



N A B A R R O

CLARITY MATTERS

The Bribery Act 2010

Summary and implications

The Bribery Bill completed its passage through Parliament and received Royal Assent on 8 April 2010. It now takes its place on the statute book as the Bribery Act 2010.

Until recently, the UK prosecution authorities have been much less proactive than their US counterparts, the latter having frequently investigated and prosecuted offences under the US Foreign Corrupt Practices Act. The UK's Serious Fraud Office is determined to demonstrate its authority. There is no doubt that the new Act will force the UK corporate community to take anti-corruption very seriously. In particular, corporates will need to have regard to the Act's new strict liability offence of failing to prevent bribery by persons associated with it. A corporate can escape liability if it can show that it had in place "adequate procedures" to prevent bribery. This is discussed in more detail below.

Consequently, in preparation for the new Act coming into force (probably by autumn of this year), we anticipate that all commercial organisations will now need to review their current anti-corruption policies, procedures and training to ensure that they have taken all appropriate steps to prevent others committing bribery on behalf of their organisation.

Key effects

The key effects of the new Act are that:

- there are two new general offences of "active" and "passive" bribery;
- there are further new offences of bribing a foreign public official (an "FPO") and (for commercial organisations only) of failing to prevent bribery;
- individuals convicted of any of the new offences will face a penalty of up to 10 years' imprisonment and corporate entities will be liable to an unlimited fine for failure to prevent bribery.

Ask a question

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Active and passive bribery

Active bribery means giving, promising or offering a bribe. Passive bribery comprises requesting, agreeing to receive or accepting a bribe.

A bribe in this either context may occur where a “financial or other advantage” is given or received where this is linked to “improper performance” of a work-related function. This includes giving an advantage in the knowledge that the acceptance of the advantage alone would be an “improper performance” of a work-related function. The scope of these new offences is intentionally broad and applies not only to cash inducements, but also to gifts and other advantages.

Individuals convicted of any of the new offences will face a penalty of up to 10 years’ imprisonment and corporate entities will be liable to an unlimited fine for failure to prevent bribery

Bribery of FPOs

This offence applies to bribes given with the intention of influencing the FPO in his official capacity. The person giving the bribe must also intend to obtain or retain (i) business; or (ii) an advantage in the conduct of business. The definition of “FPO” includes anyone who holds a legislative, administrative or judicial position of any kind, or exercises a public function for any country, public agency or public enterprise, or is an official or agent of a public international organisation. Notably, the Act does not directly address the concept of facilitation payments which may be accepted practice in other jurisdictions. This leaves potential for some interpretative difficulties.

Failing to prevent bribery

A corporate entity can be found guilty of the above offences. In addition, a commercial organisation can be guilty of an offence if a person associated with that organisation bribes another with the intention of obtaining or retaining a business advantage for the organisation. There is a defence if the organisation can show that it had in place “adequate procedures” designed to prevent bribery. A person is associated with an organisation if that person performs services on behalf of the organisation. This is a very broad definition and can include not only other entities within the group and their directors and employees, but also consultants and agents.

Directors and other managers of a corporate entity may also face criminal liability

Liability of directors and senior officers

Directors and other managers of a corporate entity may also face criminal liability if they are proved to have consented to or connived at the commission of a bribery offence by their company.

Any corporate entity, whether or not incorporated in the UK can be guilty of the corporate offence if it does business in the UK, even if the act of bribery itself was committed outside the UK

Jurisdiction

The UK courts will have jurisdiction to prosecute an offence under the Act if any part of the offence takes place in the UK or the offence takes place outside of the UK but is committed by a person with a close connection with the UK, which includes UK nationals and companies incorporated in the UK. Any corporate entity, whether or not incorporated in the UK can be guilty of the corporate offence if it does business in the UK, even if the act of bribery itself was committed

outside the UK. This means the UK Courts will, in theory, have jurisdiction to prosecute offences of bribery which have been committed outside the UK by non-UK corporate entities.

As investigations will be conducted by the SFO, corporates will need to consider self-reporting in the context of potential actions under the Bribery Act. Self reporting suspected bribery may assist a party in working with the SFO to resolve a matter constructively for all parties (and is encouraged by the SFO). Assessing whether a matter should be self-reported to the SFO is always a difficult decision for any corporate. The difficulty is compounded when legislation (such as the Bribery Act) is untested by the courts.

Public procurement

For corporates who contract with public bodies, consideration needs to be given as to whether a conviction for a bribery offence, such as a failure to implement adequate procedures, will prevent them from participating in future public contracts, by reason of the EU Public Procurement Directive. Whilst it is doubtful that a company in that position could be legally prevented from participating, it is nevertheless a risk that should not be discounted.

Preparing for the new Act

The Secretary of State is required to publish guidance on what is meant by “adequate procedures”, and the offence of failure to prevent bribery by commercial organisations will not be brought into force until that guidance is available, which will follow consultation with UK businesses. Jonathan Djanogly MP, speaking on the Bill on 7 April, said that the Conservatives would wish to explore further the creation of a business advisory service to give guidance to business, even if on a non-statutory basis. It is assumed that “adequate procedures” will be determined in a proportionate manner so that the compliance standard applicable to a large multinational will not be the same as for a small company. However, this does mean that all organisations, regardless of size, will need to review their anti-corruption policies and procedures to ensure they are effective and appropriate. Things to consider include policies on giving gifts, corporate hospitality and political contributions.

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Organisations will need to provide adequate training and ensure that structures are put in place so relevant departments such as Compliance, Audit, HR and Legal enforce the policies.

Contact us

Please contact us if you would like to discuss the implications of the Bribery Act 2010. We can offer advice on key governance risks and recommendations for managing those risks as well as assistance with advice or investigation of any matter in which bribery or corruption may be an issue.

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