BRIBERY ACT 2010

A nightmare, or just a bad dream?

Will Winch studies the effect and extent of the UK’s new anti-corruption legislation

On 1 July 2011 the Bribery Act 2010 comes into force. The Act is designed to update some fairly archaic statutory provisions and to comply with the UK’s ratification of the OECD’s Anti-Corruption Convention.

The Act received royal assent in April 2010 and immediately whipped up a storm of protest from business leaders and the press. The Act is one of the most far-ranging pieces of anti-corruption legislation in the Western world, and there were concerns that it appeared to threaten corporate hospitality and undermine Britain’s ability to compete on the world stage.

The government was due to publish guidance before the summer recess in 2010, with a view to the Act coming into force in October 2010. The guidance was delayed, which led some commentators to speculate that the Act might be amended or that parts of it would not be brought into force. However, the guidance was eventually published on 31 March 2011. It comes in two forms: a quick-start guide and a long-form guide with case studies (the guidance).

It is now clear that the Act will be untouched, and the main thrust of the guidance is ‘Don’t panic’, with examples of conduct which would be acceptable under the Act. However, it should be noted that the guidance is, well, guidance. It does not change the wording of the Act. This is perhaps an example of the government trying to soften the impact of legislation without following the legislative process. Whether it has that effect remains to be seen.

The offences

There are four main offences under the Act:

- giving a bribe, with the intention of encouraging a person to perform a relevant function or activity improperly;
- receiving a bribe, with the intention that a relevant function will be performed improperly as a result;
- bribing a foreign public official; and
- failing to prevent a bribe.

The fourth offence applies only to commercial organisations. Each offence is discussed in more detail below.

Penalties

The penalty for any of the above offences is an unlimited fine and up to ten years in prison for any individual found guilty. If a company commits the offence, any senior officer who consented to or connived in the bribe will be held personally liable.

On the subject of custodial sentences, the comments of Lord Judge CJ in R v Dougall [2010] are worth noting:

For all the respectable and reputable fronts that many fraudsters and corrupt businessmen may present, they are criminals. What is sometimes described as white collar crime or commercial crime taking the form of fraud and corruption in particular is crime... We need to take care... not to allow the issue of guidelines for the prosecution of cases of fraud and corruption to suggest that they are rather more respectable than other forms of crime, or to be persuaded that somehow or other those who commit fraud or corruption should not be ordered to serve prison sentences because such sentences should be reserved for those they would regard as common criminals. Once convicted, those are the ranks that they join.

Aside from the criminal offences, however, businesses should bear in mind that a conviction or even an investigation under the Act could be catastrophic from...
a reputational perspective. It will also result in that business being mandatorily and permanently excluded from any public contract under the Public Contracts Regulations 2006 and the Utilities Contracts Regulations 2006.

Section 1 offence: giving a bribe
A bribe is ‘a financial or other advantage’. Therefore, in addition to the traditional brown envelope stuffed with £50 notes, the promise of employment for a relative or a lavish gift could constitute a bribe.

For the offence to be made out the person giving the bribe must intend that the beneficiary will improperly perform a relevant function or activity. A ‘relevant function or activity’ includes by a rival firm to induce their team to leave and join that rival. It concluded that it was likely that this behaviour would fall foul of the Act. Whether this is a matter that the Serious Fraud Office (SFO) would consider prosecuting, however, remains to be seen, given that civil remedies already exist to prevent this sort of behaviour.

Corporate hospitality
The wide scope of this offence gave rise to concerns about corporate hospitality: what is the purpose of providing tickets to football games if not to influence the decision of the person attending the match when it comes to granting or renewing the next contract?

The guidance gives some comfort in this regard, confirming that offering a client reasonable and proportionate corporate hospitality will not constitute an offence. In the foreword, the Secretary of State for Justice, Ken Clarke, says that he does not believe that tickets to Wimbledon or the Grand Prix will fall foul of the Act, and the guidance itself states that providing tickets to the Six Nations is unlikely to constitute a bribe. However, the guidance goes on to warn that corporate hospitality could be used as a cover for bribery. Therefore the prosecutor will no doubt examine the context of the hospitality or gift, as well as its value, when assessing whether something constitutes a bribe. An expensive dinner given to a valued client may normally be seen as legitimate. However, if this dinner is given the night before a decision is taken about whether to extend or grant a contract, the host could be seen as giving a bribe.

The joint guidance for prosecutors, published by the director of public prosecutions and the director of the SFO, indicates that prosecutions will only be pursued when there is sufficient evidence of wrongdoing and if the prosecution is in the public interest.

Section 2 offence: receiving a bribe
The offence of receiving a bribe applies to any person accepting a bribe in return for services rendered, whether or not the bribe was discussed at the time the improper conduct took place. In other words, it also captures bribes given to people who perform a relevant function improperly in the hope or expectation that they may later be rewarded for doing so. This assists the prosecutor. If the prosecution is unable to establish when or whether the bribe was discussed in advance of the conduct, it will not be fatal to its case.

Section 6 offence: bribing a foreign public official
Parliament was concerned that it would be difficult to gather sufficient evidence of wrongdoing in some cases involving foreign public officials. Therefore, to bolster the effect of the section 1 offence of giving a bribe, Parliament created an additional offence under s6 of the Act. This makes it an offence to give, offer or promise a bribe to a foreign public official with

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the intention of influencing them in the performance of their official functions in order to obtain or retain business or a business advantage. In other words, there is no requirement for improper conduct to be made out.

The definition of foreign public official includes not only ministers and policemen but any agent of any emanation of the state, so doctors working in public hospitals fall within the definition, as do officers of state-owned enterprises. Therefore, if a fund manager in a financial-services firm is responsible for sovereign wealth (for instance, if they deal with the administrators of state pension funds), they should be wary of this provision.

Many businesses have expressed concerns that this offence outlaws the use of small bribes to facilitate routine government action (so-called ‘facilitation’ or ‘grease’ payments). Bribery a customs officer to process an exit visa quickly is therefore an offence. It does not matter that the visa would have been processed in any event – indeed, if it would not have otherwise been processed, the bribe would still constitute a section 1 offence. In this respect, the Act goes even further than the Foreign Corrupt Practices Act 1977, the much-feared US anti-corruption legislation, which allows for payments to be made for ‘routine governmental action’. The guidance states that the eradication of such payments is in line with the OECD’s recommendation of 2009, and points out that this conduct is already illegal under the current legal framework. However, it makes some suggestions as to how businesses should confront this problem, and also refers to prosecutorial discretion.

The only time that bribing a foreign official is not an offence is if there is a local, written law that permits the giving of a financial or other advantage in these circumstances. The guidance explains that this may include, for instance, a law that says that when deciding whether or not to grant a contract, the official should or must take into account any community investment or should seek to minimise the cost of public procurement. In these circumstances, even if it somehow benefits the public official or another person at the public official’s request, building a school next to a factory or providing training in the local hospital when securing a contract for pharmaceuticals will be permissible.

**Section 7 offence: failing to prevent a bribe**

A commercial organisation will be guilty of an offence if a person associated with it bribes another person, intending to obtain or retain business or a business advantage for the commercial organisation.

A commercial organisation will include any organisation that conducts business, whether or not for profit, so many charities will be subject to this provision.

To fall within the scope of the Act, the commercial organisation needs to be incorporated in the UK or carry on business (or part of its business) in the UK.

A person associated with the organisation is a person who performs services for it or on its behalf, and consequently can include employees, agents and subsidiaries of the organisation.

The extent to which this would apply to a large group of companies was (and, to some extent, remains) unclear. The guidance suggests that the organisation needs to have directly benefited from any bribe, and the fact that a group’s balance sheet may be improved by the actions of subsidiaries would not necessarily put the holding company in the firing line. However, if (for instance) a private equity firm has active involvement in its portfolio companies, this may bring it closer to being liable, as the bribe could be seen to be guided by and for the benefit of the investor. The guidance suggests that a joint venture company could be liable for the actions of its employees, but if an employee of a joint venture partner acted to benefit the partner and not the joint venture, the latter would not be liable.

**‘Adequate procedures’ defence**

Organisations may escape liability under s7 provided they have ‘adequate procedures’ designed to prevent bribery from occurring. In many ways the ‘adequate procedures’ defence is similar to the statutory defence available in cases of unlawful discrimination. The guidance has consciously avoided being overly prescriptive about what will constitute adequate procedures. It opts for a principles-based approach which has proportionality as its cornerstone. However, businesses should at least consider undertaking a risk assessment, and then determine what measures, if any, are required to reduce the risks identified. The measures may need to include some involvement in the anti-corruption procedures of a subsidiary or direct contracting counterparty, if the company is significantly involved in that business. In addition, if the business has a significant influence over its counterparties, it may be necessary to ensure that those organisations are taking anti-corruption measures to protect against bribery further down the supply chain.

Having regard to the principles set out in the guidance, and from an employment lawyer’s perspective, a business should consider the points listed in the box on p12.

**Likely impact of the Act**

Frustratingly for legal practitioners and clients alike, trying to assess the Act’s potential effect is a challenge, given the legislation’s wide-ranging nature and doubt about how prosecutorial discretion will be exercised. Until the Act has been in force for some months, therefore, it may be difficult to gauge how it will work in practice.

The SFO has a limited budget for combating bribery. However, it will no doubt be keen to demonstrate its commitment to enforcing the Act. The next few months may prove uncomfortable for those whose approach to ethical business practices has been cavalier. I predict, though, that those with sensible attitudes and robust procedures should be able to sleep easily at night.