

The Bribery Act 2010: All Bark and No Bite....?

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Introduction

The Bribery Act 2010, which received Royal Assent on 8th April 2010, is intended to make Britain's anti-corruption laws fit for purpose and fit for regulating international business. Its predecessors - the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Acts 1906 and 1916 - were inconsistent, anachronistic and inadequate to comply with the UK's obligations under international anti-corruption conventions. The Organisation for Economic Co-operation and Development (OECD) had been especially critical of the UK for failing to enforce some of the terms of its Anti-Bribery Convention, for having a fragmented and under-resourced approach and, in particular, for failing to prosecute its multi-national companies for overseas bribery.

The new Act repeals the earlier legislation and replaces it with a consolidated scheme of bribery offences intended to deal with bribery both domestically and abroad. It provides the United Kingdom with some of the most draconian and far-reaching anti-corruption legislation in the world. Not only is it designed to deal with corruption 'after the event', but section 7, which deals with the failure of commercial organisations to prevent bribery, is intended to foster a 'zero tolerance' culture towards corruption in businesses, stretching from the CEO to service partners abroad.

The then Secretary of State for Justice, Jack Straw, made the intention plain when addressing the 5th European Forum on Anti-Corruption (June 2009): "*A strong legal architecture is necessary in tackling corruption but in and of itself it is not sufficient. Ultimately our aim must be to bring about behavioural change within businesses themselves, creating corporate cultures in which no form of corruption is tolerated.*"

The General Offences

Offence of bribing another person

Offences under the new Act fall into three categories: general bribery offences; bribery of foreign public officials, and the failure of commercial organisations to prevent bribery. The offences focus on whether a person *intended* to induce improper conduct. Six 'cases' illustrate the ways in which offences may be committed, none of which require dishonesty to be proved.

Section 1 targets those who offer or pay bribes. A person ('P') is guilty of an offence if he offers, promises or gives a financial or other advantage to another person and P intends the advantage either (a) to induce another person to perform improperly a 'relevant function or activity', or (b) to reward a person for doing so. This scenario is described in section 1(2) as 'Case 1.'

The definition of a 'relevant function or activity' is key. A function or activity is 'relevant' if it (i) falls within section 3(2) and (ii) meets one of the 'conditions' A – C (defined in subsections 3(3) – (5)).

The list in section 3(2) covers any function of a public nature and any activity connected with a business, or which is performed in the course of a person's employment or by or on behalf of a body of persons (whether corporate or unincorporate). This is so comprehensive that it is difficult to think of an example of a function or activity which would not be covered. Although the words 'public nature' are undefined, section 16 makes plain that '*this Act applies to individuals in the public service of the Crown.*'

The conditions in subsections 3(3) - (5) are that the person performing the function or activity:

- A: is expected to perform it in good faith; or
- B: is expected to perform it impartially, or
- C: is in a position of trust by virtue of performing it.

It is irrelevant whether the function or activity has any connection with the UK or is performed in a country outside the UK. As this Act applies to any person having a close connection with the UK and any body incorporated under the law of any part of the UK (section 12), its scope and application is very wide indeed and will address offending behaviour wherever in the world conduct amounting to bribery may occur.

Under section 4, the relevant function or activity will be regarded as *improperly* performed '*if it is performed in breach of a relevant expectation*' (applying the test contained in section 5). The 'relevant expectation' is that a person should act in good faith (for condition A) or impartially (for condition B). The 'relevant expectation' for condition C is, rather opaquely, *any* expectation arising from the position of trust as to the manner in which, or the reasons for which, the function or activity will be performed (section 4(2)).

A failure to perform an activity at all is criminalised by section 4(1)(b).

The section 5 'expectation test' provides that, when deciding whether conduct has been improper, the test is '*what a reasonable person in the UK would expect in relation to the performance of the type of function or activity concerned.*'

When applying the test to functions or activities which are not subject to UK laws, local practice and custom must not be taken into account, unless permitted or required by '*written law*' (section 5(2)). Therefore, even if it is customary, for example, to make a payment to a person who has responsibility for granting a planning application, unless such a practice is permitted by the law of the country concerned, that custom is to be disregarded.

By way of example: P, a British citizen living in France, offers a payment to an Italian judge intending that payment to induce the judge to decide a case in favour of P. The judge performs a function of a public nature and a reasonable person in the UK would expect a judge to perform his function impartially (condition B, above). Since P intends by his payment to induce the judge to make a ruling in favour of P instead of considering the case on its merits, P commits an offence under the new Act as soon as the offer is made.

Section 1(4) makes it plain that the person to whom the advantage is offered, promised or given need not be the person who is to perform the function. So, an offence would still be committed in the above example if the money was offered to the judge's clerk instead.

Case 2 is an extension of case 1 and provides that bribery is also committed if P knows or believes that the very acceptance of the advantage would itself constitute the improper

performance of a relevant function or activity (section 1(3)). For example, were P to offer a sum of money to an MP, knowing or believing that acceptance of the offer would mean that a reasonable person in the UK would consider that MP to have breached the expectation placed in him by the public by virtue of being in a position of trust, then P will have committed an offence. There is no requirement for P to intend to induce or reward any other improper conduct and no requirement that the recipient should in fact act improperly as a result.

Offences relating to being bribed

Section 2 targets those who accept or solicit bribes. There are four scenarios in which a person ('R') may commit an offence:

Case 3: where R requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly (whether by himself or another person).

Case 4: where R's request, agreement or acceptance itself constitutes improper performance by R of a relevant function or activity.

Case 5: where R requests, agrees to receive or accepts an advantage as a reward for the improper performance of a relevant function or activity (whether by him or another person).

Case 6: where, in anticipation of, or in consequence of, R requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly, either (a) by R, or (b) by another person at his request or with his assent or acquiescence.

Sections 2(7) and (8) clarify that the state of mind of R or, in Case 6, of any other individual, is irrelevant. An offence is committed regardless of whether it is known or believed that the function or activity is improper.

So, if a head teacher, R, agrees to receive an advantage, for example, the redecoration of her home for a discounted price, intending in consequence that the Board of Governors should admit a child to her school, she commits the section 2 offence. She will be guilty regardless of whether the child is admitted to the school, because the very agreement to receive an advantage in relation to a prospective pupil is likely to breach the expectation of a reasonable person that school admissions should be decided impartially (case 4). If, for example, R knows that the child is very bright but lives just outside the catchment area of the school, and the only other option available to the child is a poorly performing school, then R may not believe that admitting the child is improper. Nevertheless, an offence is still committed.

Bribery of foreign public officials

In addition to the six cases above, section 6 of the Act creates a specific offence of bribery of foreign public officials in the course of business. A person ('P') commits an offence if he bribes a foreign public official ('F') intending to influence F in his official capacity and intending to obtain or retain business or an advantage in the conduct of business. This offence is only committed if P, whether directly or through a third party, offers, promises or gives any

financial or other advantage either to F or to another at F's request or with F's assent or acquiescence and if F is neither permitted nor required by the written law applicable to him to be influenced in his official capacity by the offer, promise or gift (section 6(3)(b)).

A 'foreign public official' is very widely defined, applying to the holder of any legislative, administrative or judicial position, including one within a public international organisation (sections 6(5) and (6)).

Given the scope and breadth of the general offences, one might wonder why this section is necessary. The answer appears to lie in the fact that this section mirrors Article 1 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which the UK ratified in 1998. Both the Convention and this offence focus on the supplier of the bribe and, unlike the general bribery offences, do not prohibit the acceptance of bribes. The 2010 Act is, notably, harsher than the Convention, since it does not contain a requirement that any advantage intended by P need be '*improper*.'

It is equally noteworthy that there is no requirement in this section that P should intend that F should carry out his function improperly. F might be intended to carry out his function or activity entirely properly, yet an offence is still committed if P intends to influence F and to obtain or retain business or an advantage in the conduct of business.

Facilitation payments - often paid to overseas officials to ensure the smooth and speedy execution of routine transactions - are permitted in some foreign jurisdictions. (In the USA, §78dd of the Foreign Corrupt Practices Act 1977 allows payments to a foreign official, political party or party official, the purpose of which is to expedite or secure the performance of a routine governmental action.) The Bribery Act prohibits them. Any payment for any advantage in connection with business will be an offence whether the payment is made in this country or abroad.

Section 6(3) – the requirement that P is neither permitted nor required by the written law applicable to him to be influenced by any offer, promise or gift – adds an element of strict liability. Section 6(7) defines the 'written law', again extremely widely.

The fact that P may believe that F is permitted to act in a particular way is irrelevant. To be sure of avoiding the commission of an offence, P will be required to ascertain what the law is. If the law in a particular country is unclear, P will risk offending should he offer, promise or give any relevant advantage. While it is difficult to think of an example in this country where an official might be permitted to be influenced by an offer, promise or a gift, different countries have different norms or attitudes towards bribery. For example, cash donations to political campaigns are considered acts of bribery in some countries, whereas in some states of the United States such contributions are permitted.

Failure of commercial organisations to prevent bribery

The 2010 Act introduces a new offence which imposes vicarious liability on companies and partnerships for the acts of their employees and other third parties, such as agents or subsidiaries.

Section 7 provides that a relevant commercial organisation, ('C'), commits an offence if a person, ('A'), associated with it, bribes another person intending either to obtain or retain

business for C or an advantage in the conduct of business for C. An offence is committed if the conduct complained of would constitute the commission by A of an offence contrary to section 1 or 6.

Section 8(1) defines A as a person who performs services for or on behalf of C. A may therefore be an employee, a contractor, an agent or a service provider. The country in which A is based is immaterial.

The scope of this part of the Act is extremely wide. It applies to almost all commercial organisations with a presence in the UK, whether limited companies or partnerships (section 7(5)).

Section 7 is intended to make it much simpler to prosecute such organisations for bribery offences. Previously prosecutors had to identify the directing will and mind within a company at the time an offence was committed and obtain evidence of that person's knowledge and involvement. Unsurprisingly, there were few prosecutions. Under the new Act, prosecutors will need only to prove fault by an individual connected to a relevant organisation – 'A' – in order to engage this section.

If acts or omissions which form part of the offence take place outside the UK, that is irrelevant (section 12(5)). For this section to bite, it is sufficient for the commercial organisation to be incorporated in the UK or to carry on part of a business in the UK, even if incorporated elsewhere (section 7(5)). Therefore, a German business with retail outlets in the UK which pays a bribe in Spain could, in theory at least, face prosecution in the UK.

This is, as it was intended to be, a draconian provision. The requirement is not to take all reasonable steps, but *to prevent* corruption: it thus requires companies actively to police the actions of its subsidiaries and sub-contractors.

So, if a furniture company registered in the UK ('C') set up a factory in the Philippines and employed a third party to act on its behalf to help C deal with local contractors and that third party paid a bribe without C's knowledge – C would nevertheless commit an offence.

Section 7(2) provides a defence only if C can prove it had in place '*adequate procedures designed to prevent persons associated with C from undertaking such conduct.*' The Explanatory Notes to the Act indicate that the burden will be on a defendant, to the civil standard of proof.

'Adequate procedures' is undefined. It might be argued, where bribery has occurred, that self-evidently any procedures which were designed to prevent bribery must have been inadequate. However, the prognosis is not quite so bleak! The Secretary of State is under a duty to publish guidance on 'adequate procedures' (section 9(1)) and, in a letter to the House of Lords in December 2009, the then Minister for Legal Aid, Lord Bach, indicated that

*"It is not our intention to drag well run companies before the courts for every infraction. It would be wrong to leave organisations open to a heavy fine if a rogue element within its ranks bribes on behalf of the organisation when those who manage it can show they have put in place procedures designed to prevent bribery on its behalf."*¹

¹ <http://www.justice.gov.uk/publications/docs/bach-letter-adequate-procedures-guidance.pdf>

The same letter, which indicated that guidance is intended before section 7 comes into force, explained that guidance will not be regulatory in nature, but rather it is intended that organisations should develop procedures appropriate to their size and business sectors. Lord Bach attached to his letter a copy of a draft paper by representatives of GC100, a group bringing together the senior legal officers of more than 85 FTSE 100 companies. The principles espoused in this paper are:

- a. Board responsibility for the anti-corruption programme;
- b. Compliance oversight by a senior officer;
- c. A code of ethics;
- d. Risk assessment procedures;
- e. Anti-corruption employment procedures (e.g. vetting of employees);
- f. A gift and hospitality policy;
- g. Training;
- h. Due diligence before entering into business relationships;
- i. A formal decision making process;
- j. Financial controls;
- k. Supply chain management, and
- l. Reporting and investigation procedures.

The Serious Fraud Office, in its guidance on self-reporting, *Approach of the Serious Fraud Office to dealing with Overseas Corruption* (July 2009), has also indicated what it might require commercial organisations to implement as ‘adequate procedures.’ This includes:

- i. Principles which are applicable regardless of local laws or culture;
- ii. A policy on third parties and advisers;
- iii. A policy concerning political contributions and lobbying activities;
- iv. Individual accountability;
- v. Regular checks and auditing;
- vi. A helpline to enable employees to report concerns, and
- vii. Appropriate and consistent disciplinary processes.

The guidance makes it plain that the SFO will expect to see not just paper-compliance, but rather an anti-corruption culture, ‘*fully and visibly supported at the highest levels*’ in the commercial organisation.’ (¶22, p.7)

The Ministry of Justice, in an impact assessment on the new reforms, stated that businesses will be able to adopt a proportionate approach. Adequate procedures for small firms in low risk sectors ought to be relatively ‘light touch’ – for example it may be sufficient to show that the firm’s anti-bribery principles have been fully communicated to the workforce.²

Corporate Hospitality

It is unclear to what extent corporate hospitality falls within the Act and this is likely to trouble small, medium and large businesses alike. The words ‘*financial or other advantage*’ in sections 1 and 2 are undefined and are left to be determined by the tribunal of fact. The government has accepted that corporate hospitality is part of modern business practice and

² <http://www.justice.gov.uk/publications/docs/bribery-bill-ia.pdf>

this Act is not intended to penalise hospitality for ‘*legitimate commercial purposes*.’ However, ‘*lavish corporate hospitality can also be used as a bribe to secure advantages*’ and that is intended to be captured by the Act.³ There is no defence of provision of reasonable hospitality, therefore the offering of *any* hospitality may trigger the application of the Act if it is intended to induce improper conduct.

To take an example, inviting clients to a Christmas party to establish good business relationships ought not to breach any relevant expectation; but inviting clients to a golf weekend with the intention of renewing a contract might. The difficulty lies in the fact that much corporate hospitality is intended to induce or encourage the placing of business with P, at least in part. Leaving a decision as to whether an offence may have been committed to the vagaries of prosecutorial discretion is unfortunate and leaves businesses in an unsatisfactory position when it comes to making decisions as to what hospitality might reasonably be afforded to clients.

Remaining Provisions to Note

Other important provisions in the Act are:

Section 10: the personal consent of the director of the relevant prosecuting agency is required before proceedings can be instituted. The Director may delegate this power if he is unavailable.

Section 11: a conviction on indictment for an offence contrary to section 1, 2 or 6 carries a maximum sentence of 10 years imprisonment plus an unlimited fine. Commercial organisations convicted of the section 7 offence are liable to pay an unlimited fine.

Section 13: provides for a limited defence to offences under sections 1 or 2 where the defendant proves that his conduct was necessary for the proper exercise of any function of: a) an intelligence service or b) the armed forces when engaged in active service. The Explanatory Notes to the Act indicate that the burden will be on a defendant, to the civil standard of proof.

Section 14: provides that where an offence under section 1, 2, or 6 is committed by a body corporate and the offence is proved to have been committed with the consent of a senior officer, then that person (as well as the body corporate) is guilty and liable to be proceeded against.

Referral Arrangements

The Bribery Act may apply to professions as much as to businesses. Referral arrangements are common in many sectors, including the legal services market, and may include payments for introducing a client to a firm or fee-sharing arrangements. The Legal Services Board is currently investigating and collecting evidence on the practice of paying referral fees and is

³ Lord Tunnicliffe’s letter on corporate hospitality, 14/1/10,
<http://www.justice.gov.uk/publications/docs/letter-lord-henley-corporate-hospitality.pdf>

expected to consider a number of options for referral fees over the summer. Whether the Bribery Act 2010 will impact upon their conclusions remains to be seen. Nevertheless, it is at least arguable that any advantage – financial or otherwise – conferred upon a third party in return for the referral of work has the potential to fall foul of the new Act if it is made with the intention of inducing the improper performance of a relevant function or activity, for example, the selection of advocate having regard to considerations other than the best interests of one’s client.

Conclusion

The Bribery Act 2010 is widely drafted and far-reaching in scope. In many ways it is an improvement on earlier corruption legislation: the 2010 Act treats the public and private sectors equally; does not differentiate between foreign and British nationals, and brings the UK closer to complying with its international obligations to combat bribery.

That said, the Act has the potential to include conduct that might be considered wrong but not necessarily criminal, particularly in relation to section 6 (bribery of foreign officials). The responsibility for deciding where conduct crosses the line lies with prosecutors. This does not permit either individuals or commercial organisations to predict with certainty when behaviour, seemingly criminalised by the Act, will in fact be prosecuted.

A remarkably low number of prosecutions were brought under the old legislation. Between 2001 and 2005, only seven defendants faced proceedings under the 1889 Act and 33 under the 1906 Act.⁴ Despite the Act’s commendable aims, the Ministry of Justice’s impact assessment (see above) predicted that the change to the law will only result in a very small number of additional prosecutions. Finding further resources to prosecute in the current economic climate will not be an easy task, but failing to fund investigations into and the prosecution of corruption will mean that the impact of the Act upon individuals and companies is not likely to be great – in effect, the Act will be muzzled.

Fears have been voiced that this Act imposes obligations on UK businessmen that will be substantially more onerous than those on their competitors in the international market place.⁵ It remains to be seen whether other jurisdictions will follow the UK by implementing similar legislation with a view to cracking down on corruption. The Act is certainly laudable for its objective of regulating business transactions in foreign jurisdictions. For it to be successful in this regard, the agencies with responsibility for policing overseas corruption, principally the Serious Fraud Office, will need to be resourced properly to ensure this is not an overly ambitious Act, with a bark worse than its bite.

⁴ Law Commission, *Reforming Bribery - A Consultation Paper*, no. 185 at para. 2.30.

⁵ Michaelson, J and Andrew Berkeley, A (2009) 159 N.L.J. 2009 819, 5 June 2009.