

• UK BRIBERY ACT 2010

On 30 March 2011, the UK Ministry of Justice announced that the UK Bribery Act 2010 (“the Act”) will enter into force on 1 July 2011. Together with this announcement, the Ministry of Justice published the Guidance to the Bribery Act 2010 (“the Guidance”) which was a pre-requisite to the coming into force of the Act. In addition to the Guidance, separate guidance was released regarding enforcement of the Act, detailing the standards by which prosecutors will exercise discretion in bringing cases under the Act.

THE OFFENCES UNDER THE ACT

The purpose of the Act is to make it significantly easier for enforcement agencies to bring prosecutions in respect of corruption both in the UK and abroad. Furthermore, in contrast to the US equivalent, the Foreign Corrupt Practices Act 1977 (“FCPA”), the Act extends to bribery in both the private and public sectors.

The Act contains four statutory offences: giving and receiving bribes, bribery of foreign public officials, and failure of a commercial organisation to prevent bribery (a strict liability offence).

Giving and receiving bribes

There are two general bribery offences contained in the first part of the Act: giving bribes and the receiving of bribes. Bribery is defined in sections 1 and 2 as the offering, promising or giving or the requesting, accepting or receiving of a “financial or other advantage”, either directly or indirectly, with the purpose being the inducement of a person to perform improperly a relevant function or activity or reward the improper performance of a function or activity. Functions to which bribery relate are contained in section 3 of the Act and include

functions and activities of a public nature, connected with a business, and performed in the course of employment or on behalf of a body of persons (whether corporate or unincorporated). It does not matter if the conduct has no connection with the UK and is performed outside the UK.

The Act introduces an expectation test to ascertain what constitutes “improper” behaviour in sections 4 and 5. This is a standard which is not borrowed from the OECD Anti-Bribery Convention or the FCPA. “Expectation” in the Act is subject to an objective test, being what a reasonable person in the UK would expect.

Bribery of foreign public officials

Section 6 of the Act provides a stand-alone offence which is modelled on the OECD Anti-Bribery Convention (which itself is modelled on the US FCPA).

An offence is committed where a person gives or offers any financial or other advantage to a foreign public official, either directly or indirectly with the intention of influencing the foreign official in his or her capacity as a foreign public official and to obtain or retain business or an advantage in the conduct of business.

The only exception to section 6 is where the foreign public official is permitted or required by written law applicable to him or her to be influenced by the offer, promise or gift (section 6(3)(b)).

Failure of commercial organisations to prevent bribery

Section 7 creates a new corporate offence which will render organisations criminally liable for offences committed by persons acting on behalf of the organisation (referred

to in the Act as “associated persons”). Section 7 is a strict liability offence and an organisation will be liable even if the senior controllers of the organisation are not aware of the bribery. It should be noted that the associated person need not be in fact convicted of a bribery offence themselves but prosecutors must establish that the misconduct would constitute bribery under either section 1 or 6.

An “associated person” is defined in the Act as a person who “performs services for or on behalf of” the organisation, and provides as non-exhaustive examples an “employee, agent, or subsidiary”. Accordingly, it is potentially very broad and may apply to overseas affiliates and joint venture partners and joint venture vehicles. Organisations are going to be under a positive obligation to know what organisations and people “associated” with their business are doing. This is potentially going to be one of the most onerous aspects of the legislation for organisations and will result in the need for increased CDD checks being undertaken.

Section 7(2) provides for an affirmative defence if adequate compliance procedures have been put in place. The Guidance was published on 30 March 2011 and includes six principles, which reflect existing international anti-corruption best practices standards:

- (1) **Proportional procedures:** adopting and enforcing procedures by the organisation tailored to the risks it faces and the nature, scale and complexity of the organisation’s activities.
- (2) **Top-level commitment:** ensuring top-level management are committed to the procedures and foster a culture where bribery is not accepted.

- (3) **Risk assessment:** conducting periodic, informed and documented assessments of the nature and extent of the organisation's exposure to potential external and internal risks of bribery
- (4) **Due diligence:** conducting proportionate and risk-based due diligence.
- (5) **Communication (including training):** implementing programmes within the organisation.
- (6) **Monitoring and review:** monitoring and reviewing the procedures and making improvements where necessary.

PARTICULAR ISSUES OF NOTE

Gifts and corporate hospitality

The giving of gifts and other corporate hospitality could trigger a bribery offence. There is a risk that lavish gifts and hospitality may give rise to a bribery offence, but the SFO has advised the Joint Committee that "most routine and inexpensive hospitality would be unlikely to lead to a reasonable expectation of improper conduct". The Guidance makes clear that it is unlikely that incidental routine business courtesies will fall within the ambit of an offence, particularly where the hospitality is commensurate with the reasonable and proportionate norms for an industry (eg the provision of airport to hotel transfer services to facilitate an on-site visit or dining and tickets to an event).

Nevertheless, it is advisable that strict guidelines be put in place by organisations as to what gifts and hospitality are appropriate. Small and medium organisations will be particularly vulnerable to this offence as they will more than likely not have the procedures already in place that the larger global organisations will. These policies should form part of the adequate compliance procedures to be put in place by organisations in accordance with section 7(2).

Facilitation payments

Unlike the FCPA, the Act does not contain a defence or exception for facilitation payments (small payments intended to persuade officials to perform routine functions).

However, it is questionable that organisations or individuals will be prosecuted for making facilitation payments as this would not be practical. Furthermore, the SFO stated in June 2009 that "*small facilitation payments are unlikely to concern the SFO unless they are part of a larger pattern (when, by definition, they would no longer be small facilitation payments) where their nature and scale has to be evaluated.*"

Debarment risk

The Act is a criminal statute and penalties under it will lead to mandatory debarment under the UK Public Contracts Regulations 2006, which implements the European Union Procurement Directive.

The SFO has indicated that, for organisations that voluntarily disclose offences, it will consider settlements where the penalties will be civil rather than criminal (eg under the Proceeds of Crime Act 2002 or Companies Act 2006) and, accordingly, not trigger the mandatory EU debarment.

IMPACT ON THE CHANNEL ISLANDS

Non-UK-based organisations as well as UK-based organisations are going to find that the Act will have a substantial impact on their UK business. This is particularly so for companies which have a place of business within the UK and/or UK employees. The Act applies to conduct amounting to bribery anywhere in the world by UK organisations or UK 'nationals' where that conduct would be an offence in the UK.

The general bribery offences under sections 1 and 2 and the bribery of a foreign official offence under section 6 all have wide jurisdictional scope. They will apply where the conduct occurs either:

- Within the territory of the UK (regardless of the nationality of the person or corporate);
- Outside of the territory of the UK (provided the conduct would form part of such an offence if it took place in the UK) by any person with a "close connection" to the UK. Section 12 stipulates that this will include any person who is a British citizen, British Overseas citizen, British overseas territories citizen, British National, any person ordinarily resident in the UK, or any body incorporated under the law of the UK (including a Scottish partnership).

In addition, the corporate offence of failing to prevent bribery under section 7 can be committed by non-UK-based companies and UK-based companies alike (see section 12 of the Act). This is irrespective of whether the acts or omissions forming the offence took place in the UK or elsewhere in the world. Section 7 will apply to any organisation formed under the laws of the UK or any foreign organisation which "carries on a business, or part of a business" in the UK. A "close connection" to the UK is not required.

The wide jurisdictional scope of these offences will impact organisations and individuals in the Channel Islands. The Act applies to all British citizens, including those resident abroad. Accordingly, the Act applies to British citizens resident in the Channel Islands. Which includes those persons who are 'native' Channel Islanders.

Although the Act does not apply to Channel Islands organisations directly, it will apply to all organisations which carry on business in the UK – and, in turn, the Act will potentially apply to all of the world-wide activities of that company. The Guidance does, however, indicate that a common sense approach will be taken by prosecutors, in that a demonstrable business presence in the UK would be required before an organisation would be caught.

In addition to the far reach of the Act, it is expected that enforcement agencies around the globe will begin to work together more in the prosecution of organisations in various and multiple jurisdictions. The effect of such international co-operation will be that commercial organisations will be even less likely to be able to escape the reach of the Act.

All Channel Islands organisations with potential exposure to the UK Bribery Act should consider the impact of the Act on their businesses and put in place adequate measures prior to the Act coming into force on 1 July.

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