

The Bribery Act 2010 received Royal Assent on 8 April 2010 and is expected to become operative in April 2011. It will abolish all existing UK anti-bribery laws and replace them with a suite of new offences markedly different to what has gone before.

While the Act presents a considerable risk to all commercial organisations and their senior management, the breadth of the new offences could have particular implications for firms and senior individuals in the larger accounting networks. On its face, the Act makes it significantly easier for the UK enforcement agencies to achieve convictions for bribery offences and the SFO has already made it plain that it will come down very heavily on individuals and those organisations who have not taken action to establish an anti-corruption culture and who use corruption to gain a business advantage.

THE NEW OFFENCES AND THEIR IMPLICATIONS

Bribing/being bribed. The Act makes it an offence not only to bribe another (so-called active bribery), but also to be bribed (passive bribery). A bribe may take any form and is referred to in the Act as a “financial or other advantage”, so is clearly not limited to the archetypal bribe of a brown paper envelope stuffed with banknotes. It need not be direct; it is sufficient if the bribe is provided to a third party, for example a family member of the person sought to be influenced.

These offences are very widely drafted and apply to both the public and private sectors. They are not limited to the actual giving or receiving of a bribe – to offer, promise, request or agree to receive a bribe may also contravene the Act. Concern has been expressed that the Act is so widely drafted that it has the potential to criminalise conduct that was not previously viewed as criminal, such as corporate hospitality. A written policy on the offering and acceptance of gifts and hospitality which is clear, well known and accessible, will be of crucial importance.

Bribing a Foreign Public Official. A person who bribes a foreign public official (a term which includes those who occupy a legislative, administrative or judicial position as well as representatives of public international organisations) is guilty of an offence if he intends to influence that official acting in that capacity and also intends to obtain or retain business or a business advantage.

Liability of Senior Officers. If a company or partnership commits any of the bribery offences referred to above, a “senior officer” may also be liable if he/she “consented or connived” in the commission of that offence. A “senior officer” includes a director, secretary, manager and partner, or someone purporting to act in that capacity. So, sanctioning a bribe or turning a blind eye can result in liability for senior management, even if they did not make the bribe themselves.

Failure of a commercial organisation to prevent bribery. A commercial organisation will commit an offence if a person associated with it bribes another (in the UK or overseas) intending to obtain or retain business or a business advantage for that commercial organisation. An associated person includes any person who performs services for the commercial organisation. So, for example, an associated person may include not only employees, agents and subsidiaries, but also entities over which the organisation has no ownership or control.

This offence is wholly new and applies to all commercial organisations, both corporations and partnerships wherever incorporated or formed, which carry on business or part of a business in the UK. This is potentially a very low threshold test and it remains to be seen how it will be applied and construed by the courts. Save as provided in the Act, it is a strict liability offence. The only defence is if the commercial organisation can establish that it has “adequate procedures” in place to prevent such bribery from occurring.

Draft guidance as to what may constitute “adequate procedures” is expected in September with a view to being finalised in early 2011. Indications are, however, that rather than being prescriptive, this guidance will only be principles based and provide illustrations of good/bad practice.

These offences, and particularly the last, are highly relevant for all organisations, operating across different jurisdictions, often with different business cultures.

THE ACT IN BRIEF

The new UK Bribery Act is expected to operate from April 2011. It introduces new offences markedly different to what has gone before.

In many respects, it is much wider than the US FCPA and applies to both the public and private sectors.

It will make it significantly easier for the UK enforcement agencies to achieve convictions for bribery offences.

KEY POINTS

- A bribe is not limited to a financial reward and can take any form.
- The Act makes it an offence to bribe and to receive a bribe. Both offences are very widely drafted and apply to every conceivable scenario.
- The Act includes a specific offence in respect of bribery of a foreign public official.
- A commercial organisation itself can be convicted of failing to prevent bribery by its representatives acting in the course of its business. This is a wholly new offence, the only defence to which is to establish that “adequate procedures” were in place to prevent such bribery from occurring.
- Senior management or other individuals within an organisation can also be personally liable if they consented or turned a blind eye.
- The implications of the new Act are highly relevant for all businesses and their management, including the larger accounting networks and those within them who hold global or regional coordinating or leadership roles.
- The senior management of all such organisations need to review their policies and procedures to ensure compliance with the new Act.

WHAT ARE THE IMPLICATIONS?

For the large accounting networks, those entities or individuals with co-ordinating or governance roles in the UK (including client facing and non-client facing roles) may well be caught by these offences if an associated member firm or individual bribes someone in another country. Senior individuals in such roles might also attract personal liability under the “consent or connive” offence if they knew or suspected any of the offences in any country where they had responsibility, but they turned a blind eye or otherwise failed to take steps to prevent the activity constituting the offence. This highlights a need not only to ensure that domestic employees are fully aware of the standards of business practice expected of them, but also that policies at network level agreed to by all network firms and employees apply similar standards and are sufficiently robust for the purposes of the new Act. Those with management responsibility need to have the systems and procedures to monitor compliance and respond where necessary.

TERRITORIAL APPLICATION

If the conduct element of the bribery offence occurs in the UK, the UK authorities can prosecute. They may also prosecute if the bribery offence occurs wholly abroad if the person committing that offence has a “close connection” with the UK. Even if a commercial organisation may not be subject to the Act for all purposes, there needs to be an awareness that those of its employees who are British citizens or otherwise have a close connection with the UK are subject to the Act and are exposed to the risk of prosecution even if the bribery offence occurs entirely overseas.

FACILITATION PAYMENTS

The UK Government has signalled a zero tolerance attitude

towards bribery – a bribery offence may be committed whatever the monetary value of the bribe. Unlike the Foreign Corrupt Practices Act (“FCPA”), there is no de minimis exemption. While facilitation payments may be viewed as an incidental cost of doing business in particular countries, they may constitute an offence contrary to the Act and any internal statements of policy or practice which permits or condones them leave the commercial organisation exposed to prosecution and conviction for the new offence of failing to prevent bribery.

WHAT NOW?

Those who are already subject to the FCPA should already have in place procedures to ensure FCPA compliance but since the Act is broader in scope than the FCPA, these might not satisfy all the requirements of the new Act. The Government has indicated that once the Act becomes operative, there will be no grace period to enable commercial organisations to introduce any necessary changes. Those subject to the Act have until April 2011 to take action to ensure their house is in order. This should involve a comprehensive review of the corruption risks their business is exposed to and the introduction (if not already in place) of appropriate policies and procedures to mitigate against those risks occurring. Most importantly, an anti-corruption culture should be established, visibly led by senior management. As ever, tone from the top will be seen as a very important factor for all organisations seeking to avoid the potential for liability under the Act.

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ON THE TAKE

THE BRIBERY ACT THAT CAME INTO LAW EARLIER THIS YEAR INTRODUCES NEW OFFENCES THAT COULD CATCH UNPREPARED ACCOUNTANCY PRACTICES OFF GUARD, WRITE **ANDREW LEGG** AND **MATTHEW LAWSON**



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