several successful prosecutions of individuals and in February 2016, Sweett Group plc was convicted and received a fine of £1.4 million after pleading guilty to the offence of failing to prevent bribery.

Corporate self-reporting and Deferred Prosecution Agreements

The SFO has confirmed that self-reporting by a company will not act as an automatic protection against prosecution. For self-reporting to be taken into consideration as a public interest factor tending against prosecution, it must form part of a “genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice”. Self-reporting is an onerous obligation which will require evidence of any internal investigation conducted, such as emails, banking evidence and witness accounts. Even then, self-reporting is no guarantee that a prosecution will not follow and each case will turn on its own facts. However, if companies self-report in appropriate circumstances, and in the right way, we consider that it should be possible to limit some of the risk and damage which would follow from a prosecution.

In May 2013, a Bill to introduce deferred prosecution agreements (“DPAs”) received royal assent. A DPA is an agreement between a prosecutor and a commercial organisation in respect of specified economic and financial crimes, such as bribery and corruption. The prosecutor agrees to defer a criminal prosecution in

return for admission of wrongdoing and compliance with agreed terms. The terms and conditions of a DPA will be tailored to the particular alleged wrongdoing, but may include payment of a financial penalty, disgorgement of profits, monitoring requirements and implementation of or changes to a compliance programme. The primary incentive for the corporate is avoidance of a prosecution and potential criminal conviction. Once the period of time has expired, and assuming the prosecutor is satisfied with compliance by the corporate of the agreed terms and conditions, the criminal charges may be dropped.

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Recommendations for businesses

All businesses (regardless of size) should review their anti-corruption policies, procedures and training on a regular basis. They should conduct a worldwide / business-wide risk assessment to:

- identify the level of exposure of their business;
- assess how to minimise that exposure; and
- prioritise those areas found to be most vulnerable.

Areas to consider include policies on the giving and receiving of gifts, sponsorship, political contributions, corporate hospitality, expenses, remuneration structures, employment contracts, facilitation payments, and relationships with agents, distributors and contractors. As a result of this, they should develop and maintain policies that reflect their size, business sector, potential risk and locations of operation, provide training on these and ensure that procedures are put in place to enable relevant departments (e.g. compliance, audit, HR and in-house legal) to enforce these policies.

FIND OUT MORE

If you would like to discuss further the Bribery Act 2010 and its implications for you and your business, please contact **Richard King, Beverley Flynn** or **Gustaf Duhs**:



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