

## The Bribery Act 2010

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### Briefing note

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### The Bribery Act 2010

**The Bribery Act received Royal Assent on 8 April 2010. When the Act comes into force on 1 July 2011, it will increase the risk of businesses being prosecuted in relation to bribery and corruption offences committed in the UK or abroad. Businesses should pay close attention to the offences created by the Act, in particular the new corporate offence of failing to prevent bribery, and should ensure their compliance policies are reviewed and updated prior to the Act coming into force.**

### Background

The current law on bribery is unsatisfactory, unclear and has evolved in a piecemeal fashion over time often as a hasty response to the issues of the day. It is a patchwork of common law and statutory offences, with inconsistent distinctions between bribery of public and private persons. The law has been subject to much criticism over the years which has led to the new Act.

### The offences

There are four main offences in the Act:

#### *(1) Making or (2) receiving bribes*

The Act introduces two new general criminal offences of bribery: one of giving bribes and one of receiving them.

- Paying bribes: it will be an offence to offer or give a financial or other advantage with the intention of inducing that person to perform a relevant function or activity improperly or to reward that person for doing so;
- Receiving bribes: it will be an offence to receive a financial or other advantage intending that a relevant function or activity should be performed improperly as a result.

These apply equally to public and private functions. Improper performance will be judged by whether it breaches what a reasonable person in the UK would expect in relation to performance of the type of function or activity concerned. However, the function or activity needs have no connection to the UK – it will apply if either of the parties is a UK resident or citizen, or a UK company. Concerns have been raised that the definitions are widely drafted and could criminalise some routine business conduct (one example used during Parliamentary debates was that of a team leader of one bank being poached by a rival. In offering inducements to the team leader to encourage his team to join him, the rival bank could arguably be committing bribery). The official response has been to state that prosecutorial discretion will be exercised to distinguish commercially acceptable behaviour from conduct that the Act is aimed at preventing.

#### *(3) Bribery of foreign public officials*

This offence will be committed if a person offers or gives a financial advantage to a foreign public official with the intention of influencing the official and obtaining or retaining business, where the official is neither permitted nor required by written law (as opposed to oral or customary law) to be so influenced. It is an offence if the financial or other advantage is

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  2. Receiving bribes
  3. Bribery of foreign public officials
  4. Corporate offence of failing to prevent bribery
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provided to a third party or an agent at the request of the official. This offence only covers the offering of bribes not the acceptance of them.

#### ***(4) Corporate Offence of failing to prevent bribery***

This has been the most controversial provision of the new Act. A “commercial organisation” will commit the corporate offence of failing to prevent bribery if an associated person performing services on the organisation’s behalf offers, promises or gives a financial or other advantage to another person with the intention of obtaining or retaining business or a business advantage for the organisation. An associated person is anyone who performs a service for or on behalf of the organisation which could include an employee, agent, joint venture partner, franchisee, introducer or subsidiary. The Act provides a defence for the organisation if it can prove it had adequate procedures in place designed to prevent bribery being committed by those performing services on its behalf. The burden of proof is on the organisation to demonstrate this. This provision is designed to ensure organisations have effective compliance systems in relation to their business in the UK and internationally.

#### **What are “Adequate Procedures”?**

Given the strict liability nature of this offence, the definition of adequate procedures is key. The Act provides that the Secretary of State must publish guidance on what will constitute “adequate procedures” before bringing the corporate offence into effect. The Ministry of Justice (MOJ) initially published somewhat high level draft guidance in September 2010 and asked for comments. Various bodies submitted critical responses to the consultation. This was followed by a media campaign suggesting that the Act would put UK companies at a competitive disadvantage and criminalise legitimate corporate hospitality. In the light of these responses, the MOJ agreed to issue revised guidance which it did on 30 March 2011, at the same time announcing that the Act would come into force on 1 July 2011.

#### **Penalties**

A business found guilty of an offence may receive an unlimited fine. An individual faces imprisonment of up to ten years, an unlimited fine or both. Where a person or corporate has been convicted of a corruption offence they face perpetual debarment from tendering for EU public contracts. Directors may also be subject to disqualification proceedings – potentially leading them to be disqualified from being directors of any company for up to 15 years. Bad publicity and reputational damage will also ensue. Case law under the existing bribery laws has already shown that corruption is viewed as being at the top end of serious corporate offending and that fines should be severe.

#### **Geographical reach**

The Act has wide jurisdiction. It covers any offence committed in the UK but proceedings can also be brought if a person who has a close connection with the UK commits the relevant acts or omissions outside the UK. The Act defines a person with a close connection as including British citizens, individuals ordinarily resident in the UK and bodies incorporated in the UK. The Act also provides that any business which conducts part of its business in the UK can be prosecuted for the corporate offence even if it is not incorporated in the UK.

### **Facilitation payments and corporate hospitality**

The Act adopts a zero tolerance approach and provides no specific defence for facilitation payments (e.g. making a payment to secure a visa) nor for corporate hospitality. The Government has stated that facilitation payments are not a universally accepted practice and should not be tolerated. Nevertheless, prosecutors may decide not to pursue criminal proceedings in such cases if they think it unlikely a jury would be prepared to convict. Likewise corporate hospitality can potentially be criminalised under the Act, particularly where expenditure involves foreign public officials. The Government has stated that it did not intend the new legislation to be used to penalise legitimate and proportionate corporate hospitality to establish or maintain good relations with customers. However there is no specific defence in the Act to this effect.

### **Comparison with Foreign Corrupt Practices Act (FCPA)**

Many businesses will already be familiar with the requirements of the US FCPA (which has extra territorial effect). However, compliance with US law will not necessarily ensure compliance with the UK Act which is arguably broader in scope than the FCPA. The FCPA only applies to the bribery of public officials whereas the new Act catches bribery of private citizens as well. The FCPA does not contain an equivalent to the corporate offence and it requires proof of a “corrupt” intention which is not required under the UK Act. The FCPA also contains specific defences for bribes made as small facilitating payments in order to expedite actions routinely performed by a foreign official and for marketing expenses (i.e. corporate hospitality).

### **Conclusion**

The Act is more far reaching than the existing bribery laws. The SFO’s new director, Richard Alderman, has publicly stated that he is taking active steps to improve the UK’s record on bribery prosecutions and he may be looking for early test cases under the Act.

Many organisations already have good procedures in place to ensure compliance with the Act; companies which do not must set up effective systems as soon as possible or risk stringent penalties.

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#### **More information**

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