



The UK Bribery Act

Bribery and corruption have risen rapidly up the UK political agenda in recent years. The Bribery Act finally looks set to come into force later this year. It repeals existing bribery offences and introduces new ones – including, for the first time, a corporate offence of failing to prevent bribery. In this briefing we consider some of the key issues that arise from the Act as well as some practical steps that corporates may wish to consider taking now to prepare for when the Act becomes law.

Introduction

Current UK bribery law is a patchwork of old common law and statutory offences (dating back to the Prevention of Corruption Acts 1889 and 1906). The regime's deficiencies are widely recognised and were highlighted by the Organisation for Economic Co-operation and Development (OECD) in a report in October 2008. For example, it is very difficult for a corporate entity to be convicted of a bribery offence because of the need to prove that a senior manager was the 'directing mind and will' behind the offence. Also a purely private transaction (one that does not involve a public official) cannot currently be caught by a bribery offence unless the bribe has been paid to an agent who is acting on behalf of another person.

Following several Law Commission papers, a first draft of the Bribery Bill was published in March last year. After extensive debate, the Bill received royal assent on 8 April 2010.

What are the offences?

The Act creates four categories of offence, which address the following:

- offering, promising or giving a bribe to another person;
- requesting, agreeing to receive or accepting a bribe from another person;
- bribing a foreign public official; and
- a corporate offence of failing to prevent bribery.

General offences: what is improper performance?

The two general offences of bribing another person and being bribed are linked to the 'improper performance' of an activity. This concept applies equally to public and private functions. The Act provides that improper performance is performance (or non-performance) that breaches the expectations of good faith or impartiality, or breaches a position of trust. This is an objective test based on what a reasonable person in the UK would expect in relation to the performance of the relevant activity.

Concerns have been raised in parliament that the two general offences are drafted too widely and will capture conduct that would not typically be regarded as criminal. For example, there is no requirement for the accused to act corruptly, as under the present law. An individual may be said to be inducing improper performance where the offender has little practical choice – for instance, if a passenger pays an airport assistant who insists on receiving a payment before issuing a boarding pass to which the passenger was already entitled. It is also possible to be convicted of being bribed without any awareness of the improper performance. However, in each of these areas, the government has resisted amendment. It is keen for the Act to remain widely drafted to bring about a zero tolerance culture and prefers instead to rely on prosecutorial discretion.

Bribing foreign officials

The offence of bribing a foreign public official is based on a different test, in line with the OECD's requirements.

Unlike the general bribery offences, this offence covers only the offering, promising or giving of bribes, and not the acceptance of them. The person giving the bribe must intend to influence the foreign official in the performance of his functions as a public official and must intend to obtain a business advantage. There is a further requirement that the written law of the relevant jurisdiction does not permit or require the foreign official to be influenced by the offer, promise or gift.

The definition of public official in the Act is drafted broadly to reflect OECD publications. It will catch individuals who are not part of government and includes an individual who holds a legislative, administrative or judicial position of any kind, exercises a public function or is an official of a public international organisation.

In practice, there is likely to be a significant overlap between the offence of bribing a foreign public official and the general offence of bribing another person, despite the different test.

The new corporate offence

The introduction of a new strict liability offence for corporates of 'failing to prevent bribery' is the most significant departure from the current law. A company (or partnership) will commit the offence if an associated person performing services on its behalf bribes another person in order to obtain or retain either business or a business advantage for the company. The only defence available to the company is proving that it had adequate procedures in place designed to prevent bribery from being committed by those performing services on its behalf. Once the prosecution has proved to the criminal standard that a bribe was paid for the benefit of the company, the burden of proof will shift to the company to demonstrate adequate procedures in accordance with the civil balance of probabilities standard.

Penalties

There is a maximum penalty of 10 years' imprisonment for all the offences, other than the corporate offence, which will carry an unlimited fine. The Lords have queried whether the corporate offence will also trigger mandatory debarment under the EU Procurement Directive but this is still to be resolved. A director convicted of a bribery offence may also be subject to a director disqualification order under the Company Directors Disqualification Act 1986. This could result in

his disqualification from holding a director position for up to 15 years.

What are the key issues that arise from the Act?

Jurisdictional reach

The Act falls short of the US Foreign Corrupt Practices Act (FCPA) in jurisdictional reach, but it still has a wide territorial scope.

The new corporate offence applies to any UK incorporated entity (or UK registered partnership) and any overseas entity that carries on a business or part of a business in the UK. The government has left it to the courts to interpret 'part of a business'. Precedents in other contexts suggest that the phrase may be given a very broad meaning, perhaps including just a single transaction. Crucially, the associated individual or entity that carries out the act of bribery on behalf of the organisation does not need to have any connection to the UK.

Meaning of 'an associated person'

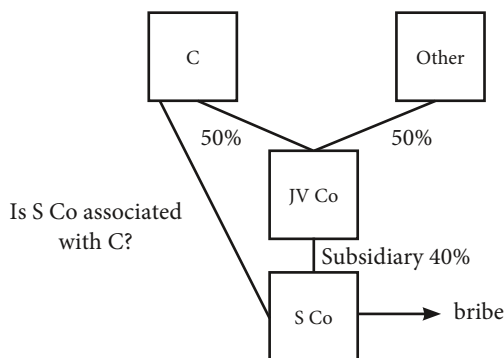
The corporate offence is triggered by the acts of those associated with the relevant organisation. Under the Act a person is associated with an organisation if he performs services on its behalf. This is clearly wide enough to cover employees, agents, intermediaries and introducers. How far the definition stretches beyond that is unclear. The Act requires the courts to have regard to 'all the relevant circumstances' and not just the nature of the relationship between the parties.

There is no requirement for any formal contract between the associate and the organisation, nor is there any requisite degree of control. For example, parliamentary debates state that a joint venture entity can be caught as an associate of a participating organisation. This also creates the possibility that a subsidiary may be regarded as associated with each of its corporate shareholders, no matter how small the stake.

There is also a related question of how far removed the associated individual or entity can be from the organisation charged. Prosecutors may give short shrift to firms that try to circumvent the provisions by arguing that an individual is only acting on behalf of their foreign subsidiary. Relevant factors in assessing whether the

individual is also acting on behalf of the UK parent may include the similarity of the business operations within the UK parent and the foreign subsidiary, whether it can reasonably be said that the transaction in question benefits the UK parent and whether a deliberate motive for operating through intermediate foreign subsidiaries is to avoid liability.

Associated persons



The Law Commission intends, in a future project, to consider the extent of liability across corporate structures more generally. Its findings may shed some light on what approach will be taken in relation to the corporate bribery offence.

The 'adequate procedures' defence

Given the strict liability nature of the corporate offence and the broad test of association, the defence of adequate procedures is likely to assume particular significance. There is no definition within the Act but it does require the secretary of state to publish guidance and the government has committed to doing so before the Act comes in force.

The government guidance is unlikely to be very detailed or prescriptive in nature. The government is instead asking courts to consider what a proportionate response should be for a particular firm, taking into account its size, resources and degree of risk (for example, whether it operates in jurisdictions that fare badly in the Transparency International Corruption Perceptions Index, whether it routinely uses intermediaries or agents etc).

There may be situations in which a company is unable to exert much influence over a service provider with which it is associated (eg a joint venture company in which it holds a small minority stake). Firms cannot reasonably

be expected to withdraw from every association in which they are unable to influence the other party's procedures. However, where possible, it may be prudent to include in contracts with service providers a mechanism for termination in the event that bribery is suspected. The degree of influence and bargaining power that the organisation has may affect what can reasonably be expected of it. For example, it may be more reasonable to expect a dominant company to insist on strict anti-bribery procedures for its suppliers than vice versa.

Pending publication of the government guidance, some assistance can be derived from these sources:

- a Serious Fraud Office (SFO) briefing of July 2009 listing examples of the types of areas firms should look at when assessing their procedures;
- OECD and UN guidance on standards expected from businesses in relation to bribery and corruption;
- the Woolf committee recommendations on ethical business conduct following the bribery allegations at BAE Systems;
- regulatory overlap in the financial sector – especially the Senior Management Arrangements, Systems and Controls rules in the FSA Handbook; and
- the Turnbull Guidance on Internal Control for companies subject to the Combined Code.

Practical steps to consider taking now

There is no one-size-fits-all approach, but some practical steps that corporates may wish to consider taking now include:

- preparing and publishing a global code of conduct across all group companies, which is continually monitored and revised;
- setting up an internal anti-corruption committee with reporting responsibility to the board;
- strong internal communications on anti-bribery and corruption that set the tone from the top;
- corruption training and testing for staff;
- prohibitions on facilitation payments;
- clear policies on corporate hospitality and lobbying;
- robust screening processes for third party payments;
- clear channels for staff to escalate concerns in confidence (such as an 'ethics hotline');
- due diligence around the selection and appointment of third parties and the imposition of controls over their terms of business;

- due diligence around proposed mergers and acquisitions;
- disciplinary measures and remedial action arising from unethical behaviour; and
- a reward and bonus structure that does not encourage a corruption culture.

The overriding message being conveyed by both the SFO and the government is that paper policies are not sufficient. What matters is what is happening in practice within the organisation and whether there is a pervasive culture against corruption.

Liability of senior officers

Directors of companies will also be concerned to know whether they may be in the firing line for the company's transgressions. The Act provides for a senior officer to be liable if it can be shown that the company committed one of the three main offences (bribing, receiving bribes or bribing a foreign public official) with the officer's consent or connivance. 'Senior officer' is defined broadly as a director, manager, secretary or other similar officer. The senior officer must be British or ordinarily resident in the UK. It has been suggested that the concepts of consent and connivance are similar to encouragement and tolerance.

In practice, prosecutors may find it very difficult to convict senior officers due to the initial requirement that the company must have committed one of the three main offences. The Act does not provide any new mechanism for corporate liability in relation to these offences and so the existing attribution test of 'directing mind and will' would still need to be satisfied. Prosecutors have historically struggled to convict organisations using this test.

A senior officer cannot be liable for the corporate offence of failing to prevent bribery. The Bribery Act is weaker here than the FCPA, which can impose liability on a senior officer for a company's failure to devise and maintain an appropriate set of anti-corruption controls or for other FCPA violations in his capacity as a 'control person'. As a result, we are unlikely to see the same number of director convictions in the UK as there have been in the US. However, directors may still want to extend their directors and officers liability insurance to cover the risks.

Prosecutorial discretion

Given the Act's broad language, much will rest on how prosecutorial discretion will be exercised. In addition to the issues raised above, the discretion will be important in relation to areas such as facilitation payments or excessive corporate hospitality.

Will UK prosecutors continue the trend of adopting prosecutorial techniques employed in the US? For example, will we see the use of deferred prosecution agreements and non-prosecution agreements (similar to the cartel immunity/leniency agreements and criminal offence 'no action' letters seen in the antitrust context)? The SFO has begun to experiment with these measures and Richard Alderman (its director) has openly encouraged firms to make use of the SFO's self-reporting regime in the context of the new bribery legislation.

The government's impact assessment predicted only a small number of additional prosecutions but the SFO appears to anticipate a more marked change. There will inevitably be additional risk, given the current enforcement environment and increased appetite for corporate criminal liability. The most pronounced effect is likely to be in the early period after enactment, when firms are adjusting their procedures to reflect the new guidance and the prosecuting authorities are looking for 'trophy' precedent convictions.

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