

Bribery Act 2010

The risk of criminal liability for your business

Overview

The Bribery Act 2010 (in force from 1 July 2011) creates the most onerous anti-corruption regime in the world. Businesses face criminal liability for bribes paid by their employees or paid by their business partners, in the UK, and overseas. The Act raises the prospect that businesses will face prosecution in relation to bribes they do not know about, paid by individuals over whom they may have little practical control. The penalty will be an unlimited fine.

The Act provides that it will be a defence for an organisation to show that it had in place "adequate procedures" to prevent bribery taking place. The Government has published guidance on what measures are likely to constitute "adequate procedures".

In light of the specific defence in the Act, businesses would be well advised to implement "adequate procedures". Those organisations that do not implement the recommended procedures will not be able to defend themselves properly if faced with a corruption prosecution and they will run a greater risk of conviction and penalties.

Detailed provisions

In broad terms there are four types of offences under the proposed Act which are:

- 1) A general offence targeting the payer of a bribe. (Section 1).
- 2) A general offence targeting the recipient of a bribe. (Section 2)
- 3) A specific offence prohibiting the bribery of foreign public officials. (Section 6)
- 4) A corporate offence of failing to prevent bribery. (Section 7)

The maximum penalty for individuals under the first three offences is 10 years and/or an unlimited fine. The maximum penalty for a commercial organisation under the Section 7 offence is an unlimited fine.

Section 1

The prohibition against bribing another person in Section 1 is such that a party will be guilty if he, directly or indirectly, offers, promises or gives an advantage to another, intending to induce another person to do something improper or to reward someone for behaving improperly. It is also an offence if the person offering the bribe knows or believes that the very acceptance of it would in itself be improper.

The key elements are that there must be a financial advantage linked to improper performance of any function or activity other than in your private personal capacity.

The improper performance does not need to have a connection to the UK or be carried out in the UK.

Section 2

It is also an offence to request, agree to receive or accept a financial or other advantage as a bribe. The Section 2 offence is effectively a mirror image of section 1, defining the offence of bribery by reference to the recipient rather than the briber.

As with Section 1 the constituent elements are “financial or other advantage” and a link to “improper performance by another person”.

Financial or other advantage is not defined in the Act and will be determined as a matter of common sense by the Court. It is clear that the Act covers more than the payment of money and will include other items of value such as a contract or the giving of products.

The Act lists the functions and activities to which the legislation relates and in effect covers all business related activities in the public and private sector. However not every defective performance of one of these functions for financial advantage engages the law of bribery. There must be an “expectation that the functions be carried out in good faith, or impartially, or the person performing it must be in a position of trust”. That expectation is an objective one, the test is what a reasonable person in the UK would expect of a person performing the relevant function or activity taking into account local written law but not local custom.

In other words improper performance of a business related activity is defined as the performance which breaches that expectation or position of trust.

It does not matter where in the world the function or activity is carried out. No connection to the UK is required.

Section 6

Section 6 of the Bill contains a prohibition against bribery of a foreign public official. This is a separate standard alone offence and requires that the advantage given or offered to influence the foreign official in his professional capacity. The briber must intend to obtain or retain business or a business advantage by giving or promising the final advantage. There is no need to show improper performance of a function or activity.

The advantage is not a bribe if a foreign official is permitted or required by written law applicable to him to accept it – custom is insufficient.

This is a strict liability offence which puts the onus firmly on the individual making the payment to ensure that it is legitimate.

Section 7

Under section 7 of the Act, an offence is committed by a commercial organisation when:

a person *performing services* for the commercial organisation bribes another person; and

the bribe is intended to obtain or retain business or a business advantage for the commercial organisation.

The key points to note about the proposed corporate offence are

1. It requires the positive offences under section 1 and 6 to have been committed. The Act is targeted at the payment of bribes on behalf of commercial organisations not commercial organisations who may receive bribes.
2. The Act creates extraterritorial jurisdiction. The corporate offence of failing to prevent bribery applies to commercial organisations which *carry on business* in the UK. It does not matter where the organisation was incorporated or where the bribe itself took place.
3. That there is a statutory defence if the commercial organisation can show that it had adequate procedures to prevent bribery. Commercial organisations will want to ensure that they have adequate procedures in place, and the Government is issuing guidance on what constitutes adequate procedures.
4. It does not matter whether the advantage is offered directly to the recipient or offered through a third party intermediary. The person who carries out the bribe, that is the 'person performing services' for the commercial organisation may, for example, be an employee, agent or subsidiary of the company. However these are just examples and the Act states that "the capacity in which a person is performing services does not matter". There is a real danger for a commercial organisation of unwittingly committing the corporate offence as a result of someone on the ground either in the UK or in another country, over whom you may have no real control, making an irregular payment.