

The Bribery Act 2010. An overview.

The Bribery Act 2010 (the “Act”)¹ received Royal Assent on 8 April 2010 and will come into force on 1 July 2011. It radically overhauls the UK's outdated and criticised anti-corruption laws and introduces a new, clearer regime for tackling bribery that will apply to all businesses based or operating in the UK. The penalties for non-compliance are serious, but guidance has been published by the Ministry of Justice (the “MoJ”) to provide some clarification on what organisations may do to ensure their practices do not fall foul of the Act. In this briefing we explain the main provisions of the Act and consider the steps businesses should take now to ensure their practices are ready, once the Act is implemented.

Background

The previous UK anti-corruption legislation was a mis-match of common and statutory law emanating from the late 1800s/early 1900s which had been little developed over 90 years. It was criticised as being confusing and complex, having a dependence on a distinction between public/private bodies, and an unclear application of legislation. The new law aims not only to rationalise the existing legislation, but to target overseas corruption and to make companies criminally liable for failing to have in place adequate procedures to prevent bribery. Unlike previous legislation, the Act applies to the whole of the UK, including Scotland. Furthermore, it covers offences committed by UK nationals and residents wherever such offences are committed and so is broader in remit than the previous regime.

The general offences - bribing and being bribed

The Act sets out two general offences of bribing and being bribed which are committed when someone:

- offers, promises or gives another (the offence of bribing),² or
- requests, agrees to receive or accepts (the offence of being bribed),³

¹ The full text of the Bribery Act 2010 is available [here](#).

² Bribery Act 2010, section 1

Contents

Background	1
The general offences - bribing and being bribed ...	1
Two new offences.....	2
Bribing a foreign public official (FPO)	2
Corporate offence of failing to prevent bribery	3
Adequate procedures.....	3
Guidance and consultation.....	3
The six principles	4
Penalties	5
Additional liability of “senior officers”	5
Prosecutorial discretion.....	5
The Act v FCPA.....	6
What now?	6

- a financial or other advantage in connection with a person performing a function “improperly”.⁴

These offences are not new, but are re-stated more clearly than previously. Improper performance of a function is one which breaches an expectation that the function will be performed in good faith, impartially or as a result of a position of trust. This contrasts with previous legislation which required an element of corruption. The change in approach should make it easier for bribery offences to be prosecuted since there is no longer any need to show a corrupt intent on the part of the giver or recipient of the advantage.

Two new offences

In addition, the Act introduces two new offences: that of bribing a foreign official, regardless of where the bribe is committed; and a new corporate offence of failing to prevent bribery.

Bribing a foreign public official (FPO)⁵

This offence is committed when a person bribes an FPO or offers an advantage to an FPO:

- with the intention of influencing the FPO in his capacity as an FPO
- in order to obtain or retain business or an advantage in the conduct of business, and
- the FPO is not permitted or required by applicable local written law to be influenced by the advantage.

Although this appears as a new discrete offence in the Act, it is not new in substance. However, the provision demonstrates the UK’s commitment to OECD principles⁶ and emphasises to businesses the need to exercise caution in their dealings with FPOs.

Unlike the general offences, there is no need for the FPO to perform his or her function “improperly” as a result of the bribe. Where local advice has been properly sought and the payment made in accordance with that advice, it is anticipated that prosecutors and juries will take that into account. However, the Government has provided no guidance on this issue.

Facilitation (or “grease”) payments remain illegal under the Act, even if they are permitted, or even expected, by local custom. This contrasts with the position in the US where, under the Foreign Corrupt Practices Act (FCPA) there is an exception for so-called facilitating payments. This permits companies to make payments for the purpose of expediting the performance of routine governmental actions, such as clearing goods through customs, although it does not extend to payments made for the purpose of obtaining a

³ Section 2

⁴ Sections 3 and 4

⁵ Section 6

⁶ As demonstrated in the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1998

particular substantive decision from a governmental agency. Concern has been raised that the inconsistent standards of conduct applicable to corporates subject to differing national laws will weaken the commercial position of UK businesses when competing with foreign businesses abroad. However, the unambiguous stance of UK law sends a clear signal to businesses and the global community alike that bribery, no matter how it is dressed up, will not be tolerated.

Corporate offence of failing to prevent bribery⁷

This is a completely new offence and the one which has, so far, provoked the most reaction among the business community. Under it, a relevant commercial organisation will be liable if:

- a person associated with it bribes another person intending to obtain or retain business or an advantage in the conduct of business for the company (that is, commits the general offence of bribing under section 1 or bribing a FPO under section 6), and
- there are no adequate procedures in place designed to prevent bribery.

It is effectively an offence of strict liability, subject to the adequate procedures defence, and reflects the government's emphasis on corporate culture and the need for all in an organisation to be committed to preventing bribery.

The definition of "relevant commercial organisation" is very wide and includes bodies incorporated in the UK or UK partnerships, no matter where they carry on business, and companies and partnerships carrying on business in UK, no matter where they are incorporated. Likewise, "associated person" has been defined widely to include people who perform services for or on behalf of the company regardless of their capacity,⁸ so may include, for example, the company's employee, agent or subsidiary or joint venture partner.

How these provisions will operate in practice has been clarified to an extent by guidance published by the MoJ, but it will be left to the courts ultimately to determine their application.

Adequate procedures⁹

It is a defence to a charge under section 7 that the business had "adequate procedures" in place designed to prevent persons associated with the company from undertaking such conduct.

Guidance and consultation

Pursuant to its obligation under section 9 of the Act, the Government published guidance on 30 March on the procedures that organisations may

⁷ Section 7

⁸ Section 8

⁹ Section 7(2). For a more detailed note on "adequate procedures" please see Linklaters' briefing: The Bribery Act 2010 – Adequate Procedures

put in place to prevent persons associated with them committing bribery.¹⁰ The guidance is not intended to be prescriptive, nor to provide a one-size-fits-all solution. Instead the guidance seeks to reflect good practice and provide generally applicable guidelines to be adapted by businesses as appropriate.

The guidance focuses on six key principles and provides commentary on each. Illustrative scenarios, although not forming part of the guidance, serve to expand on what may be considered “adequate” in certain circumstances.¹¹

The six principles

Proportionate procedures

A commercial organisation should look to implement procedures which are proportionate to the bribery risks it faces, and the nature, scale and complexity of its activities. The remaining five principles provide guidance on how to implement proportionate procedures.

Top level commitment

Commitment to an anti-corruption culture should come from the board of directors down. Policies should be visible both within the organisation and to external partners and subsidiaries.

Risk assessment

This involves businesses understanding the risks they face in their particular operation. Some sectors of industry, because of their nature or the geographical location, or the type of transaction involved, are considered to be more exposed to corruption than others. Activities undertaken in some developing countries are also likely to warrant a higher degree of investigation and consideration.

Due Diligence

Potential risks should be ascertained by appropriate due diligence, including enquiring about intended transaction partners and agents, and the risks posed specifically by the geographical location or sector of the intended operation.

Communication (including training)

Once developed, an organisation’s policies and procedures should be promulgated throughout the organisation, backed by training if appropriate and clear penalties for breach.

Monitoring and review

Policies should be evaluated periodically to ensure they develop in line with business needs.

¹⁰ [The Bribery Act 2010 – Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing](#) (section 9 of the Bribery Act 2010)

¹¹ Linklaters has published a separate briefing on the MoJ guidance: [The Bribery Act 2010. Guidance on adequate procedures published.](#)

Penalties¹²

The penalties for breaching the provisions of the Act are far more severe than under the previous regime, with conviction carrying up to 10 years imprisonment or an unlimited fine (or both) for individuals, and unlimited fines for businesses. Businesses also risk being debarred from competing for public contracts under the Public Contracts Regulations 2006¹³ and are in any event likely to incur negative publicity and damage to their reputation.

Additional liability of “senior officers”¹⁴

If any of the general offences of bribing another person, being bribed, or bribing a FPO is committed by a body corporate or a Scottish partnership, any “senior officer” is guilty of the same offence if he or she has consented to or connived in the commission of the offence provided that, if the offence is committed outside the UK, he or she has a close connection to the UK. This provision has not received much attention from commentators, but clearly places an obligation on company officers to ensure that they are not taken to have connived or consented to bribery acts committed by others. Whether the consent or connivance will have to be express, or could be implied through a failure to act, is not yet clear.¹⁵ However, the provision emphasises again the need for an organisation’s anti-corruption culture to be led from the top.

“Senior Officer” is widely defined to include a director, manager, secretary, or similar officer, or in relation to a Scottish partnership, a partner. A close connection will be established if the officer is a British citizen, British National (Overseas), an individual ordinarily resident in the UK, a body incorporated under the law of any part of the UK, or a Scottish partnership.

Prosecutorial discretion

Under the Act, the bringing of proceedings for bribery offences in England and Wales requires the personal consent of the Director of the Serious Fraud Office or the Director of Public Prosecutions. Guidance was issued jointly by these bodies on 30 March 2011 which, together with the Code for Crown Prosecutors, sets out the Directors’ approach to prosecutorial decisions under the Act.¹⁶ The guidance emphasises that, while bribery is a serious offence, a prosecution will only be brought if there is both sufficient evidence and that prosecution is in the public interest. The guidance includes non-exhaustive lists of factors both for and against prosecution, with specific references to facilitation payments and hospitality and promotional expenditure.

¹² Section 11

¹³ In a written statement to Parliament on 30 March 2011 the Minister for Justice indicated that a conviction of a commercial organisation under section 7 of the Act in respect of a failure to prevent bribery would attract discretionary rather than mandatory exclusion from public procurement under the UK’s implementation of the EU Procurement Directive (Directive 2004/18). The relevant regulations are to be amended to reflect this.

¹⁴ Section 14

¹⁵ “Consent and connivance” of senior officers is another issue under consideration in the Law Commission’s review of criminal liability (see note 8 above).

¹⁶ *Joint prosecution guidance of the Director of the SFO and the Director of Public Prosecutions*, issued on 30 March 2011.

The Act v FCPA

Many companies and businesses are already familiar with the requirements of the FCPA and used to ensuring their policies and practices meet those demands. However, compliance with US law will not necessarily ensure compliance with the new UK Act.

The Act is arguably significantly broader than the FCPA in a number of ways:

- Not only does the Act apply to bribery of public officials but also of private citizens, unlike the FCPA. (Individual commercial bribery is covered by state statutes in the US.)
- There is no defence for facilitation payments in the Act, unlike under the FCPA.
- The FCPA does not contain an equivalent to the corporate offence for failing to prevent bribery, (although it does include provisions relating to the keeping of books and records that accurately reflect business transactions and to the maintenance of effective internal controls).
- There is no need under the Act to prove “corrupt” intention, which is still required under FCPA.
- Unlike the US Department of Justice, the UK Government has rejected calls for a hotline advisory service, although it has indicated that it may consider such a move.

It will therefore be necessary to consider UK legislation separately and ensure that any business with a connection to the UK is Act-compliant, in addition to meeting any US requirements. Given that a connection will be established simply by having a place of business in the UK, even if the organisation’s main activities are carried on elsewhere, the reach of the Act is potentially very wide.

What now?

The Act will come into force on 1 July 2011. Businesses will be expected to have implemented adequate procedures by that date. Linklaters would be delighted to assist you further in determining what may be appropriate for your organisation and working with you to develop appropriate policies and procedures.

Contacts

For further information
please contact:

Satindar Dogra

Partner

(++44) 20 7456 4316

satindar.dogra@linklaters.com

Michael Bennett

Partner

(+44) 20 7456 4291

michael.bennett@linklaters.com

Dario Dagostino

Managing Associate

(+44) 20 7456 5061

dario.dagostino@linklaters.com

Jane Larner

Managing PSL

(+44) 20 7456 4244

jane.larner@linklaters.com

Author: Jane Larner

This publication is intended merely to highlight issues and not to be comprehensive, nor to provide legal advice. Should you have any questions on issues reported here or on other areas of law, please contact one of your regular contacts, or contact the editors.

© Linklaters LLP. All Rights reserved 2011

Linklaters LLP is a limited liability partnership registered in England and Wales with registered number OC326345. The term partner in relation to Linklaters LLP is used to refer to a member of Linklaters LLP or an employee or consultant of Linklaters LLP or any of its affiliated firms or entities with equivalent standing and qualifications. A list of the names of the members of Linklaters LLP together with a list of those non-members who are designated as partners and their professional qualifications is open to inspection at its registered office, One Silk Street, London EC2Y 8HQ or on www.linklaters.com and such persons are either solicitors, registered foreign lawyers or European lawyers. Please refer to www.linklaters.com/regulation for important information on our regulatory position.

We currently hold your contact details, which we use to send you newsletters such as this and for other marketing and business communications.

We use your contact details for our own internal purposes only. This information is available to our offices worldwide and to those of our associated firms.

If any of your details are incorrect or have recently changed, or if you no longer wish to receive this newsletter or other marketing communications, please let us know by emailing us at marketing.database@linklaters.com.

One Silk Street

London EC2Y 8HQ

Telephone (+44) 20 7456 2000

Facsimile (+44) 20 7456 2222

Linklaters.com