

The Bribery Act 2010 – a new beginning

On 8 April 2010, the Bribery Bill received Royal Assent. The Bribery Act 2010 applies throughout the UK and marks a significant change in UK law with very important implications for all those subject to UK legal oversight. The preceding laws (contained in a combination of statutes dating back to the 19th Century and the common law) will be abolished when the new Bribery Act is brought into force.

The Act is intended to make it significantly easier for enforcement agencies to bring successful prosecutions, including against UK corporate entities, in respect of corruption offences committed at home and abroad.

The main provisions of the Act are not yet in force. Implementation will require a statutory instrument to be made by the Secretary of State so cannot now take place until after the UK General Election in May 2010. The Act does not have retrospective effect so will apply only to offences committed after it comes into force. In the meantime, the old bribery laws will remain in place and therefore have continuing relevance and will govern conduct until the Act is in force.

We set out below a summary of the main provisions of the new Act.

The Act introduces four new statutory offences, all of which are referred to in more detail below – giving or receiving bribes, bribery of foreign public officials and failure of a commercial organisation to prevent bribery by persons working on their behalf. This last offence is entirely new and, as it is a “strict liability” offence, it has very important implications for all commercial organisations with a base in the UK.

Making or receiving bribes

The first part of the Act contains two general bribery offences: one of giving bribes and one of receiving them. These are sub-divided into six “cases”, which are expressed very broadly and are designed to catch every conceivable fact pattern. There are two “cases” of giving bribes and four of receiving bribes.

There are two common elements to all six cases. First, a financial or other advantage. In addition to cash offers or payments, promises of future work, discounts, gifts, donations, offers of employment can all amount to bribes. The second element common to all six cases is the improper performance of a function or activity (whether intended or actual).

Functions and activities caught by the Act are those of a public nature; any activity connected with a business; any activity performed in the course of a person’s employment or performed by or on behalf of a body corporate or unincorporated body provided that the person performing the function or activity is expected to perform it in good faith; is expected to perform it impartially or is in a position of trust by virtue of performing it.

It does not matter whether the function or activity has no connection with the UK and is performed outside the UK.

Improper performance is described in the Act as performance in breach of a relevant expectation, which will include breach of the expectation that the function or activity is performed in good faith, impartially or without breaching the position of trust outlined above. Expectation is subject to an objective test, namely what a reasonable person in the UK would expect.

Comment

The focus now is improper performance rather than corrupt intent.

Bribing a foreign public official

The offence of bribing a foreign public official is modelled on the OECD Anti-Bribery Convention, which in turn is modelled on the US Foreign Corrupt Practices Act 1977 (as amended) (“FCPA”). The offence is committed if the person making the bribe (again, defined as a financial or other advantage) intends to influence the official in his capacity as a foreign public

official; intends thereby to obtain or retain business or a business advantage; and the official is neither permitted nor required by the law applicable to the official to be so influenced.

Comment

When determining what is permitted or required by local laws to which an official is subject, reference is to be made to the written law of that jurisdiction – custom and practice which does not form a part of the written law will not be sufficient.

Facilitation (“grease”) payments

There is no carve-out in the legislation for “facilitation” payments and in principle, if made, these will constitute an offence contrary to the Act. It is not practical to prosecute every occasion on which a facilitation payment is made; each case will be a matter for prosecutorial discretion. There must be a greater likelihood of prosecution if the making of facilitation payments was widespread within an organisation, indicating cultural and/or systemic shortcomings. The outgoing government has stated expressly, however, that it does not intend that the new legislation should be used to penalise the legitimate and proportionate use of corporate hospitality to establish or maintain good relations with prospective customers.

Failure to prevent bribery

The offence of failure of commercial organisations to prevent bribery by associated persons who intend to obtain or retain business advantage for the organisation, is a strict liability offence, subject to a statutory defence.

The offence is committed if the associated person would be guilty of one of the two general bribery offences or the offence of bribing a foreign public official, referred to above. As it is a strict liability offence, a commercial organisation will effectively be vicariously liable for bribes made by associated persons, even if those in charge of the organisation did not know about the bribery.

- “Commercial organisation” will include any UK corporate or partnership which carries on a business or any other body corporate or partnership (wherever incorporated or formed) that carries on business in the UK. Overseas companies and partnerships which are headquartered or have a representative office in the UK will be subject to this new statutory offence.
- “Associated person” is defined in the Act as a person who performs services for or on behalf of the commercial organisation. The Act states that this may include employees, agents and subsidiaries. It will also include joint venture partners and joint venture vehicles. The need for thorough due diligence on business partners and representatives has therefore never been greater.
- It will be a defence if the organisation has “adequate procedures” in place to prevent bribery. The Act requires the government to publish guidance on procedures that commercial organisations should put in place. This guidance is not yet available and is expected to be published in the autumn. However, this is unlikely to be a “one size fits all” guidance and consideration should be given now to the particular risks that might arise in the course of a commercial organisation’s business operations so that procedures can be introduced (if not already in place) to minimise the risk of bribery occurring. It should be borne in mind that whilst the Act may not be in force until much later this year, when it is in force there is unlikely to be any grace period for commercial organisations to get their house in order. As a result, it would be prudent to conduct a review of existing procedures over the coming months, making such improvements as are considered necessary.

Connivance

Directors and senior managers can be prosecuted separately under the new Act if they consent to or connive at the commission of the general bribery offences or the bribery of a foreign public official.

Penalties

Penalties for individuals under the Act will be more severe than they are at present. The maximum term of imprisonment is increased from seven to ten years, in line with other fraud offences. There is also the prospect of an unlimited fine for individuals or commercial organisations convicted of the two general bribery offences or the offence of bribing a foreign public official and for organisations convicted of the offence of failure to prevent bribery.

International reach

The Act will have a considerable impact on foreign companies who do business in the UK, particularly those which have a place of business in the UK and/or UK employees.

It is not limited to acts of bribery committed in the UK by British citizens or commercial organisations. It extends to acts committed anywhere in the world by UK corporates or individuals if the act of bribery would amount to an offence in the UK.

The Act provides that the general bribery offences and the offence of bribing a foreign public official will be committed if any act or omission that forms part of the offence takes place in the UK. These offences will also be committed if the relevant act takes place outside the UK, provided that it would form part of such an offence if it took place in the UK and the offender has a close connection with the UK, e.g. is a British citizen, a foreign national who is “ordinarily resident” in the UK or a company incorporated in any part of the UK.

It should be noted that the corporate offence of failing to prevent bribery in the course of business can be committed by foreign companies which are headquartered or have representative offices in the UK, as well as UK registered corporates and partnerships. This corporate offence may be committed wherever in the world the bribery occurred.

Comment

In contrast to the FCPA, the Bribery Act 2010 extends to bribery in both the private and public sectors (the FCPA extends only to the public sector).

The move to target corporate wrongdoers in the Bribery Act 2010 extends the range of offences available to the UK enforcement authorities. Whilst the new legislation was undoubtedly a response to international pressure, it is also part of a wider trend to bring corporate wrongdoing within the criminal sphere.

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