

The Bribery Act 2010 – Update February 2011

February 2011



Background

UK law as it relates to acts of bribery has developed in a largely piecemeal fashion as a hybrid of legislation and case law, some of which is over 100 years old. It should then come as no surprise that reform has been keenly debated for more than a decade, not least to combat increasingly sophisticated bribery schemes.

The Bribery Act 2010 (the "Act") received Royal Assent on 8 April 2010 and had been due to come into force towards the end of 2010. A Government consultation exercise on the guidance to be issued to commercial organisations bribery prevention concluded in November 2010 and the publication of finalised guidance is expected shortly. The Ministry of Justice has indicated that there will be a three month notice period following the publication of this guidance in order to allow businesses an adequate familiarisation period before the commencement of the Act. In late January 2011 it was widely reported that the Government was to review and amend the guidance before its publication and as such, the implementation of the Act has been indefinitely delayed.

The Act follows in the wake of the UK's slippage to 17th position, behind Japan, Hong Kong and Austria in the 2009 international "corruption perceptions index" as produced by Transparency International and is effectively the culmination of the implementation of the UK's obligations under the Organisation for Economic Cooperation and Development's (OECD) Convention on Combating Bribery of Foreign Public Officials which was ratified by the UK in 1997. Notwithstanding the fact that the Act comes some 13 years later, the changes it brings will present clear and immediate organisational challenges for businesses operating both internationally and in this jurisdiction.

The Offences

The Act codifies the existing law on bribery and introduces a new corporate offence. The offences can be summarised as follows:

1. Offering a bribe to another person;
2. Accepting or soliciting a bribe;
3. Bribery of foreign public officials; and
4. Failure of a commercial organisation to prevent bribery (the "Corporate Offence").

The first three offences are largely self-explanatory and cover the act of bribery, receipt of a bribe and the bribery of foreign public officials. However, it is likely that the Corporate Offence will be of most interest to employers. A commercial company or a partnership will be guilty of this offence if an associated person (including an employee, agent or subsidiary providing services for the organisation) bribes another person intending to obtain or retain business for the organisation, or to obtain or retain an advantage in the conduct of business for the organisation. The Corporate Offence, is committed "irrespective of whether the acts or omissions which form part of the offence take place in the United Kingdom or elsewhere."

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The extraterritorial reach of the Act is wide and has important implications, particularly as regards the Corporate Offence. A business, even if based entirely in the UK, may be held responsible for the acts of its foreign associated persons. Similarly, organisations incorporated elsewhere but carrying on business in the UK or employing UK citizens should not assume that they will fall outside the reach of the Act.

The Penalties

An individual guilty of one of the first three offences is liable to a maximum of 10 years' imprisonment and/or an unlimited fine. A Commercial organisation convicted of the Corporate Offence will be subject to an unlimited fine.

The Defence

The Corporate Offence is a strict liability offence. However, there is some light at the end of the tunnel for businesses, as the Act provides for a defence whereby a company may escape liability if it can show that it had in place "adequate procedures" designed to prevent those persons performing services on its behalf from committing bribery.

As such, if it is proved that a bribe was paid on a company's behalf with the intention to obtain or retain business for the company, an offence will have been committed for which the company will be liable, subject to the "adequate procedures" defence.

Where an organisation might be liable because an associated person has committed a relevant offence, the sole defence available to the organisation will be for it to show that it had in place "adequate procedures" to prevent bribery. The Act, therefore, places the onus on organisations to ensure that their own procedures (and where necessary those of their associated persons) are adequate.

Governmental Guidance

What constitutes adequate procedures is not currently clear in the absence of final governmental guidance. In the meantime, the Ministry of Justice has published a December 2009 letter from Lord Bach (the then Parliamentary Under-Secretary of State) which makes the following suggestions on the areas which should be considered in the adoption of adequate procedures:

- A company's board of directors (or similar body) should take responsibility for establishing an anti-corruption culture and programme.
- A senior officer should be responsible for overseeing the anti-corruption programme.
- There should be a clear and unambiguous code of conduct including an anti-corruption element, and procedures should be established to assess the likely risks of corruption arising in a company's business.
- Employment contracts should expressly state penalties relating to corruption.
- There should be a gifts and hospitality policy to monitor receipt of gifts and entertainment.
- Anti-corruption training should be provided.
- There should be financial controls to minimise the scope for corrupt acts to be committed.
- There should be appropriate whistleblowing procedures to enable employees to report corruption in a safe and confidential manner.

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In this regard, organisations will have to ensure they have the necessary resources available to implement such procedures and it appears that it will not be sufficient for large commercial organisations to simply produce written policies and compliance programmes without supporting them through effective implementation and thorough record keeping.

Conclusion

Although the guidance on adequate procedures has not yet been published, the delay in implementation of the Act affords organisations some time for preparation and it is imperative that quick steps are taken to prepare for the Act coming into force. Organisations should review existing procedures, decision-making processes and financial controls. If such procedures are not already in place, they should be implemented without delay, and employees should be provided with appropriate training. Organisations should undertake due diligence on any proposed new business relationship and where possible, utilise procurement and contract management procedures to minimise the opportunity for corruptive practices by agents, partners and sub-contractors.

It is of note that the Act will not change the disciplinary processes that a firm is required to follow in the investigation of any alleged act of corruption before the imposition of a disciplinary sanction. Firms should continue to follow their own procedures or rely on the statutory disciplinary and grievance procedures.

Please contact Jennifer Ebbage (j.ebbage@cfrlaw.co.uk), Scott Kennedy (s.kennedy@cfrlaw.co.uk) or any solicitor in our Company Commercial Department should you have any queries regarding the implementation and impact of the Act.

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