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ARTICLE

The Bribery Act 2010

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The Bribery Act 2010 comes into force on 1 July 2011. The Act repeals the old English bribery laws contained in three statutes dated between 1889 and 1916. The principles in these old statutes are replicated in the Act, which also introduces a new offence. The Act also abolishes common law offences of bribery. The origins of the Act lie in a perception that Britain was behind the rest of the world in tackling bribery, the fact that although Britain had ratified the Organisation of Economic Cooperation and Development Bribery Convention (OECD) 1998 there had been no successful prosecutions of a company for bribery in Britain, and OECD criticism of the handling of the bribery investigation into BAe Systems. The Act extends to England and Wales, Scotland and Northern Ireland.

The Act creates four new offences:

- Active bribery - bribing another person
- Passive bribery – being bribed
- Bribery of a foreign public official
- Failure by a commercial organisation to prevent bribery.

There are two cases of active bribery set out in section 1: case 1 is where P offers, promises or gives a financial or other advantage to another person and P intends the advantage to induce a person to perform improperly a relevant function or activity, or to reward a person for the improper performance of such a function or activity. Note that the person bribed does not have to be the same person as the one performing the function or activity concerned. Case 2 is where P offers, promises or gives a financial or other advantage to another person, and P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.

There are four further cases of passive bribery set out in section 2. Case 3 is where R requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly; case 4 is where R requests, agrees to receive or accepts a financial or other advantage and the request, agreement or acceptance itself constitutes the improper performance of a relevant function or activity; case 5 is where R requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance of a relevant function or activity; case 6 is where, in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly by R or by another person at R's request or with R's assent or acquiescence. There is no definition of 'financial or other advantage'.

In cases 3-6 it does not matter whether R requests, agrees to receive or accepts the advantage directly or through a third party, and whether the advantage is for the benefit of R or another person. In cases 4 - 6 it does not matter whether R knows or believes that the performance of the function or activity is improper. In case 6, where someone other than R is performing the function or activity, it also does not matter whether that person knows or believes that the performance of the function or activity is improper.

A relevant 'function or activity' is defined in section 3, and covers all functions of a public nature, all activities connected with a business (including a trade or profession), all activities performed in the course of a person's employment, and all activities performed by or on behalf of a body of persons (whether corporate or not). There must be an expectation that the person performing the function or activity is expected to perform it in good faith or impartially, or is in a position of trust by virtue of performing it. The function or activity will be relevant even if it has no connection with the UK and is performed in a country or territory outside the UK.

Section 4 provides a definition of 'improper performance.' A relevant function or activity is improperly performed if it is performed in breach of a relevant expectation, or if there is non-performance which is itself a breach of a relevant expectation. The relevant expectation is the expectation of good faith or impartiality, or any expectation as to the manner in which, or the reasons for which, the function or activity will be performed that arises from a position of trust.

By section 5, the test of what is 'expected' in sections 3 and 4 is a test of what a reasonable person in the UK would expect in relation to the performance of the type of function or activity concerned. Where the performance is not subject to the laws of the UK, any local custom or practice is to be disregarded unless it

is permitted or required by the written law applicable in the country or territory concerned. By 'written law' is meant any written constitution, provision made under legislation, or any judicial decision evidenced in published written sources. So for example the payment of facilitation payments, which may be a local custom or practice, is not disregarded unless permitted under local written law.

Section 6 covers the bribery of a foreign public official, and closely follows the OECD Anti-Bribery Convention. A foreign public official is defined as anyone outside the UK who holds a legislative, administrative or judicial position of any kind, or who exercises a public function on behalf of a country or territory outside the UK or for any public agency of that country or territory, or is an official or agent of a public international organisation. This covers (for example) UK politicians who are MEPs or who have a role in the EU. A person is guilty of bribing a foreign public official ('F') if the person intends to influence F in F's capacity as a foreign public official, and intends to obtain or retain business or an advantage in the conduct of business, and directly or indirectly offers, promises or gives any financial or other advantage to F or to someone else at F's request or with F's assent or acquiescence, and there is no written law applicable which permits F to be influenced in this way. Note that unlike under the US Foreign Corrupt Practices Act there is no provision which allows small 'facilitating payments' to facilitate a routine government action.

Section 7 introduces a new corporate offence, of the failure of commercial organisations to prevent bribery. The expression 'commercial organisation' covers partnerships, limited liability partnerships, any body incorporated under UK law even if it carries on all its business elsewhere, and any body corporate (wherever incorporated) which carries on any business in any part of the UK. If a person 'associated with' the commercial organisation ('C') bribes another person intending to obtain or retain business for C, or to obtain or retain an advantage in the conduct of business for C, C is guilty of an offence. This applies whether or not C knew of the associated person's actions, and it is a strict liability offence. The only defence is under section 7, that C had in place 'adequate procedures' designed to prevent persons associated with C from undertaking such conduct.

Note:

- the associated person is taken as having bribed if that person is or would be guilty of a bribery offence under section 1 or section 6 (direct bribery or bribery of a foreign public official);
- A person ('A') is associated with C if A is a person who performs services for or on behalf of C, so may for example be C's employee, agent or subsidiary;
- If A is an employee, the presumption is that all of A's services are performed on behalf of C.

Under section 9 of the Act the Secretary of State for Justice must publish guidance on what adequate procedures may constitute a section 7 defence. These guidelines were published on 31 March 2011. (The delay in the Act coming into force was because of a delay in the publication of the guidelines, originally expected in January 2011.)

The guidelines set out six principles to assist commercial organisations in establishing anti-bribery procedures. They are:

1. The procedures must be proportionate to the bribery risks faced, and to the nature and scale of the organisation's activities.
2. The organisation must have senior ('top-level') commitment to preventing bribery.
3. There should be an assessment of the risk of bribery, and periodic reassessments;
4. There should be due diligence to mitigate bribery risks.
5. Bribery prevention policies should be embedded and understood throughout the organisation through appropriate communication, including training.
6. The procedures should be monitored, and improved where necessary.

Each principle is accompanied by a commentary, and following the principles there is a series of 11 case studies, in which a basic scenario is set out, with suggestions of what may form appropriate anti-bribery procedures appropriate to the scenario. These can include suggestions that the organisation expect third parties to take action, for example request that the organisation's customers or agents train their staff in anti-bribery measures, or include a commitment to anti-bribery measures in contracts.

Each of the ten case studies is designed to illustrate the application of one of the six anti-bribery principles, and they are headed with the theme of the case study: facilitation payments, proportionate procedures, joint ventures, hospitality and promotional expenditure, assessing risks, due diligence of agents, communication and training, community benefits and charitable donations, and top level commitment. The case studies are worth reviewing in full, and can be found in the guidance published on the Ministry of Justice website at <www.justice.gov.uk/downloads/guidance/making-reviewing-law/bribery-act-2010-guidance.pdf>.

Many commentators on the Act have remarked on the rigour of its provisions. It should not be thought however that these provisions are new. For example, there has been concern about traditional facilitation payments, or hospitality. However it was always possible that these facets could be illegal, for example under the Prevention of Corruption Act 1906 which makes it an offence if 'Any agent corruptly accepts or obtains,

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or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do ... any act in relation to his principal's affairs or business'. Also, 'If any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward.'

In the foreword to the Bribery Act 2010 guidance, Kenneth Clarke the Secretary of State for Justice states that 'Combating the risks of bribery is largely about common sense, not burdensome procedures. The core principle it sets out is proportionality.' He goes on to state that 'Rest assured – no one wants to stop firms getting to know their clients by taking them to events like Wimbledon or the Grand Prix.' Despite this reassurance, it is surely the case that the provision of tickets for popular sporting events can amount to bribery within the meaning of the Act. Providing the ticket is presumably providing an advantage, and in providing the advantage P intends, at least in part, to induce the contact to look kindly on P when placing future contracts, and if so the necessary elements of a section 1 Bribery Act offence are present. However the key is to make sure that one or more elements of the bribery offence are not present: for example that there is no intention for the offer of tickets to induce the contact to prefer P above any other competitor.

Case study 4 in the guidelines covers this scenario, referring to a firm of engineers which has a programme of annual events providing entertainment, quality dining and attendance at various sporting occasions, as an expression of appreciation of its long association with its business partners. On that scenario, the guidelines suggest that the firm of engineers could consider such procedures as the issue of internal guidance providing that any hospitality should reflect a desire to cement good relations and show appreciation, and that the recipient should not be given the impression that they are under an obligation to confer any business advantage or that the recipient's independence will be affected.

An important component which may take hospitality over the line of acceptability is proportionality: where the hospitality is exceptionally lavish, or disproportionate to the relationship. The guidance comments that 'An invitation to foreign clients to attend a Six Nations match at Twickenham as part of a public relations exercise designed to cement good relations or enhance knowledge in the organisation's field is extremely unlikely to engage section 1 as there is unlikely to be evidence of an intention to induce improper performance of a relevant function.' This is not a statement that such hospitality could *not* be bribery, rather an acknowledgment that a key component of the bribery offence – an intention to induce improper performance – will probably be missing in this example. Although it would be for the prosecution to prove the intention, it would clearly be sensible for an organisation's procedures to include statements of principle about the purpose of offering hospitality of this sort. As already noted, the more disproportionate and extravagant the hospitality offered, the more likely it is that it will be perceived as bribery.

The Act poses possible difficulties for insolvency office holders. Suppose you are an administrator of a UK manufacturing firm, which has outstanding contractual commitments and trading with companies and agents in other countries. Suppose that a shipment of the company's products had been held up in a foreign dock, and for them to be released to the eventual customer and paid for facilitation payments are required to be paid to certain dock staff. What is the administrator's position? Payment of the facilitation payments would be bribery, and an offence under the Act. What is more, the dock officials may be foreign public officials, so there is a possibility of an offence under section 6 as well as section 1. There is of course a practical point as to whether the necessary evidence will be available to UK prosecutors to show that a section 1 or section 6 bribery offence has been committed, or would be committed if the UK prosecuting authority had jurisdiction to do so. Although this consideration may affect the risk, it would be foolish to rely on it. The only defence for the company, if there has been bribery, is to show that there are adequate procedures in place under section 7. Therefore it would seem sensible that one of the first tasks of an office holder, on appointment, should be to check the company's anti-bribery procedures. If there are none, or they are thought to be inadequate, it may be a wise precaution for the office holder, at least in the interim, to adopt the anti-bribery procedures formulated by the office holder's own firm.

Although it is unlikely that an office holder could have personal responsibility, it is not beyond all possibility. Section 14 of the Act provides that if there is bribery (whether direct, passive or bribery of a foreign public official) by a body corporate, and the offence is proved to have been committed with the consent or guidance of a senior officer or 'a person purporting to act in such a capacity' that person is guilty of the offence and liable to be prosecuted and punished. In the scenario outlined, if the company had no adequate procedures in place, and the administrator authorised the facilitation payments so as to get the goods released and raise much needed cash, the necessary ingredients for the corporate offence, without any defence, are present and the administrator may be regarded as having allowed the corporation to commit the offence with the administrator's consent or connivance, and be liable under section 14.

For the adequate procedures defence to work in relation to the corporation, the procedures must, naturally, be 'adequate': the adequacy of the procedures will only be measured when it is too late to change them, and convictions may follow even though a corporation does have anti-bribery procedures in place. However, given the avowed commonsense approach to the application

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of the Act and appropriate procedures, the author submits that anti-bribery procedures are only likely to be held inadequate if they have been devised or implemented with little regard for the principles set out in the guidance so that they are inadequate, even perhaps viewed as a sham.

The difficulty for an office holder is that the nature of a company's anti-bribery procedures may not readily be apparent, and even if it is the thoroughness of implementation may be unknown. The office holder may know little about the business and the anti-bribery risks it faces, and not be in a position to work out whether existing procedures could conceivably be inadequate. Nonetheless it seems improbable that an office holder would be prosecuted, let alone convicted, unless the office holder had connived in the act of bribery which exposed the company to prosecution under section 7.

The overall lesson is that all corporations should review the guidance, and the risks they face in their business, and ensure that appropriate procedures are devised to counter the bribery risks they face in their business. The same is true for office holders, who should, at the very least, check on appointment (if not before) that the company concerned does in fact have anti-bribery procedures.

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International Corporate Rescue

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