

The Bribery Act 2010

New Edition

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At a glance

- on 1 July 2011 the Bribery Act 2010 will come into force
- the Act is intended to provide a consolidated scheme of offences, replacing a patchwork of legislation regarded as uncertain and outdated
- the Act applies to bribery in both the public and private sectors
- the Act criminalises offering, giving, requesting and receiving bribes
- the Act contains a specific offence of bribery of foreign public officials
- criminalisation extends to bribes paid overseas
- directors and other officials could be personally criminally liable if they have consented to or turned a blind eye to the commission of an offence
- a new offence of the failure of a commercial organisation to prevent bribery will be introduced
- that offence applies to UK entities and to foreign entities that carry on business in the UK, and could apply to bribes with no other connection with the UK
- the Act requires companies to assess the bribery risks to which they are exposed, and to implement, maintain and enforce anti-bribery policies and procedures, proportionate to the risks they face
- facilitation payments are criminalised, but it is suggested they will only rarely be prosecuted
- hospitality, promotional expenditure and gifts could be regarded as bribes, but recent Government guidance emphasises that this is not intended to criminalise established and ordinary business practices
- a company convicted of an offence of corruption or bribery faces permanent mandatory exclusion from public procurement contracts across the European Union
- it is possible that conviction for failure to prevent bribery may trigger the mandatory exclusion
- dealings with funds received as a result of bribery could constitute a money laundering offence

Introduction

The law of bribery in England and Wales is widely regarded as outdated and uncertain. The Government has been under significant international pressure to revise and simplify the law, in particular from the Working Group responsible for monitoring compliance with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, to which the United Kingdom is signatory.

In an October 2008 report, the Working Group stated that the UK's failure "to enact effective and comprehensive legislation undermines the credibility of the UK's [anti-bribery] legal framework and potentially triggers the need for increased due diligence over UK companies by their commercial partners or Multilateral Development Banks".

The Bribery Act 2010 (the Act) was passed on 8 April 2010. The Act followed an earlier consultation paper and a detailed review of the existing law by the Law Commission. It applies to bribery in both the private and public sectors, and to bribes paid overseas. It is intended to provide a consolidated scheme of offences: existing bribery and corruption laws will be repealed on implementation of the Act.

A bribe could be the payment of money, another financial advantage or a non-financial advantage, including, for example, unduly lavish hospitality or gifts.

The Act includes the offence of "a failure by a commercial organisation to prevent bribery", applicable both to organisations incorporated or formed in the UK, and to organisations which carry on any business in the UK. An organisation will be liable for a bribe paid on its behalf unless it can demonstrate that it had implemented adequate procedures designed to prevent bribery. This means commercial organisations should assess the bribery risks they face, and implement, maintain and enforce effective anti-bribery policies, systems and controls proportionate to the risks that are identified.

The Act will be implemented on 1 July 2011, following consultation exercises leading to the publication at the end of March 2011 by the Ministry of Justice of guidance¹ on the Act, ("**the Guidance**") in particular on the meaning

1 <http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf>
<http://www.justice.gov.uk/guidance/docs/bribery-act-2010-quick-start-guide.pdf>

and scope of adequate procedures. At the same time, the Director of the Serious Fraud Office (SFO) and the Director of Public Prosecutions issued guidance describing the approach to deciding whether prosecutions should be brought under the Act².

The offences

The Act contains the following broad offences:

- offering or giving a bribe (**bribing another person**)
- requesting or receiving a bribe (**being bribed**)
- bribery of a foreign public official
- a commercial organisation failing to prevent bribery

The general offences of bribing another person or being bribed

The general bribery offences can be committed only in relation to broadly defined functions or activities: any function of a public nature; any activity connected with a business, trade or profession; any activity performed in the course of a person's employment or any activity provided by or on behalf of a company, partnership or unincorporated association.

It will be necessary for the prosecution to demonstrate that the person performing one of these functions or activities was expected to perform it in good faith, or was expected to perform it impartially, or was in a position of trust by virtue of performing it; and had acted improperly by failing to meet that expectation. Improper performance is to be judged by whether it breaches the expectation of what a reasonable person, in the UK, would expect in relation to the type of function or activity concerned. In assessing that question, local custom or practice is to be disregarded, unless permitted or required by written law.

2 <http://www.sfo.gov.uk/media/167348/bribery%20act%20joint%20prosecution%20guidance.pdf>

Unusually, the offences are expressed as scenarios, termed “cases” in the Act. There are two offences covering the payment of bribes, and four covering their receipt. The formulations of the offence are complex, and probably overly so, although when publishing draft legislation the Law Commission suggested that this is necessary to ensure that the offences cover all of the widely differing ways in which bribes are promised, made, demanded and received.

The proposed offences are expressed as follows:

Payment offences

- Case 1: the defendant offers, promises or gives a financial or other advantage intending to induce another to perform improperly one of the functions or activities, or as a reward for improper performance;
- Case 2: the defendant offers, promises or gives a financial or other advantage to another, knowing or believing that the acceptance of the advantage would itself constitute the improper performance of one of the functions or activities;

Recipient offences

- Case 3: the defendant requests, agrees to receive or accepts a financial or other advantage intending that one of the functions or activities should be performed improperly;
- Case 4: the defendant requests, agrees to receive or accepts a financial or other advantage, where the request, agreement or acceptance constitutes the improper performance of one of the functions or activities;
- Case 5: the defendant requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance of one of the functions or activities;
- Case 6: the defendant performs one of the functions or activities improperly in anticipation or in consequence of the receipt of a financial or other advantage.

Bribes paid through third parties, or provided for the benefit of third parties, are caught by the offences.

Bribery of foreign public officials

The Act contains a specific and stand-alone offence of bribery of a foreign public official. The definition of a foreign public official is wide.

The offence will be committed if the defendant offers or pays a bribe with the intention of influencing a foreign public official, in his or her official capacity, to obtain or retain business, or an advantage in business. The Act includes a broad definition of a foreign public official which, for example, extends to officials of state-owned companies. Again, the offence will catch both direct payments and payments made through third parties, and also payments made to third parties at the request or acquiescence of the public official.

It would be a defence to show that the foreign public official was permitted or required by written law to be influenced by the offer or making of a payment. For example the Guidance issued by the Ministry of Justice noted that an offence would not be committed if local law permitted a foreign public official to be influenced by offers of investments in the local economy or community.

The offence inevitably overlaps with the general offences described above. This has been justified on the basis of the need for the UK to demonstrate and monitor compliance with its international obligations to deter and punish corruption transactions taking place overseas in accordance with the OECD Convention on Combating Bribery, and to make it easier for the courts to interpret the scope and nature of the offence against the “evolving background” of the OECD Convention.

There is no requirement for the foreign public official to perform their functions improperly. The offence will be committed if the defendant intended to influence the decision of the foreign public official, but failed to do so.

Senior officials consenting to bribery, or turning a blind eye

Directors, managers, company secretaries or those holding similar offices will be personally criminally liable if they have consented to or connived at (i.e. ignored) the commission of one of the proposed general offences, or the offence of bribing a foreign public official. This is consistent with similar provisions in the Fraud Act 2006. The term “manager” is not well-defined in English law, and could apply to quite junior employees in large organisations.

Failure of commercial organisations to prevent bribery

A company or other entity could be liable for the proposed general offences outlined above, if committed by individuals representing its “controlling mind”. However, it is notoriously difficult to prosecute companies on this basis and there has never been a successful prosecution in England of a company for bribery. The OECD Working Group, in its October 2008 report, stated that the UK had not effectively criminalised bribery by companies.

The Act introduces a new corporate offence of failing to prevent bribery. It will not require proof of dishonest or corrupt intent by the defendant company. The offence will be committed by a commercial organisation where:

- a bribe is paid by a person associated with the commercial organisation (note that the offence does not apply to the receipt of bribes);
- the bribe was paid with the intention of obtaining or retaining business, or an advantage in the conduct of business;
- the commercial organisation is unable to demonstrate, on the balance of probabilities, that it had implemented adequate procedures intended to prevent bribery by those associated with it.

Commercial organisations include UK companies and partnerships, or foreign companies and partnerships that carry on business in the United Kingdom.

A person is associated with a commercial organisation if he or she performs services, in whatever capacity, for or on behalf of the organisation. This is wide in scope. The capacity in which services are provided does not matter. The definition necessarily includes employees and agents, and employees are specifically presumed to be acting on behalf of their employer when paying a bribe unless the contrary is shown. It could also extend to subsidiaries, joint venture companies, third party agents or other business partners.

Liability can also extend to contractors, but the guidance stresses that this will be limited to the main contractor where there is a chain of contractors and sub-contractors, addressing a concern expressed by companies in a number of industries that they had limited or no direct control over the activities of sub-contractors.

In relation to joint ventures, the degree of control will be critical. A contractual joint venture is more likely to create a risk of generating liability than a separate legal entity, particularly where the legal entity is separately managed.

The organisation could commit the offence even if no member of senior management was aware that an offence was being committed, and even if the company had done nothing to encourage or acquiesce in the payment of a bribe. Again, the offence applies to bribes paid domestically or overseas. A company can be prosecuted whether or not criminal proceedings are brought against the person responsible for the bribe.

The offence, in effect, requires companies to assess the bribery risks they face, to implement, maintain and enforce effective anti-bribery and anti-corruption procedures and policies proportionate to identified risks, and to keep them under review. Criminal liability should be avoided if a properly trained but fraudulent employee found a way to circumvent adequate compliance procedures. The Guidance emphasises that well-governed companies should not be criminalised for an isolated case of bribery by a maverick employee.

In formulating the offence, the Government has rejected automatically imposing criminal liability on companies for bribery by their employees or agents, as is the case, for example, in the US. Such an approach has traditionally been taken only in relation to less serious wrongdoing. Doing so in relation to bribery offences in isolation was considered inadvisable, pending a broader review of the nature and scope of corporate criminal liability.

Ultimately, it will be for the courts to decide whether the procedures put in place for the relevant business are ‘adequate’. The Act itself provides no definition as to what constitutes ‘adequate procedures’, but provides for guidance to be issued by the Government.

Guidance on adequate procedures

The Guidance was published on 30 March 2011, and immediately generated polarised reactions. Transparency International UK issued a statement suggesting that the guidance had undermined one of the best anti-bribery laws in the world and departed from best international practice, also stating that “Parts of [the Guidance] read more like a guide on how to evade the Act, than how to develop company procedures that will uphold it.”

Business groups, however, welcomed the Act, suggesting in particular that it provided much-needed clarification of ambiguities, in particular as to how the Act would apply to gifts and hospitality and the ability of third parties to generate liabilities, whilst also emphasising that compliance efforts should be proportionate to the risks that are faced.

The Guidance identifies and explains six general principles, to be used by commercial organisations to develop appropriate and proportionate procedures and policies. They are intended to be “flexible and outcome focussed”. The Guidance also appends a number of case-studies, although these are primarily aimed at small to medium-sized businesses.

The six principles are as follows:

Top level commitment to preventing bribery

- The board of directors or owners should be committed to preventing bribery, and should work to establish a culture that bribery is never acceptable, although in large organisations senior managers may lead anti-bribery work.
- Top level management should be involved in the development of bribery prevention procedures, the making of key decisions, and approval of the risk assessment.
- Top level management should be involved in communication of the organisation’s anti-bribery stance.
- All levels of management and the workforce should be aware of the anti-bribery policy, although the means of communication will vary according to the size and type of organisation, the bribery risks it faces and the audience.

Risk assessment

- Commercial organisations should assess the nature and extent of its potential exposure to bribery by persons associated with it.
- The assessment should be periodic, informed, and accurately and appropriately documented. Reviews will be required, for example, when an organisation enters a new sector or country.

- A risk assessment should be carried out prior to the implementation of the Act. Its contents will inform the procedures that a business should implement.
- The Guidance suggests that the risk assessment may form part of a more general risk assessment carried out in relation to business objectives. It should be overseen by top level management, be appropriately resourced, and identify the internal and external information sources that enable risk to be assessed.
- A risk assessment should consider the risks that arise from the countries, business sectors, and types of transaction with which an organisation is involved, and the relationships through which business is conducted. For example, the use of intermediaries in transactions with foreign public officials is likely to be a higher risk activity that requires particular scrutiny.
- Commonly encountered risks include deficiencies in employee training, skills and knowledge; a bonus culture that rewards excessive risk taking; lack of clarity on policies and procedures for hospitality and promotional expenditure or political and charitable contributions, or lack of clear financial controls.

Proportionate procedures

- Anti-bribery policies and procedures are required to deter and detect bribery.
- The Guidance stresses that policies and procedures should be proportionate to the bribery risks that are identified in the risk assessment, and to the nature, scale and complexity of the organisation’s activities.
- Policies and procedures should be “clear, practical, accessible, effectively implemented and enforced”.
- The Guidance recognises that procedures will vary with relationships - significant scrutiny is likely to be required in relation to a third party agent representing an organisation in negotiations with foreign public officials, while procedures may be much more low key in relation to associated persons presenting a minimal risk of bribery.
- The Guidance suggests that applying procedures retrospectively to existing associated persons should be done “over time” using a risk-based approach. Despite this, it may prove difficult to justify a lack of due diligence on, say, existing sales agents, if they were to pay a bribe following the implementation of the Act.

- Specific policies should be considered, certainly where risks are identified, for political and charitable contributions, gifts and hospitality, dealing with demands for facilitation payments, dealing with allegations of bribery, and on the use of third parties to win business.
- In large organisations, it may be appropriate to implement a whistle-blowing system which allows staff safely and confidentially to report suspicions or knowledge of bribery, and which ensures that all reports are investigated (and possibly a helpline on which advice can be taken).

Due diligence

- Due diligence should be carried out on those performing services on behalf of an organisation, with the extent of the scrutiny depending on the risk that the third party presents.
- The objective is to have procedures designed to prevent persons associated with an organisation from paying bribes.
- It appears that due diligence is no longer required of suppliers, unless those suppliers can be said to be performing a service on behalf of the organisation.
- Particular care will be needed in high risk circumstances, for example where local laws dictate the use of local agents.
- Due diligence will be important in mergers and acquisitions.
- Commercial organisations should consider incorporating due diligence into its recruitment and human resources procedures, at least in positions that carry the risk of bribery.

Communication and training

- Bribery prevention policies and procedures should be embedded and understood throughout the organisation, in proportion to the risks that are faced.

- There needs to be effective communication of policies in key areas such as hospitality and promotional expenditure, facilitation payments, and charitable and political donations.
- Training should be tailored to the identified risks associated with specific positions.

Monitoring and review

- Policies and procedures should be monitored, reviewed and improved.
- Review mechanisms will depend on the type of organisation, and the risks to which it is exposed. Appropriate systems will range from internal financial control mechanisms, staff surveys and formal internal or external assessments.

Other guidance

In addition to the guidance issued by the Ministry of Justice, guidance can be found in a number of existing publications such as that published by the SFO on self-reporting of bribery, Transparency International's "Business Principles for Countering Bribery", Transparency International UK's "Guidance on Adequate Procedures under the UK Bribery Act 2010", the OECD's Business Approaches for Combating Corrupt Practices and the US Federal Sentencing Guidelines for Organizations published by the US Department of Justice.

Extra-territorial application

The Act has wide extra-territorial application, extending to bribes paid overseas by British citizens, UK residents and companies or partnerships incorporated in the UK³, even where no steps in relation to those bribes are taken in the UK.

3 The proposed offences would also apply to citizens of British Overseas Territories, British Nationals (Overseas), British Overseas Citizens, British subjects and British protected persons.

The offence of a failure to prevent bribery could also be committed where the bribe, and all steps taken in relation to it, occurred outside of the UK, and applies to foreign commercial organisations which carry on business in the UK. There is no need for a connection between the bribe and the UK business.

This could mean, for example, that a parent company located abroad could be liable for the acts of subsidiary located in the UK. Indeed, a foreign parent company with a subsidiary in the UK could be liable for the acts outside of the UK of a separate non-UK subsidiary, although prosecutors will have to consider whether it is in the public interest for a prosecution to be brought in these circumstances.

However, the Guidance issued by the Government suggests that there needs to be a demonstrable business presence in the UK, and the level of control over the subsidiary will be a key consideration. The Guidance also suggests that a UK share listing will not, by itself, be sufficient to conclude that business is being carried on in the UK.

Penalties

An individual found guilty of an offence is liable to ten years imprisonment or an unlimited fine. A company is liable to pay an unlimited fine.

Facilitation payments

Facilitation payments are payments made to induce a person to perform a duty which that person is obliged to perform, without resulting in preferred treatment, and where the payment exceeds that properly due. Such payments are typically, but not necessarily, of low-value, for example payments to obtain utilities or a licence that must be issued by law. Payments made to obtain any kind of preferential treatment are not facilitation payments, for example payments made to obtain a licence where the criteria for issue have not been met.

The criminalisation of facilitation payments has been a matter of considerable debate. Demands for facilitation payments are customary in some countries, and the person from whom the payment is demanded is often the victim of extortion. Facilitation payments are not criminalised under the United States Foreign Corrupt Practices Act, although they are illegal in many jurisdictions.

The Act criminalises facilitation payments, both under the general offences and also under the specific offence of bribing a foreign public official. The Government has indicated, however, that it would only rarely be appropriate to prosecute the making of facilitation payments.

Gifts, hospitality and promotional expenditure

The Act does not contain provisions which specifically govern the provision of gifts, hospitality and promotional expenditure. Unduly lavish hospitality or gifts could be considered bribes. The Government has stated on a number of occasions since the Act was published that it does not wish to prevent or punish genuine expenditure considered part of ordinary business practices. The difficulty is identifying the line where, for example, genuine hospitality stops and lavish hospitality begins. There will undoubtedly be a grey area between legitimate and illegitimate gifts and hospitality, particularly when policies are applied across jurisdictions that differ in wealth and culture.

The Guidance repeatedly stressed that the Act was not intended to criminalise accepted business practices. In the foreword, for example, the Justice Secretary stated “Rest assured – no one wants to stop firms getting to know their clients by taking them to events like Wimbledon or the Grand Prix”, and the Guidance itself said that taking foreign clients to attend a Six Nations match at Twickenham (an international European Rugby tournament) as part of a public relations exercise designed to cement good relations is extremely unlikely to engage the Act as there is unlikely to be evidence of an intention to induce improper behaviour. The Guidance has considerably lessened concerns that ordinary commercial activities would be treated as criminal.

In difficult cases, a useful test may be whether the gift or hospitality is something the recipient would themselves be able or willing to buy. Timing will also be important. Hospitality or gifts during a tender process may prove difficult to justify.

Particular care will be needed in dealing with whether gifts, hospitality and promotional expenditure involving foreign public officials are appropriate. However, the Guidance suggests that hospitality and promotional expenditure is unlikely to create liability where the costs would otherwise be met by the public body they represent.

Money laundering offences

Money laundering offences may also be committed when dealing with funds received as a result of a bribe, for example payments made under a contract procured by bribery. Those funds are very likely to be regarded as criminal property, being a benefit obtained from criminal conduct. Any dealings with those funds, with knowledge or suspicion that they represent criminal property, would constitute a money laundering offence under the Proceeds of Crime Act 2002. That could include funds obtained through historic bribes, for example under previous management. Money laundering offences can be committed by anyone. The only defence to a money laundering charge, for example against directors, is for a report to be made to the Serious Organised Crime Agency disclosing the payment of bribes. However, disclosure could lead to criminal investigation and prosecution.

It should be noted that the regulated sector, for example auditors, accountants or lawyers, have a duty under the Proceeds of Crime Act to report suspicions of money laundering, unless the information was obtained in privileged circumstances. A failure to report is a criminal offence.

Mandatory exclusion from public procurement

European Union procurement law, implemented in the UK, provides for mandatory exclusion (debarment) of a company from public sector contracts if the company, or its directors or certain other representatives, have been convicted of corruption or bribery or fraud or money laundering. This is a draconian provision: debarment is mandatory regardless of the seriousness of the offence and the presence of mitigating factors. There is a need for the existing law to be replaced with a system that applies fair and proportionate penalties, with mandatory debarment reserved for particularly serious or persistent cases.

It is unclear whether conviction for failure to prevent bribery would lead to mandatory debarment. On the one hand, it is an offence of strict liability which does not require dishonesty or improper intent on the part of the defendant company. Debarment in the absence of such intent would be particularly harsh. However, during pre-legislative debate the Government stated that active consideration was being given to whether conviction should lead to mandatory debarment. No further guidance has yet been provided.

Self-reporting

The SFO is actively encouraging companies to self-report discovery of bribery or corruption. In July 2008, it published particular guidance in relation to overseas corruption: “Approach of the Serious Fraud Office to Dealing with Overseas Corruption”. Self-reporting is a difficult decision for any company to make. The advantage is that the preferred approach of the SFO is to deal with self-referrals through civil penalties, at least for the company involved, rather than criminal prosecution. An exception could be where board members were personally involved in the wrongdoing, particularly where they had personally benefited. Civil penalties would not, for example, trigger mandatory exclusion from public procurement.

Conclusion

On some issues, the Act itself lacks clarity. Obvious examples include the meaning of adequate procedures, the circumstances in which third parties could be said to be acting on behalf of an organisation, and the circumstances in which the making of facilitation payments would be prosecuted. The Guidance issued by the Ministry of Justice provides clarification of these areas. However, elements of the Guidance have been criticised by campaigning groups, and the interpretation of the Act is a matter for the Courts.

Anti-corruption and anti-bribery policies, systems and controls are a requirement of the Act, and these will need to be robust and effective in areas of risks. Vigorous enforcement by the US Department of Justice and Securities Exchange Commission of the US Foreign Corrupt Practices Act against both domestic and foreign companies already make this essential for any company trading internationally, and such companies will already be compliant with major elements of the Act. However, policies will need to be updated to reflect the differences between the US and UK legislation, notably the extension of the UK legislation to private sector bribery and the treatment of facilitation payments. Companies without existing compliance programmes will need to introduce policies as quickly as possible. UK law enforcement agencies have been demonstrably prioritising the investigation and enforcement of bribery, and this is likely to continue following the implementation of the Act.

It is important for all companies to carry out a risk assessment to identify both the bribery risks faced by their business, and whether current systems, controls and procedures are adequate to prevent bribery.

Capability statement

Edwards Angell Palmer & Dodge has substantial experience and capabilities in assisting corporations confronting corruption issues in a wide array of contexts. Our offices in the US, London and Hong Kong can guide clients through almost any corruption-related issue, whether it be implementing effective training and compliance programmes, conducting domestic or international internal investigations, or responding to government inquiries or enforcement actions. The Hong Kong office has attorneys experienced in compliance issues both in Hong Kong and China. We also have extensive experience in data protection, whistleblower protocols, and privacy compliance duties of companies in different countries arising from corruption enquiries, investigations and remedial compliance actions.

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