

Publications

The New UK Bribery Act 2010

Copyright by: LAYTONS LLP

Auteur: Rupert Lescher



This article describes some of the international moves to combat corruption, the lead given by the United States which passed the Foreign Corrupt Practices Act (**FCPA**) and the recent United Kingdom Bribery Act (**Act**)

The article will address some of the novel aspects of the Act including:

- the wide scope of the bribery offences;
- the new offence of bribing a foreign official;
- the new corporate offence of failing to prevent bribery;
- the outright ban on facilitating payments;
- the need for a policy covering promotional expenditure;
- possible criminal liability of a senior officer of a business who connives at the payment of a bribe;
- the extra-territorial reach of the legislation; and
- how businesses can protect themselves.

Enforcement of the Act

In recent years there has been an increase in the number and prominence of enforcement actions in several jurisdictions. The US Department of Justice has prosecuted more bribery and corruption actions in the last two years than in the preceding twenty. In the UK the Financial Services Authority has imposed a record fine on AON, while Siemens was fined heavily in Germany and the US.

The US Lead

In all this the undoubted leader was the United States which passed the FCPA in 1977. Following this the US started to put pressure on other countries to clean up their acts and this eventually resulted in the Organisation for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (**OECD Convention**).

The main trends which can be seen are for US enforcement efforts to increasingly target non-US companies and for enforcement to be conducted in co-operation with UK and other European authorities.

The UK Legislation

In its October 2008 report the OECD heavily criticised the judicial handling of the investigation into bribery allegations against BAe Systems and made a number of other criticisms of the then UK anti-corruption legislation. Basically the UK had done very little to comply with the OECD Convention.

As a result the Law Commission published detailed proposals and, eventually, the Act received the Royal Assent on 8 April 2010 as one of the last acts of the outgoing Labour government.

The UK Ministry of Justice summarises the Act on its website by saying that "*the Act will:*

- *provide a more effective legal framework to combat bribery in the public or private sectors;*
- *replace the fragmented and complex offences at common law and in the Prevention of Corruption Acts 1889-1916;*
- *create two general offences covering the offering, promising or giving of an advantage, and requesting, agreeing to receive or accepting of an advantage;*
- *create a discrete offence of bribery of a foreign public official;*
- *create a new offence of failure by a commercial organization to prevent a bribe being paid for or on its behalf (it will be a defense if the organization has adequate procedures in place to prevent bribery);*
- *require the Secretary of State to publish guidance about procedures that relevant commercial organizations can put in place to prevent bribery on their behalf; and*
- *help tackle the threat that bribery poses to economic progress and development around the world."*

There are a number of aspects of the Bribery Act which need to be highlighted, namely:

• ***The Wide Scope of the Two General Offences***

The general offences outlined above are drafted very widely and may capture conduct that would not normally be regarded as criminal. For example, there is no requirement for the accused to act corruptly as there was under the previous law. This contrasts with the FCPA which requires persons to act corruptly and wilfully before criminal liability results and conduct which is not wilful attracts civil rather than criminal penalties.

- ***The New Offence of Bribing a Foreign Official***

There is a new offence of bribing a foreign official.

A person is guilty of the offence if his intention is to influence the official in the official's capacity as a foreign public official. Foreign public officials include government officials and those working for international organisations. The offence does not cover accepting bribes, only offering, promising or giving bribes.

It does not matter whether the offer, promise, or gift is made directly to the official or through a third party.

The person must intend to influence the official in the performance of the official's functions as a public official, including any failure to exercise those functions and any use of his position, even if he does not have the authority to use the position in that way. The person must also intend to obtain or retain business or an advantage in the conduct of business (which includes what is done in the course of a trade or profession). It should be noted that there is no requirement that the payment should be "improper".

It would appear that buying a foreign public official an expensive holiday so as to gain his favour would be likely to be an offence. There seems to be no reason why this analysis should not apply to taking him out for lunch.

- ***The New Offence of Failing to Prevent Bribery***

The Bribery Act introduces a new offence for companies and partnerships of failing to prevent bribery by persons associated with them. This is committed where a person associated with the organisation commits an act of corruption with the intention of obtaining or retaining business or of obtaining or retaining an advantage in the conduct of business.

A person is deemed to be "associated" if he or she performs services for or on behalf of the company or partnership, without regard to whether the person is an employee, agent or subsidiary company. The offence is one of strict liability. There is a statutory defence if the organisation can show that it had in place "adequate procedures" designed to prevent bribery. Guidance will be given on what constitutes "adequate procedures" but at the moment we can only speculate about what this means.

In many countries it is common to act wholly or partly through agents, or local businessmen, or joint venture partners. This may be because they have a serious business contribution to make, or it may be a requirement of local legislation. In either case the business will need to set up a system which prevents such agents from doing anything on its behalf which could constitute bribery.

- ***Facilitating Payments***

Facilitating payments appear to fall within the definition of bribery. An example might be a person who has to bribe an official to permit him to take a seat on an aircraft for which he has

already paid. There may be no other way for the person making the payment to get onto the aircraft. This was pointed out in the course of the bill's passage through Parliament but the then government was not prepared to make an amendment. It stated that it preferred to rely on the discretion of the prosecutor! So much for the rule of law! It should be noted that this is one area where the Act is stricter than the FCPA which recognises the necessity of facilitation payments in certain circumstances.

- ***Promotional Expenditure***

The Act contains no exception for reasonable and bona fide expenditures relating to the promotion, demonstration, or explanation of services, or the execution or performance of a contract with a government. Given that the foreign bribery offence contains no requirement that the payment must be "improper", and the only exception to the offence is where a payment is explicitly permitted or required under the written laws of a foreign country, bona fide expenditures could technically be an offence if it could be shown that they were made with an intent to influence the official and to obtain, or retain business.

The outgoing Labour government said that it would be left to the discretion of prosecutors to ensure that truly bona fide expenditure would not lead to prosecutions. Once again, so much for the rule of law!

- ***Liability of Senior Officers***

If the business commits an offence and the offence occurs with the "consent or connivance" of a "senior officer" of the organisation the senior officer will separately be liable under the Act. Senior officer is not defined. It will be interesting to see how the courts interpret the terms "consent and connivance".

Foreign directors of companies will be relieved to hear that they cannot be liable for the corporate offence of failing to prevent bribery as the senior officer must be British or normally resident in the UK.

- ***Extra-territorial Effect***

The Bribery Act has extra-territorial effect. For example, the offence of failing to prevent bribery applies to conduct outside the UK provided that an organisation carries on a business, or part of a business within the UK. This means that a French company, say, (whose only connection with the UK may be that it owns a shop in London) can commit the offence if it fails to stop corrupt practices by its agent in South Africa! The conduct does not need to be in any way connected with the UK. To defend itself against prosecution in the UK the French company would need to demonstrate that it had in place adequate procedures to prevent bribery.

There are a number of practical consequences for businesses.

Who Needs to Worry About the Bribery Act?

The new corporate offence can be committed by any UK company or partnership and also by any overseas business which carries on a business or part of a business in the UK. There is no definition of “part of a business” but it is likely to be interpreted widely. It is also noted that the person who carries out the act of bribery on behalf of the corporation need have no connection with the UK. Thus applying this to the example of the French company with the shop in London and a business in South Africa the actual bribe might be paid on behalf of the French Company by its South African agent who had no connection at all with the UK and may not even have known about the shop in London.

Thus the answer to the question is that any company or partnership carrying out any business in the UK should consider its position in the light of this legislation.

Guidance of the Ministry of Justice

The Ministry of Justice has issued guidance about the procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing. This has sections on the offences of bribing another person, bribery of a foreign official and failure of commercial organisations to prevent bribery. It sets out six principles which commercial organisations should follow and, finally, sets out some case studies. The six principles cover the following:

- There should be procedures which are proportionate to the bribery risks the organisation faces and the nature, scale and complexity of its activities.
- Top-level management should be committed to preventing bribery and should foster a culture within the organisation in which bribery is never acceptable.
- There should be periodic informed and documented risk assessment
- The organisation should apply due diligence procedures taking a proportionate and risk based approach.
- The bribery prevention policies and procedures should be embedded and understood through the organisation and there should be an adequate training programme.
- There should be regular monitoring and review.”

In the section headed “How Can Businesses Protect Themselves?”, first paragraph, delete the whole of the following passage “The Secretary of State is...delinquent behaviour” and insert in its place “It is important to study the guidance issued by the Ministry of Justice and to implement appropriate policies and procedures

How Can Businesses Protect Themselves?

It is important that all businesses should ensure that they have adequate procedures in place to act as a defence if they should find themselves being prosecuted. The Secretary of State is required to produce guidance in this respect but as yet we do not have anything. It is thought that the guidance will lead to the courts considering all the relevant facts such as:

- whether bribery is common in the markets in which the business operates;
- whether it is usual to use agents or intermediaries;
- what steps have been taken to monitor any such agents or intermediaries;

- the nature of the company's anti-bribery procedures; and
- above all, what the business does to ensure compliance. It will not suffice to have a system, fail to enforce it and then blame junior managers for delinquent behaviour.

It has been suggested that businesses should include anti-bribery clauses in their agency, partnership and distribution contracts.

Business may wish to consider such measures as:

- preparing a code of conduct;
- setting up a compliance committee and corruption training;
- the prohibition of facilitation payments,
- implementing clear policies on corporate hospitality;
- organising a proper screening policy for third party payments; and
- formulating a policy to encourage and protect whistle blowers. The policy should be made to fit the circumstances of the business.

Regardless of size, commercial organisations which fail to have formal written anti-bribery systems and training programmes run a considerable risk.

Perhaps most importantly it is not enough to have a paper compliance policy. This will not provide protection unless the business can demonstrate that it has a genuine anti-corruption culture.

The Act, a Mixed Blessing?

Nobody supports bribery but, sadly, the Act is likely to lead to:

- uncertainty, since it will take some time before we know what procedures are adequate to protect businesses and much is left to the discretion of the prosecuting authorities;
- increased compliance costs; and
- an increasing tendency for standards to be enforced by the criminal law rather than by civil sanctions.

Droit d'auteur (C) 2018 Libralex