THE LONG ARM OF UK BRIBERY LEGISLATION

OUTLINE

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The first three offences

1 The offences:

- active bribery: offering, promising or giving a bribe;
- passive bribery: requesting, agreeing to receive or accepting a bribe;
- bribing a foreign public official: a less stringent test.

2 Territorial scope:

- the offence takes place in the UK, or
- the person concerned has a close connection with the UK.

The corporate offence

3 The offence: failure by a relevant commercial organisation to prevent bribery by persons associated with it.

4 Territorial scope - the person concerned is:

- incorporated/formed in the UK and carries on a business, or
- carries on business or part of a business in the UK.

5 Defence - adequate procedures:

- proportionate procedures;
- top-level commitment;
- risk assessment;
- due diligence;
- communication (including training)
- monitoring and review

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The UK Bribery Act 2010 (**Bribery Act**) rewrites the law of bribery in the United Kingdom and has a territorial reach far beyond its shores. This paper first gives an overview of the new law and then looks at two particular issues - its territorial scope and its effect on financing transactions.

OVERVIEW OF THE LAW

The Act itself is quite short, but understanding what it means is helped by two bits of guidance:

- from the Ministry of Justice on procedures that can be adopted to prevent bribery (**MOJ Guidance**); and
- from the Director of the Serious Fraud Office and the Director of Public Prosecutions, setting out the Directors' approach to deciding whether to bring a prosecution under the Bribery Act (**Prosecution Guidance**).

The offences

The Bribery Act introduces four major offences:

- **active bribery**: offering, promising or giving a bribe (section 1)
- **passive bribery**: requesting, agreeing to receive or accepting a bribe (section 2)
- bribing a foreign public official (section 6)
- **corporate offence:** failure by relevant commercial organisations to prevent bribery (section 7).

The word "bribe" is construed widely to cover a financial or other advantage. In addition, the Prosecution Guidance clarifies that there is no need for the transaction in question to have been completed. It emphasises that the Bribery Act focuses on conduct and not results.

General offences

The two general offences of bribing (section 1) and being bribed (section 2) are concerned with the conduct of the payer and the recipient, respectively. The briber must be shown to have intended to induce the recipient to perform a relevant function or activity "improperly" (or to reward the recipient for such conduct); and the recipient must be shown to have intended that, in consequence of a bribe, a relevant function or activity should be performed "improperly".[1] In both instances, the bribe could be given or received directly or through a third party and could be given to, or received by, a person who is not necessarily the intended recipient.

A relevant function or activity covers any function of a public nature or an activity connected with a business or performed in the course of employment. The Bribery Act therefore covers both "public" and "private" bribery.

The "improper performance" is performance or non-performance which amounts to a breach of an expectation that a person will act in good faith or impartially, or in accordance with a position of trust.[2] The test for improper performance is objective, based on what a reasonable person in the UK would expect in relation to the performance of the relevant activity. As the Prosecution Guidance emphasises that the Bribery Act "focuses on conduct not results", the prevailing view is that prosecutorial discretion will be used widely.

Bribing a foreign public official

Where a person offers, promises or gives a bribe to a "foreign public official" (**FPO**), or to another person at the FPO's request or with the FPO's acquiescence, such conduct may trigger a specific offence under section 6. A distinction between this offence and the active bribery offence under section 1 is that there is no need to show an "improper performance" of a relevant function or activity by the FPO. Accordingly, where an organisation frequently deals with FPOs, it may elect to require its associated persons to apply the more exacting FPO standard to all transactions they conduct in order to help keep the implementation of such procedures as straightforward as possible.

For the bribing of an FPO offence to apply, the payer must have intended to influence the FPO in the performance of his functions as a public official to obtain or retain a commercial

[1] Sections 1 and 2 cover a number of other types of case, but in each one the "improper performance" is, essentially, the intended or anticipated result of the conduct in question.

[2] Section 4 of the Bribery Act.

advantage; and the FPO must not be allowed or required by the applicable written law to be so influenced.[3]

An FPO is defined widely to include, essentially, any person holding a legislative, administrative or judicial office of a foreign country, any person exercising a public function for a public agency or public enterprise; and any officials or agents of public international organisations, such as the World Bank, the United Nations, the International Monetary Fund and the International Finance Corporation.

The FPO definition is wide enough therefore to include not only civil servants in ministries - a classic example - but can include doctors working within a national health service outside the UK and employees in state-owned enterprises. In many countries with a state-controlled economy, major enterprises tend also to be stated-owned and controlled, and it is not always clear whether dealing with such enterprises would amount to dealing with FPOs (although, to err on the side of caution, one would usually assume so in such cases). The test that the Serious Fraud Office has stated it will use is one that was set out by the OECD in the commentary on the OECD Convention, namely, whether or not the foreign State is in a position to influence the relevant organisation, or in other words, whether the commercial organisation is, in effect, being run by the relevant State.

General offences and bribing an FPO: territorial scope

An individual or a corporation can be liable for an offence under sections 1, 2 and 6 if the relevant act or omission either:

- takes place in the UK; or
- takes place outside the UK, if the individual or corporation concerned has a "close connection" with the UK.

In broad terms, an individual will have a "close connection" with the UK if he is a British citizen or is ordinarily resident in the UK. A company will have a "close connection" with the UK if it is incorporated in the UK.[4]

[3] For example, where a local written law permits or requires those tendering for a publicly funded contract to offer an additional investment in the local economy (often referred to as the 'beneficiation'), such arrangements would fall outside the ambit of the section 6 offence, even though they may amount to an advantage to the relevant FPO or to another person at the FPO's request or with his acquiescence.

[4] See section 12(4) of the Bribery Act for full definition of "close connection". This is a different test to the test for a "relevant commercial organisation" for the purposes of the section 7 offence (the corporate offence), which is addressed later.

General offences and bribing an FPO: corporate liability

A body corporate can be liable for one of the underlying offences under sections 1, 2 or 6. In addition, if it is committed with the "consent or connivance" of a "senior officer" (such as a director), the senior officer will also be personally liable for the underlying offence.

Corporate offence: elements

Section 7 of the Bribery Act introduces a new offence of failure by "relevant commercial organisations" to prevent bribery by persons associated with it. A person is associated with an organisation if that person performs services on its behalf, for example an employee or agent (see "*Corporate Offence: associated persons*" below).

The only defence available to the commercial organisation in connection with an action under section 7 is to prove that it has "adequate procedures" in place designed to prevent its associated person from bribing (see "*Corporate Offence: adequate procedures*" below).

It should be borne in mind that the corporate offence does not replace or remove direct corporate liability for bribery. A corporation may be prosecuted for a section 1 or 6 offence in the alternative or in addition to any offence under section 7[5], if it can be proved that someone representing the corporate's "directing mind" bribes or receives a bribe or encourages or assists someone else to do so.

To be guilty of the corporate offence, the associated person of the "relevant commercial organisation" (**C**) must have committed an offence of bribing another person (section 1) or an offence of bribing an FPO (section 6). Section 7 does not require a prosecution for these underlying offences, but there needs to be sufficient evidence to prove the commission of such an offence to the criminal standard - beyond a reasonable doubt. The underlying offences could be committed anywhere in the world and the briber himself or itself does not need to have a UK connection.

The standard of proof for C to show that it had adequate procedures in place to prevent bribery by its associated persons is the civil one - on a balance of probabilities.

In determining whether liability could arise under the corporate offence, the following questions should be considered:

[5] Or even a section 2 offence if the offence relates to receiving a bribe.

	Question	*Answer / Outcome*	*Considerations*
1.	**Is C incorporated or formed in the UK or carrying on part of a business in the UK?**	**No** no Bribery Act liability **Yes** consider questions below	See "*Corporate offence: jurisdictional scope*" below.
2.	**Was the bribe intended to benefit C (i.e. by obtaining or retaining business for C)?**	**No** no Bribery Act liability **Yes** consider questions below	This question should be considered alongside Question 3 (whether the briber is the associated person of C). See "*Corporate offence: associated persons*" below.
3.	**Was the giver of the bribe an "associated person" of C?**	**No** no Bribery Act liability **Yes** consider questions below	See "*Corporate offence: associated persons*" below.
1.	**Did C have in place "adequate procedures"?**	**Yes** no Bribery Act liability **No** C is liable under the corporate offence	See "*Corporate offence: adequate procedures*" below.

Corporate offence: territorial scope[6]

The offence can only be committed by a "relevant commercial organisation". Broadly, this means companies and partnerships that are either:

(a) incorporated or, in the case of partnerships, formed, in the UK; or

(b) incorporated or formed elsewhere, but "carry on a business or part of a business" in the UK.

Corporate offence: associated persons[7]

The Bribery Act states that: a "relevant commercial organisation" (**C**) can be liable only for bribes by an "associated person" (**A**) as defined in section 8, which is a "person who performs services" for or on behalf of C. The MOJ Guidance makes it clear that section 7 is intended to be given a broad scope so as to embrace the whole range of persons connected to an organisation who might be capable of committing bribery on the organisation's behalf.

[6] See paragraphs 34 to 36 of the MOJ Guidance. The jurisdictional analysis is similar to, but distinct from, whether an entity amounts to an associated person of a relevant commercial organisation, in respect of which see "*Corporate offence: associated persons*" below (in particular *Members of a corporate group*) and paragraphs 37 to 43 of the MOJ Guidance.

[7] See paragraphs 37 to 43 of the MOJ Guidance.

Whether A is associated with C is determined by the nature of what is done (disregarding any bribe under consideration) rather than the capacity in which it is done. It is necessary to take into account all the "relevant circumstances",[8] not just the nature of the relationship. The degree of control exercised by C over A is likely to be one of the relevant circumstances to be considered by the courts on a case by case basis. Perhaps counter-intuitively, the Bribery Act does not specifically refer to a level of corporate ownership or control as being sufficient to make a commercial organisation responsible for the acts of bribery of others - see "*Members of corporate a group*" below.

The MOJ Guidance also explains that C is only liable for the actions of A if the bribe was intended (by A) to benefit C directly. Intention to bribe is likely to be proved in a situation where the bribe paid actually does result in the award of business to C.

Companies within a corporate group are capable of being considered associated persons of their parent company and of the other companies in the group, depending on the nature of the relationship between them and the degree of control exercised by the relevant companies.

Corporate offence: adequate procedures

The MOJ Guidance confirms that the procedures to prevent bribery need to be proportionate to the particular bribery risks faced by that organisation and to the "nature, scale and complexity" of its activities. There is no "one-size-fits-all" approach for the procedures to be adopted, but all businesses should start by conducting an assessment of the risk of bribery being committed by the organisation or by persons associated with it worldwide. The risk might increase because of the countries where business is carried out, the sector concerned, the type of transaction, the value of a particular project (if significant) or the business relationship concerned. The MOJ Guidance provides examples in each case. Internal factors may also affect the level of risk to which the organisation is exposed, for instance a bonus culture that rewards excessive risk taking or a lack of anti-bribery commitment from senior management.

The adequate procedures are to be informed by the following six principles which are "not prescriptive" but "flexible and outcome focused":

- proportionate procedures

[8] Section 8(3) of the Bribery Act.

- top-level commitment
- risk assessment
- due diligence
- communication (including training)
- monitoring and review.

The Prosecution Guidance recognises that an occurrence of bribery may be insufficient to demonstrate to a jury that an organisation's procedures are not adequate (both sets of guidance acknowledge that no system can be perfect). It provides that "the defence of adequate procedures is likely to be highly relevant when considering whether there is sufficient evidence to provide a realistic prospect of enforcement". Consequently, demonstrating adequate procedures may also serve as a defence to an investigation, as well as to a prosecution.

Hospitality

Reasonable and proportionate business hospitality that seeks to showcase products or services or to cement relationships will fall outside the scope of the offence. Hospitality will constitute bribery only if the provision of the hospitality is intended to induce someone to breach a relevant duty defined in the Bribery Act or to influence a FPO. The MOJ Guidance provides examples of acceptable hospitality, such as taking a client to a sporting event, or paying for a FPO to travel abroad for a site visit and then providing a meal and entertainment. Most commercial organisations will already have policies in place regarding hospitality, gifts and entertainment and they must continue to exercise their good judgment and common sense as to what is proportionate in the circumstances as well as maintain an appropriate register of hospitality given and received.

Facilitation payments

The Bribery Act provides no exemption for facilitation payments which will amount to bribery (with the exception of legally required administrative fees or fast-track services). The elimination of facilitation payments remains a Government objective because such payments have a corrosive effect on the countries in which they are paid. However, the Government acknowledges the difficulty of eradicating such payments in the short term and has provided some comfort to businesses by confirming that prosecutorial discretion will be applied where necessary. The Serious Fraud Office has recognised that some companies have not yet eradicated facilitation payments and it is prepared to be sympathetic, provided that the

company in question is "genuinely committed to achieving zero tolerance" of facilitation payments and "there is meaningful commitment within a reasonable timeframe."

Conclusions

A number of conclusions in this note are drawn in part from the MOJ Guidance, which does not have the force of law and can be revised by the Secretary of State at any time. The effect of the Bribery Act will depend on how it is interpreted by prosecutors and the courts and, ultimately, there remains a risk that they will approach issues such as "associated persons" or the territorial scope of the Act more broadly than this note or the MOJ Guidance suggests. In particular, the Director of the Serious Fraud Office has commented:

"In my view it will be very unwise for companies to use a very technical interpretation of the Bribery Act in order to persuade themselves that they can continue to use bribery because they are not within the Act. … The safe assumption if there are business activities [in the UK] is that the group will be covered."[9]

TERRITORIAL SCOPE

One of the most important things about the Bribery Act is the extent of its reach. It goes far beyond what might be expected.

When considering the territorial scope of the legislation, it is necessary to draw a distinction between (a) the general offences and the offence of bribing an FPO, and (b) the corporate offence.

General offences and bribing an FPO

A person can be liable for bribery, being bribed or bribing an FPO if the offence takes place in the UK. But a person can also be liable for these offences even if they do not take place in the UK. Liability arises in such a case if the person concerned has a "close connection" with the UK. As far as individuals are concerned, this broadly means a British citizen or someone who is ordinarily resident in the UK. In the case of a company, it means a company incorporated in the UK.

As a result, as far as these offences are concerned, liability will only arise where the offence takes place outside the UK if the person concerned has such a connection. In the case of companies, therefore, the legislation will not apply if:

[9] "Managing corruption risk in the real world", 7 April 2011, speech by Richard Alderman, Director, Serious Fraud Office.

- the offence took place outside the UK; and
- the company concerned is not incorporated in the UK.

The corporate offence

The jurisdictional rules are broader where the corporate offence is concerned. Any relevant commercial organisation can be liable if it fails to prevent bribery by persons associated with it. In broad terms, a "relevant commercial organisation" is:

- a company which is incorporated in the UK and carries on a business (whether in the UK or elsewhere);
- a partnership which is formed in the UK and carries on a business (whether in the UK or elsewhere);
- a company incorporated outside the UK which carries on a business, or part of a business, in the UK; and
- a partnership formed outside the UK which carries on a business, or part of a business, in the UK.

The expression "carrying on a business" is not defined under the Bribery Act, but from analogous authorities it would usually connote at least a succession of acts (or an intended succession of acts, the first of which has been performed) designed to advance some enterprise pursued for financial gain. The Serious Fraud Office has sometimes referred to this test as being one of having an "economic engagement" in the jurisdiction.

For example, if an international corporation based abroad were to have a branch office in the UK, it would be very likely to satisfy the "carrying on business" requirement since the branch is part of the same legal entity. Having a UK subsidiary, which is a separate legal entity, would not in itself amount to an overseas-based parent company carrying on business in the UK. But if the UK subsidiary acted as an integrated extension of an overseas parent, so that it could be said to be acting as the parent's *de facto* branch or agent, then this may mean that the overseas parent could be said to be carrying on business in the UK.

Although the Bribery Act test is different to the test for when an organisation is "ordinarily resident" in the UK for UK tax purposes, it is anticipated that if an organisation is found to be "ordinarily resident" in the UK for UK tax purposes then in all likelihood it would also be "carrying on business" in the UK.

A similar analysis applies in relation to UK-based joint ventures of international companies. Much will turn on the facts of the arrangements, the degree of control and influence exercised by the overseas company over the joint venture entity and its operations in the UK.

The listing of a company's securities in the UK should not *of itself* mean that the company is "carrying on business in the UK".

As the MOJ Guidance states, the courts will be the final arbiter as to whether an organisation "carries on a business" in the UK taking into account the particular facts in individual cases. "However, the Government anticipates that applying a common sense approach would mean that organisations that do not have a demonstrable business presence in the United Kingdom would not be caught."[10]

Where does this leave companies? If they are incorporated in the UK, and they carry on a business, they can be liable for failing to prevent bribery anywhere in the world.

More controversially, a company which is incorporated outside the UK can be liable for failing to prevent bribery if it carries on business - or even part of a business - in the UK. If such a company fails to prevent an associated person from committing bribery, it can be liable even if the offence itself has no connection with the UK.

EFFECT ON FINANCING TRANSACTIONS

What effect has all this had on banks and on financing transactions?

In December 2011, the British Bankers Association published guidance for its members on compliance with the Bribery Act. Much of the guidance is concerned with helping banks understand what sort of procedures they need to put in place in order to prevent persons associated with them from bribing or being bribed, and therefore to have a defence to the corporate offence.

When it comes to lending transactions, there are two obvious ways in which banks can be affected by the legislation. One concern is that the bank might find that it is associated with its borrower in such a way that it might become liable itself for failure to prevent bribery by the borrower. That is a relatively limited risk in most cases, but it has been considered in the context of project finance transactions in jurisdictions in which bribery is more prevalent - particularly in the context of enforcement procedures.

[10] Paragraph 36, MOJ Guidance.

The other obvious concern is that bribery prosecutions against borrowers will make it more difficult for the banks to recover their loans.

How are banks dealing with these issues in practice?

Whenever new legislation comes into force, the temptation is to add a few more pages of undertakings to the facility agreement. That is sometimes still done, but normally only where the bank has identified an issue.

Perhaps more important in practice is the due diligence which the bank will carry out before the facility is made available. The Bribery Act is just one example of a number of recent developments around the world which are aimed at clamping down on bribery; and banks lending to borrowers in areas where bribery is more likely to occur need to understand the extent of the risks to their borrower, and thereby to themselves as lenders.

The bribery legislation is just one of the legal issues facing companies and their lenders. It should not be taken out of context, but lenders, and their lawyers, need to understand the risks, in order to decide how to deal with them. As Hamlet said, “the readiness is all”.