

THE BRIBERY ACT 2010 – A SHORT GUIDE

Sean Larkin QC QEB Hollis Whiteman

The Bribery Act 2010 is probably the most controversial piece of recent criminal legislation. It has radically extended corporate criminal liability criminalising a substantial amount of activity. It is easier to prove, it covers more entities, it covers activities worldwide. It came into force on 1 July 2011. The Government have provided Guidance to assist businesses comply with the law.

Introduction

The Bribery Act 2010 has become one of the most controversial acts of Parliament in recent years. It has radically extended corporate criminal liability: criminal offences are easier to prove, capture more entities, and cover activities worldwide.

The new corporate offence of failing to prevent bribery means if anyone, acting for a corporate entity [which I will refer to as company] that does some business in the UK, bribes anyone, anywhere in the world, the company will be criminally liable in the UK unless it can show it had 'adequate procedures' to prevent bribery. Governmental guidance on 'adequate procedures' has been published following consultation.

The Bribery Act 2010 was passed in April 2010 but came into force on 1 July 2011 to allow for consultation. The existing law covers alleged offences up until that date.

The reaction of business has been to fear that more activities will be caught in the prosecutorial net and will be at the mercy of prosecutorial discretion as to whether any charges will be brought.

The Bribery Act 2010 - overview

The Act applies to the whole of the UK and repeals the existing law on bribery although the existing law will apply to any offences committed before the Bribery Act came into effect.

The new offences

In summary, the Act creates four offences:

- **the active offence of bribing** - offering, promising or giving of a financial or other advantage intending the advantage to induce or reward improper performance or knowing or believing that acceptance itself would be improper performance (section 1)

- **the passive offence of being bribed** - requesting, agreeing to receive or accepting of a financial or other advantage intending improper performance whether by himself or another (section 2) –
- a specific offence of **bribing a foreign public official** (section 6);
- the corporate offence of **failure by a commercial organisation to prevent bribery** (section 7).

If a company is convicted of sections 1, 2 or 6, directors may also be personally liable.

The sentence will be up to **10 years' imprisonment** or, for a company, **an unlimited fine**.

The general offences may be boiled down to two simple propositions.

- was an **advantage** given or received intending to induce or reward a person for the **improper performance** of a function?
- is that function one which caught by the act? Virtually all work related functions will be caught.

The offences are free-standing i.e. the general offence could be committed by P [provider] without R [receiver] being also convicted, and vice versa.

To avoid issues of local custom and expectation, the test of what is expected is a test of what a reasonable person in the United Kingdom would expect in relation to the performance unless the local custom or practice is permitted or required by the local written law.

The Serious Fraud Office [SFO] is the lead agency for investigating and prosecuting cases of domestic and overseas corruption. They have identified some examples of concern:

- **Bribery** - Giving or receiving something of value to influence a transaction
- **Illegal gratuity** - Giving or receiving something of value after a transaction is completed in acknowledgement of influence
- **Extortion** – demanding a sum of money or goods with a threat of harm if demands are not met
- **Conflict of interest** – an employee has an economic or personal interest in a transaction
- **Kickback** – portion of the value of the contract demanded as a bribe by an official for securing a contract
- **Corporate espionage** – theft of trade secrets, intellectual property or piracy
- **Commission/fee** – used by a UK company or individual to obtain the services of an agent/agency for assistance in securing a commercial contract.

No doubt many of these examples have a resonance with business acting in the commercial world.

Corporate liability

A company can be guilty of:

- offences of bribing, being bribed or bribing a foreign public official [sections 1,2 6] – **the directing mind principle**,
- failing to prevent bribery [section 7] – **the new offence**

Directing mind - A company can be guilty of virtually any criminal offence if a 'directing mind' of a company is guilty of offence. The 'directing mind' is somebody sufficiently senior that they effectively are the company. For example, if the Managing Director bribes a person in his capacity as Managing Director the company may also be guilty. The difficulty in past investigations is that the offences are usually committed by people who are not 'directing minds'. It is for this reason that the Corporate Manslaughter legislation was introduced.

The situation is different in the US where corporate liability is easier to prove for a variety of offences. This is of some importance as bribery in a third country may be prosecutable in both US and UK and liability may be accepted on a lower basis leading to actions in both jurisdictions. In some recent cases in which plea agreements have been entered by a company, it is not always easy to identify who was the 'directing mind' through whom the company, who had admitted the offence, was liable.¹

If a company is convicted on this basis a senior officer will be guilty if he consented [agreed] or connived [turned a blind eye] to the offence.

¹ The law in this area is being reviewed by the Law Commission No 195 http://www.lawcom.gov.uk/docs/cp195_web.pdf

Failing to prevent – the difficulty in proving the 'directing mind' committed an offence has led to the creation of failing to prevent bribery was introduced. The corporate offence is committed where:

- a person (A) who is associated with the commercial organisation (C) [meaning he performs services for, or on behalf of C],
- bribes another person,
- with the intention of obtaining or retaining business or an advantage in the conduct of business for C.

There is a defence if the company can prove it had adequate procedures to prevent bribery.

Unusually for English criminal law, offences committed wholly abroad can be prosecuted in UK [although it is the position in the existing law with regards to bribery].

The Attorney General has said that the failing to prevent offence is similar to the health and safety model. The company have a duty to discharge and will have failed to discharge that duty if bribery has taken place. In such circumstances, it is likely that the prosecution will simply have to prove the fact of the bribe and the circumstances connecting it to the company². The prosecution will not have to prove mistakes that were made, what actions ought to have been taken or remediable steps. It will be for the company to satisfy the court that it had 'adequate procedures'. The court may be unfamiliar with corporate structures, operations abroad and the risk that a rogue employee/agent may embark upon 'a frolic of his own' contrary to corporate guidance. The issues to be resolved will include:

- The company's written policies, implementation, training, monitoring and review;
- Advice and monitoring internally or by external advisers;
- Comparisons to similar businesses operating in similar regions;
- A comparison of the policies to the Guidance and any other guidance provided, such as that by the Financial Services Authority (FSA), Transparency International (TI), and the GC100;
- Potentially consideration of lengthy discussions in Parliament as the bribery legislation was discussed;
- Potential consideration of whether the policies were compliant with other jurisdictions such as the US Foreign Corrupt Practices Act (FCPA).

² R v Chagot Ltd [2009] 1 WLR 1

Who can be prosecuted? - Relevant commercial organisation

A company can be prosecuted if it is incorporated under the law of UK or carries on a business or any part of a business in UK.

It will be a matter for the courts to decide this test. The Guidance suggests that the mere fact that a company's securities are traded on the London Stock Exchange would be sufficient. Likewise, having a UK subsidiary will not in itself mean that a parent company is carrying on a business in UK. However, the Act is sufficiently wide to catch a large number of companies.

'Adequate procedures' - The Guidance

There is no definition of 'adequate procedures' in the Act. The Ministry of Justice has produced Guidance. Unlike money laundering or financial services regulations, the Guidance provides principles rather than detailed checklists or procedures. Matters are left to business to resolve. The Guidance is produced to give businesses, particularly small businesses a quick start guide.

Commentators have agreed that the golden rule is for a company to have a will to eradicate corruption and to apply common sense to analyse the risks it faces be they by sector or country of operation. A company should know its business and the high areas. It should then take steps to minimise or reduce those risks.

The guidance produced by the Ministry of Justice has identified six key principles of good compliance:

1. Proportionate procedures

This is more than having policy documents, although important. "Procedures" requires the organisation to take steps to implement and embed an "anti-bribery culture."

2. Top level commitment

There must be a "tone from the top" of zero tolerance to bribery. This must be clearly articulated both internally and externally. In large multi-nationals, the Board must assume responsibility for setting bribery prevention policies.

3. Risk assessment

There should be risk assessments of market, the countries in which they operate and the third parties with whom they interact. The risks should be reviewed. Consideration should be given to internal structures or policies, which may unconsciously encourage bribery, for example, bonuses to do deals in high risk areas.

4. Due diligence

Due diligence should be performed as part of the risk assessment for example with regards to persons with whom they are doing deals.

5. Effective implementation

Policies need to be put into practice in all areas of the business, from recruitment to training.

6. Monitoring and review

Auditing and financial controls should be put in place, and the company's procedures should be regularly reviewed, including externally, if appropriate.

The guidance also touches on the effect of written local law under section 6, hospitality and promotional expenditure, facilitation payments and prosecutorial discretion. It provides illustrations as guide.

The Guidance is a guide. Following it is no guarantee of a defence and not following it does not mean conviction. However, it will be closely considered by prosecutors considering whether to prosecute a company.

The DPP and Director of SFO have produced guidance on the factors that would be taken into account when considering whether or not to prosecute.³

Issues raised by guidance

In preparation for the implementation of the Act, many companies are already putting into place compliance procedures or stress-testing existing procedures. Practitioners are unanimous in reporting an increase in work in this area.



³

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

No one has concerns about obvious instances of bribery. There have been repeated concerns about issues at the edge of bribery.

Corporate hospitality

There has been considerable concern about whether corporate hospitality can be considered bribery. The answer is yes under both the existing and new law. The Guidance accepts that

Bona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations, is recognized as an established and important part of doing business and it is not the intention of the Act to criminalise such behavior....does not intend for the Act to prohibit reasonable and proportionate hospitality and promotional or other similar business expenditure for these purposes....

This has provided assurance to business. The Guidance has given examples of behaviour where prosecution is unlikely. Most discussion on corporate hospitality has concentrated on the lavishness of hospitality. However, lavishness is more a question of evidence ie the more you spend, the more likely the advantage is intended to influence. This does not mean the offence will not have been committed if there was a smaller amount spent. The issue remains: what was the intention behind the advantage provided by way of hospitality - if intended to induce improper performance, it will be an offence no matter how small the advantage.

Facilitation payments

'Facilitation payments' are 'grease payments' or small payments to facilitate or expedite the performance of a routine or necessary action. They are recognised as an exception to the usual rules on bribery in the US Foreign Corrupt Practices Act. However, they are offences under both the existing law in UK and the new Bribery Act.

The DPP and Director of SFO have produced guidance on when there would be prosecution. Factors in favour of prosecution would be:

- Large or repeated payments are more likely to attract a significant sentence
- Facilitation payments that are planned for or accepted as part of a standard way of conducting business may indicate the offence was premeditated
- Payments may indicate an element of active corruption of the official in the way the offence was committed
- Where a commercial organisation has a clear and appropriate policy setting out procedures an individual should follow if facilitation payments are requested and these have not been correctly followed.

Factors against prosecution:

- A single small payment likely to result in only a nominal penalty
- The payment(s) came to light as a result of a genuinely proactive approach involving self-reporting and remedial action
- Where a commercial organisation has a clear and appropriate policy setting out procedures an individual should follow if facilitation payments are requested and these have been correctly followed
- The payer was in a vulnerable position arising from the circumstances in which the payment was demanded

Frequently asked questions

- *Where do I get adequate procedures? How will companies know if they have put in place adequate procedures?*

A company can consider guidance produced by the Ministry of Justice; there are other bodies [FSA⁴, Transparency International⁵, GC100] who have also produced assistance. Many other international bodies will have guidance [UN Global Compact, OECD]. Any existing procedures for the FCPA or to comply with other legislation [sanctions etc] can be tweaked. It may be the sector specific companies will liaise to have common systems and a common approach to bribery eg Anti-Corruption Forum in construction, or Transparency International's Corporate Supporter's Forum.

However, there is a real absence of guidance for small to medium businesses that have neither the resources to implement full procedures or the presence in foreign countries to resist bribes by referring to top level officials.

The SFO encourages liaison to raise any issues.

- *Who is to judge what is adequate and what is not?*

Initially the prosecutor will consider a company's procedures as part of the decision-making process whether or not to prosecute. Any prosecutor when considering charge will apply the Code for Crown Prosecutors which requires two tests to be satisfied: firstly, is there a realistic prospect of conviction and, secondly, is prosecution in the public interest? The Attorney General has produced guidelines on when it would be appropriate to prosecute a company.⁶ If there is a prosecution, it will be for the court to consider [the jury in the Crown Court]

⁴ http://www.fsa.gov.uk/pubs/anti_bribery.pdf

⁵ <http://www.transparency.org.uk/working-with-companies/adequate-procedures>

⁶ http://www.cps.gov.uk/legal/a_to_c/corporate_prosecutions/

whether there were adequate procedures. As in Health & Safety cases, it is likely that this will involve a review of the policies, risk assessment, recruitment, training, auditing and monitoring of the procedures.

If the matter goes to trial it will be the tribunal of fact, most likely a jury, who will decide the issue.

- *If a company has stringent rules in place, checks on its employees, has transparent accounting and so on, but a determined associate of that company still manages to bribe another, were those procedures adequate? They did not, after all, prevent the offence of bribery taking place.*

There will be a real fear that the fact a bribe took place will indicate that there were not adequate procedures. However, the procedures do not have to be foolproof but 'adequate procedures designed to prevent [bribery]'. It is likely that the company will have to show that the activity went outside the remit, training and expectation of what happened.

- *What should a company do if it suspects that bribery has been committed?*

The SFO are adopting a 'carrot and stick' approach to all crime. This is entirely sensible. Prosecutions tend to be lengthy, expensive and have an uncertain outcome. Companies may be liable for offences committed by persons long since disciplined and gone; boards may have changed; the company due to be sentenced may be a completely different animal to that at the time of the offending.

The SFO want to encourage responsible companies to behave responsibly. If a company suspects an offence, the SFO encourage it to carry out internal investigations and use external advisers used to dealing with the SFO to liaise with the SFO. The advantage to the SFO is that the company have a better idea of what it is looking for and will bear the cost of conducting an investigation. The advantage to the company is that disruption can be reduced, wrongdoing can be remedied and the company can be put in a better light when negotiating with the SFO. Matters that arise may be protected by legal professional privilege.

Using the "carrot and stick" approach, 'rotten' companies can be put out of business and responsible companies will effectively be given a 'yellow' card. This approach is similar to that of the US Department of Justice in its dealings with offences contrary to the Foreign Corrupt Practices Act [FCPA].

An example of the approach is the prosecution of Balfour Beatty. The SFO proceeded on a parallel basis of criminal prosecution [the stick] and civil recovery [the carrot]. Balfour Beatty had self-reported, put its house in order and consented to:

- a Civil recovery Order of £2.25m,
- a voluntary agreement to introduce certain compliance systems, and to submit these

systems to a form of external monitoring for an agreed period,

- the decision, and therefore the wrongdoing, was published.

A Civil Recovery Order is a power available to recover the proceeds of crime via action in the High Court as opposed to the criminal court. There is no conviction. The civil, as opposed to the criminal, standard of proof applies. The power is available under the Proceeds of Crime Act 2002, albeit the guidance supplied confirmed that it should not be used in lieu of prosecutions. The SFO has no power to require compliance or monitoring. It has no power to require publicity. Nonetheless, Balfour Beatty is an example of the SFO trying to apply a flexible to encourage the co-operation of companies.

A further inducement was the prospect of global settlements which arise where a company's offending would be prosecutable in different jurisdictions and agreement between prosecutors to deal with the matter comprehensively.

This approach was criticised by Lord Justice Thomas in the case of *R v Innospec*. With regards to the global settlement made he stated: "*I have concluded that the Director of the SFO has no power to enter into the arrangements made and no such arrangements should be made again.*" The rationale for his decision was that sentencing was a matter for judges and not for private deals between prosecutors. That is now accepted in conviction cases. In passing, Lord Justice Thomas also said that "*it would rarely be appropriate for criminal conduct by a company to be dealt with by way of a civil recovery order*" and that "*it was of the greatest public interest that the serious criminality of any who engage in the corruption of foreign governments is made patent for all to see by the imposition of criminal and not civil sanctions.*" The corruption in Innospec was serious and clearly merited criminal prosecution and sanction. The issue arises as to whether prosecutors would feel that offending on a smaller scale could be dealt by way of civil rather than criminal proceedings. The UK Attorney General has recently stated that the public interest in bringing a prosecution for bribery is considerable: "*As far as I am concerned there is a UK government determination that national and international bribery should be prosecuted.*"⁷

The US has wider powers and facilities to resolve matters civilly:

- Civil action for a fine;
- Debarment from doing business with the federal government;
- Deferred prosecution – a prosecutor agrees not to prosecute in exchange for the defendant agreeing to requirements which may include fines, corporate reforms, co-operation with any investigation, directors being barred;
- Opinion procedure – a company may request a statement from the Attorney General as to whether proposed conduct conforms to

⁷ World Bribery & Corruption Seminar 14th September 2010

enforcement intentions *i.e.* whether they would be prosecuted if they pursued a particular course of action.

There is a US incentive to whistle-blowers to come forward. A whistle-blower whose information helps the SEC recover monetary sanctions will be entitled to 10-30% of the award. When one considers that SEC obtained \$350m in settlement with Siemens, there will be cases when the incentive will be very powerful indeed. That was a fraction of the overall cost to Siemens which was 3 billion euros if one includes settlement with German authorities, advisor expenses and remedies.

- *What penalties may follow on conviction?*

Imprisonment for a human defendant. Disqualification as a director.

Unlimited fine for a company.

Confiscation – confiscation proceedings are where the benefit of a crime is confiscated. In some cases the court can make assumptions that all monies paid/received in the preceding 6 years are the benefit of crime unless the defendant proves otherwise.

Compensation.

Costs.

Adverse publicity and reputational damage.

Similar actions in other jurisdictions.

Possible debarment – there is uncertainty about the application of EU provisions that will debar companies from applying to tender for EU projects. It may be that companies found guilty of sections 1, 2, 6 [the 'directing mind' principle] will be debarred but section 7 offences will not fall within the remit.

As a matter of commercial reality, organisations such as the World Bank and European Bank of Reconstruction and Development will bar companies and individuals guilty for corruption from tendering where their funds are involved. An example is MacMillan the UK publisher being debarred for 6 years for bribery in Sudan. This will be reduced to 3 years if there is compliance and instruction of an external monitor.

Recent examples of prosecutions [all under the existing legislation which was harder to prove than the Bribery Act and many of which mutated from corruption investigations into other offences]:

Deputy International Ltd – Johnson & Johnson bought Deputy's parent company and began an internal investigation into bribery in Greece. They informed the Dept of Justice and SEC who referred to the SFO. A human, Dougall, pleaded guilty as a co-operating witness and ultimately received a suspended sentence. There have been criminal and civil sanctions against the

company in the US. Last week the SFO obtained a civil recovery Order for £4.829m.

Mabey & Johnson – two directors and a sales manager gave kickbacks to the Iraqi government of Saddam Hussein and inflated the contract price. The company pleaded guilty and was sentenced in 2009 having agreed it would be subject to financial penalties and submit its internal compliance programme to an SFO approved independent monitor. It was fined a total of £3.5m, made subject to a confiscation order of £1.1m, reparations @£1.6m and prosecution and monitor costs £600,000. Earlier this year the humans was convicted, sentenced up to 21 months' imprisonment and disqualified as directors.

- *Are there other civil or criminal consequences*

It should be remembered that a decision not to prosecute may be judicially reviewed such as the decision by Corner House and CAAT to seek judicial review of the 'non-prosecution' of BAE for offences of corruption.

Monies that are obtained by corruption will fall within the definition of the proceeds of crime. Accordingly, persons involved with those monies will be guilty of the offence of money laundering if they know or suspect the monies to be the proceeds of crime. Regulated persons will have duties with regards to the reporting of any activity that may be considered suspicious.

Even if a person does not know or suspect that the monies are the proceeds of crime the property may be the proceeds of crime and liable to be recovered by a Civil Recovery Order.

The increase in willingness to prosecute

The Government have taken bribery very seriously. In addition to the Act there have been the following developments:

- The Lord Chancellor is the Anti-Corruption Champion,
- The Cabinet Office drawing together various criminal, civil and non-legal measures,
- Serious Fraud Office [SFO] Bribery and Corruption unit which has become the reporting centre – there are a number of active investigations and a substantial increase in prosecutions,
- The Financial Services Authority [FSA] take action against bribery
- A City of London Police Unit to deal with bribery and corruption which has a number of active investigations,
- The extension of compulsory powers of production and interview to offences of bribery and corruption and an express reference to using covert surveillance,
- The increased use of civil powers to recover the proceeds of crime,
- The use of ancillary orders such as Financial Reporting Orders and Serious Crime Prevention Orders,
- An increase in actions under the FCPA which leads to referral to the SFO.

Conclusion

There is no doubt that the Bribery Act will have the effect of criminalising a significant amount of activity hitherto not criminalised. The real issue is to what extent such activities will be reported, investigated and prosecuted.

The SFO have spent a substantial amount of effort promoting compliance by companies in the hope that such companies will wish to eradicate bribery and corruption and, if found, to report it.

A greater burden will fall upon internal managers, compliance officers and external advisers to ensure that companies have 'adequate procedures' and deal with any suspected incidents in appropriate fashion.

Sean Larkin QC

sean.larkin@qebhw.co.uk

1 November 2011

**APPENDIX A:
Extracts from 'Approach of the Serious Fraud Office
to Dealing with Overseas Corruption'**

2. *A key question for the corporate and its advisers will be the timing of an approach to us. We appreciate that a corporate will not want to approach us unless it had decided, following advice and a degree of investigation by its professional advisers, that there is a real issue and that remedial action is necessary. There may also be earlier engagement between the advisers and us in order to obtain an early indication where appropriate (and subject to a detailed review of the facts) of our approach. We would find that helpful but we appreciate that this is for the corporate and its advisers to consider. We would also take the view that the timing of an approach to the US Department of Justice is also relevant. If the case is also within our jurisdiction we would expect to be notified at the same time as the Department of Justice.....*

4. *Very soon after the self report and the acknowledgement of a problem we will want to establish the following:*

- *is the Board of the corporate genuinely committed to resolving the issue and moving to a better corporate culture?*
- *is the corporate prepared to work with us on the scope and handling of any additional investigation we consider to be necessary?*
- *at the end of the investigation (and assuming acknowledgement of a problem) will the corporate be prepared to discuss resolution of the issue on the basis, for example, of restitution through civil recovery, a programme of training and culture change, appropriate action where necessary against individuals and at least in*

some cases external monitoring in a proportionate manner?

- *do the corporate understand that any resolution must satisfy the public interest and must be transparent? This will almost invariably involve a public statement although the terms of this will be discussed and agreed by the corporate and us.*
- *will the corporate want us, where possible, to work with regulators and criminal enforcement authorities, both in the UK and abroad, in order to reach a global settlement?.....*

5. *A very important issue for the corporate will be whether the SFO would be looking for a criminal or a civil outcome. Without knowing the facts, no prosecutor can ever give an unconditional guarantee that there will not be a prosecution of the corporate. Nevertheless, we want to settle self referral cases that satisfy paragraph 4 civilly wherever possible. An exception to this would be if Board members of the corporate had engaged personally in the corrupt activities, particularly if they had derived personal benefit from this. In those cases we would, in fact, be likely to commence our own criminal investigation. Professional advisers will have a key role here because of their knowledge of our approach. We shall look at the public interest in each case. We would in those circumstances be looking for co-operation from the corporate and would be prepared to enter into plea negotiation discussions within the context of the Attorney General's Framework for Plea Negotiations*

14. *We will expect to discuss the results of the investigation with the corporate and its professional advisers. In discussing settlement terms, once we are satisfied with the conclusion of the investigation, we shall be looking at the following:*

- *restitution by way of civil recovery to include the amount of the unlawful property, interest and our costs*
- *in some cases monitoring by an independent, well qualified individual nominated by the corporate and accepted by us. The scope of the monitoring will be agreed with us. We undertake that if monitoring is going to be needed, it will be proportionate to the issues involved.*
- *a programme of culture change and training agreed with us.*
- *discussion, where necessary, and to the extent appropriate, about individuals.*

15. *In addition, a public statement agreed by the corporate and the SFO will be needed so as to provide transparency so far as possible for the public.*