The Bribery Act 2010

Industry Guidance

for

Hotel Booking Agents and Venue Operators

July 2011

Introduction

The Bribery Act 2010 ("the Act"), which came into force on 1 July 2011, represents a comprehensive overhaul of the UK's anti-bribery legislation.

Businesses (domestic and foreign companies who carry on business in the UK) face unlimited fines and their individual senior officers and employees face prosecution and criminal liability (with penalties including unlimited fines and up to 10 years in prison for individuals) for engaging in bribery and potentially for even unauthorised actions carried out by employees, agents, business partners and subsidiaries – **in any jurisdiction**.

The wide scope of liability has understandably been a cause for concern for UK business. There has been a great deal of guidance published elsewhere (*see appendix 1 for Norton Rose's briefing notes on the Act and the government's guidance*) in relation to general policies and procedures; these will not be repeated here.

This guidance is aimed at giving industry members specific advice to assist with their understanding of how the Act could affect the business relationship between booking agents and venue operators and the practical steps that members of the industry can take to protect their businesses and to ensure that the individuals they employ or are associated with do not fall foul of its provisions.

This guidance has been prepared in consultation with Norton Rose LLP but is not intended to be, and is no substitute for, seeking independent legal advice, tailored for each individual business.

This guidance is intended rather to give some more practical guidance to the application of the Act by considering the more general guidance and other resources and applying these to relevant issues faced by the industry in light of the introduction of the Act.

General Compliance

A key ”takeaway” for both venue operators and booking agents is that the Act does not result in an outright prohibition of commission, which continues to be a major mechanism of remuneration in the relationship between venue operators and booking agents. Rebates from agent to client may also continue to be permissible. However, some concerns exist regarding some forms of commission, and these are explored in the case studies below.

Corporate hospitality will also not be banned under the Act, which means that venue familiarisations can continue to play a part in the industry, but only for instance where these represent bona fide attempts at showcasing products and venues. More importantly, this means that corporates will still be looking to book rooms and venues for client entertainment.

The aim of the Act is not to criminalise legitimate business expenditure. However, activities that might previously have been considered grey areas or at the boundaries of proper commercial behaviour must be considered very carefully in light of the new Act.

It is clear from the general guidance that has been published in relation to the Act that a token response by e.g. publishing of a document detailing an apparent anti-corruption and anti-bribery policy will not be sufficient to provide an organisation with a defence to a prosecution brought under the Act. The Ministry of Justice has, however, emphasized in its guidance the principle of proportionality in response to concerns raised by SMEs in particular about the burden of compliance.

As has been stated elsewhere, it will be crucial for any implementation of anti-bribery and anti-corruption procedures to be demonstrably pro-active, subject to continuous monitoring and review, and that the policies and stance on bribery and corruption of an organisation is widely circulated and made known to employees, agents, associates and those with whom there is a direct business relationship, e.g. the immediate supplier in a chain. The procedures will also need to be implemented from the highest level of the organisation down to those on the ground level, with proper control systems, supervision and appropriate training being provided to those involved with e.g. transaction counterparties.

Agents and venues who comply with the HBAA Code of Conduct will make a strong start to complying with the Bribery Act. The HBAA is considering what amendments to the Code are appropriate in light of the Act.

The Act and the Venue Booking Industry

Issues

As is apparent from the general guidance and the introduction above, the Act allows the Serious Fraud Office ("SFO") to prosecute commercial organisations that are engaged in bribery which is in some way intended to benefit them, or who fail to prevent bribery committed on their behalf.

The Act applies where there has been some form of improper performance of a duty. This will be the case where there is a duty owed (i.e. a duty to act in good faith or where someone is in a position of trust) or where there is an expectation that someone will act impartially.

Under English law, agents owe a fiduciary duty to their clients and are exposed to charges of "improper performance" of a duty. In the context of booking agents, the duty includes the requirement to act in the best interests of the client, and in particular not to recommend venues which are less suitable to the client than others.

The major areas of concerns for this industry will be those areas where there is room for ambiguity as to propriety i.e. those certain acts about which it is not entirely clear whether they could constitute a "bribe" for the purposes of the Act.

Transparency about commission has been a hot topic in the industry for some time; this is likely to be brought into sharp focus by the Act. Consideration will need to be given as to whether current levels of transparency in each business will serve to remedy or mitigate the application of any of the offences under the Act.

Perhaps the most important ambiguities will be in relation to two key areas of discussion in the industry, namely the commission payment model for booking agents (and any areas where there is de facto commission e.g. in the form of a rebate or override) and the various types of incentives offered by venues to booking agents (and their individual employees) to secure their clients' business.

Clients will also be looking for assurances from all their suppliers, including booking agents, that their suppliers have in place procedures to comply with the Act. For instance, an agent could bribe an employee at a venue in order to secure the best dates and rooms for the client. Clients may ask the agent to confirm that "adequate procedures" are in place to prevent such bribes being paid. If agents and venues cannot demonstrate that they have performed a rigorous assessment of their own business practices in light of the Act, then business may be lost to competitors.

The hotel booking industry is not alone in facing challenges following the passing of the Bribery Act. All organisations are reviewing their gifts and entertainment policies to ensure that their activities are reasonable and proportionate, and cannot be construed as inducements to their clients or their clients' employees. In addition, many industries use commission as a remuneration model (such as the insurance industry) and are examining from first principles whether, and in what circumstances, commission is appropriate.

Case Studies

In order to better understand the application of the Act to the industry, it will be helpful to consider some examples of situations which could arise in practice where there could be liability under the Act.

Some issues surrounding commission are considered below:

1) Commission

Scenario A: A client instructs a booking agent to find a venue for a meeting including accommodation. The client has made it clear that they are seeking the lowest priced option, in so far as the venue meets certain key criteria.

The booking agent works on a non-declared commission basis and as a venue member of the HBAA the venue operator is also bound not to disclose its commission rate to the client, though the client is aware of the payment of some form of commission by the venue operator to the agent.

The booking agent finds several suitable venues for the same price which meet the strict criteria provided by the client. However, one (which pays higher commission) is less attractive than the others because it does not offer value added services such as free WiFi and breakfast, neither of which the client has specified in its criteria.

Questions:

a) *Are commissions caught by the Act?*

Commission is a perfectly valid form of remuneration for booking agents. However, if the venue offers commission to induce the agent to breach its duty to the client, then the venue is committing an offence under section 1 of the Act. If the agent receives commission with the intention of breaching its duty to the client, the agent is committing an offence under section 2 of the Act (even if the venue did not intend the agent to breach its duty). The amount of commission will be a relevant factor in any assessment of propriety. The risks also increase if the client is unaware of the level of commission.

As stated previously and considered further below, this does not mean that commission is no longer permitted as a method of payment, since it is often a quite proper and accepted method of reward (the key issue is propriety under the circumstances).

Venue operators (and where appropriate booking agents) should consider whether the level of commission is in line with industry standards and whether the services they are paying for are legitimate and commercially justifiable.

A venue which was unaware that its employees had authorized an inappropriate level of commission will not avoid liability unless there were “adequate procedures” in place to monitor such transaction (see Norton Rose’s briefings for more detail on adequate procedures).

b) I*s the lack of disclosure of the rate of commission to the client problematic? In other words, should all commissions now be disclosed to avoid prosecution under the Act?*

It is possible to continue to use the non-declared form of commission where such commission is on or around the industry standard rate, although there is more scope for charges of impropriety where the arrangement is not transparent.

Many of the larger booking agents now operate on a declared commission basis for their major clients. Turning to industry practice for smaller agents and the remaining 10% or so of clients of the larger HBAs who do not know the level of commission, then as stated above, the non-declaration of commission could be acceptable – but the relevant context would be where such commission was at the market standard rate.

Similarly, venues may continue to pay commission where the client is unaware of the level of commission, but only if the level of commission is on or around the industry standard rate.

c) *What if the agent stood to receive a special or override commission?*

Override and special commission (where the agent receives a higher rate of commission if it provides more business to the venue) are integral to the industry because they are the mechanism by which business development projects are funded (for instance, investment in online sales on the agent's website, marketing and training.) However, special or override commission would constitute bribery if the agent were induced to perform improperly its duties to the client, especially if an agent recommended the override/special commission generating venue over another where such arrangements are not in place.

Disclosure to the client of the existence of special/override commission is crucial, although it may not be the final word. On the one hand, it is arguable that disclosure of the arrangement removes any impropriety, because the client has agreed to the arrangement. But there remains a risk that if special or override commission is disclosed to the client, it may still constitute a bribe. In other words, it is arguable that a bribe is still a bribe even if the client is warned about it in advance. This is an untested area of the law. The hospitality industry is not alone in facing these questions. For instance, in the insurance industry, brokers receive commission including occasionally contingent commission, and as a result insurers and brokers face challenges about transparency and incentive payments.

An agent could, perhaps, disclose special commission to the client by means of an open book accounting arrangement, where the client can see <u>before any bookings are made</u> how much special commission the agent will receive as a result of that client's bookings. This may help to render the commission compatible with the Act. However, it may not be possible for the agent to calculate in advance how much the special commission will be or to apportion it between its clients. In addition, as said above, disclosure may not be enough to prevent the commission from being a bribe within the meaning of the Act.

It is considered responsible industry practice that agents should account for overrides and other special incentives in their P&Ls to clients, but this would not be sufficient, since it occurs <u>after the performance of the agents' duties</u>. Disclosure to a client of special or override commission after the event may not cure the impropriety, because at the relevant time (when the venue was selected) the agent was arguably induced to breach its duty to the client.

A venue which pays override or special commission would be committing an offence if it intends the commission to induce the agent to breach its duty to act in the best interests of the client. A venue will generally pay special or override commission to pay for the business development schemes that the agent has invested in. The venue's intention will generally

not be to induce the agent to act against the best interests of its clients. But since the venue will be aware of the potential conflict of interest between the agent and client in these circumstances, and if the venue was aware that the client did not know about the commission, prosecutors might infer that the venue's intention is to induce the agent. To reduce this risk, venues should take care to ensure that its policies and intentions are well-documented and that it complies with its own policies and code of conduct. If the nature of the commission were disclosed to the client, then (as said above) this may not necessarily prevent the commission from being a bribe.

d) *What if the venue provides benefits to the agent such as funds for the agent's marketing and IT budget?*

These funds could be considered to be improper if there is a linkage between the receipt of these funds and the amount of business provided by the agent to the venue. For instance, the agent may feel that it must provide a certain volume of the business to the venue otherwise the agent would lose the funds from the venue. If this were against the best interests of its clients, then the funds might be a bribe. These sorts of benefits are often not disclosed by the agents to the clients, which makes it especially difficult to justify them; even if they were disclosed, they could still contravene the Act.

e) Could the agent pick and recommend the higher paying though less convenient venue, since it does, strictly speaking fulfill all the of the client's criteria?

The agent has a duty to act in the client's best interests. The agent has arguably breached this duty by not bringing the second (better) venue to the client's attention.

The venue operator is only guilty of bribery if it is offering the higher commission with the intention of inducing the agent to breach its duty to the client. If the level of commission is the industry standard, then the venue operator may not be committing an offence because the venue operator may not know about the other venue.

f) If there is no appreciable difference between venues (e.g. all offer the same value added services as standard), could the agent recommend the higher paying venue over the others?

Even where there is no appreciable detriment for the client in selecting one venue over another but the agent stands to gain more from one venue over another, then the decision to select the higher paying venue should be approached extremely carefully. On the face of it, there is no problem because the agent has not breached its duty to the client, but the agent must be very sure that there is no detriment to the client.

Scenario B: I am a venue operator. I normally pay 10% commission. In order to secure a contract, I agree to pay 15% commission. Is this a bribe?

As above, the level of commission must be on a par with standard industry commission. If 15% exceeds standard commission, then it could be inducing the agent to give you the contract when another contract would have been in the best interests of its client.

General points to note regarding commission

The disclosure of the existence of any special or enhanced commission to the client when recommending a particular venue is likely to be significant in avoiding liability under the Act. Even if the arrangement is disclosed, it is a grey area whether the agent and venue operator are committing an offence. A recommendation of a venue should be made only where this meets the precise criteria sought by the client and where there is no better option available for the client.

Declaration of commissions may lead to increasing use of other remuneration models, e.g. management fees or hybrids such as the proposed fee/commission offset model. In the fee/ commission offset model, the client pays a fee to the agent before the booking, the agent then also receives commission in the normal way; if the level of commission were less than the fee, then the whole of the commission is remitted to the client and agent keeps the excess; if the level of commission is more than the fee, the excess difference is split between between agent and client. This option better aligns the interests of the two parties, thus improving the position in terms of compliance with the Act. But the agent still potentially receives extra commission from its preferred agents and this may, in some circumstances, mean that it recommends the preferred venue when it is not in the interests of client - external advice would need to be taken before such arrangements are entered into.

2) Incentives

Introduction

Booking agencies providing their employees with performance incentives are unlikely to be caught by the Act, but the employee bonus structure must not encourage employees to conduct business improperly. A proper bonus structure is part of the adequate procedures that an agency must put in place.

Venues who give incentives to agencies should consider whether the incentives are proportionate and reasonable, and whether they could induce the agency to breach its duty to its client.

Scenario A

An individual employee of a booking agent is offered a free gift worth £500 by the venue for bringing £20,000 worth of business to a venue within a certain timeframe. What if the gift was offered to the agency instead?

Analysis:

It is permissible to give gifts if the intention is merely to cement a business relationship with the agent, but not if the intention is to encourage (or reward) the agent to breach its duty to the client. Common sense is a good guide here: ask whether the agent or the agency would be embarrassed if the existence of the gift were reported in the press.

Ideally, it is better to avoid providing incentives to individual employees of a booking agency. It is likely to be difficult and impractical, particularly for larger booking agents, to monitor the actions of all of their employees and the impact of an expensive gift as an incentive could result in an inference of bribery, since a high value electronic product could well induce an individual to improperly perform his duties.

Schemes of this type are therefore best avoided. Venue operators would be well advised to consider an alternative method of providing incentives that are unambiguous in their compliance with the Act. Booking agents should also make it clear that the receipt of high value products are unacceptable and that any instance where a gift is offered to individual employees should be declared to management.

The new corporate offence of failing to prevent bribery means that if an employee of a venue offers a bribe to an agent without the approval of the venue, then the venue is guilty of an offence unless it had adequate procedures in place to prevent the bribery. By contrast, if an employee of an agency accepts a bribe without the approval of the agency, then the agency is not committing the corporate offence because that offence applies only to giving (rather than receiving) bribes.

The HBAA Code of Conduct states that such incentives provided by venue operators should be notified to the directors of the booking agent. This suggests a solution to the problem of individual incentives by providing them to the booking agency, which can then use them internally as an incentive. Incentives should still be proportionate when provided to the agency, i.e. providing one gift which would then go into e.g. a draw or pool of products received from other venue operators is more likely to be compatible with the Act. The pool method would also allow "a senior person" at the booking agent's "head office to have visibility of what is happening and to be satisfied that what is happening is justifiable", per the words of the director of the SFO.

As said above, other incentives, such as contributions to the marketing funds of booking agents may be not acceptable even though booking agents are an additional advertising resource in the current commercial framework of the industry. As ever, due to the current level of legislative uncertainty common sense and commercial pragmatism should be applied when making or receiving any payments or incentives, with appropriate queries as to the intention and proportionality of these in the relevant context.

Scenario B

A member of staff of a booking agency is offered a complimentary weekend for themselves and their spouses and children at one of the locations of a venue operator.

Analysis: Familiarisation weekends appear to be commonplace in the industry and the Ministry of Justice general guidance states that where these are designed as a bona fide attempt to showcase the venue operator and to "establish cordial relations" then these are likely to be "recognised as an established and important part of doing business and it is not the intention of the Act to criminalise such behaviour."

Venue operators should nevertheless ask themselves the question why they are offering the weekend, what the ultimate aim is, and if this and the promise of future weekends are designed to incentivise the agent to bring their business to them, then this is not likely to be appropriate behaviour under the Act.

Further if, for example there was a degree of market research conducted as well, e.g. surveys needing to be completed by the family then this could provide demonstrable evidence to rebut a presumption of bribery.

If the hospitality provided is no more than that sought by the average consumer of the type represented by the agent (again a contextual point), then this is more likely to be deemed proportionate and reasonable under the Act. Another factor that will be taken into account is the regularity of the hospitality: frequent visits are more likely to be inappropriate. A further factor is the timing of the visits: if the visit occurs shortly before the agent recommends the venue to a client for a big event, this may appear to be an inducement to the agent; if the visit occurs shortly afterwards, it may appear to be a reward.

It would also be helpful for venue operators to ensure that the booking agent employees and their families clearly understand that any hospitality provided is without obligation on their part.

Both booking agents and venue operators should consider ensuring that within their anti-corruption policies there are clear provisions for reporting any hospitality offered and, where appropriate, to have a system requiring approval of these as commercially justifiable by a central manager, bearing in mind the general guidance on corporate hospitality.

Scenario C: I am a venue operator and I have an annually recurring booking from an agent. If I give a gift to the agent immediately after each booking, is that a bribe?

The intention of the gift is more important than its timing. If the intention is more than a business courtesy to cement a working relationship, and is rather to induce the agent to continue placing the booking with you (or as a reward for having placed business with you), then it could be a bribe. You must be especially careful about gifts and hospitality in the time immediately before a contract is awarded because it becomes more likely that the intention was to influence to a decision. The above example shows that, if the contract is a recurring one, a gift given after the contract is awarded might be a bribe.

3) Liability of Agents and Venues for what happens at the venues

Much of the publicity around the Act has concerned hospitality and entertainment. Commentators have questioned whether businesses may still entertain their clients at sports venues or hotel receptions. In general it will depend on the reasonableness and proportionality of the entertainment and whether the intention is either to cement a business relationship and showcase a product, or to influence someone improperly.

A question that has been asked by the hospitality industry is as follows: when a client pays for its own client to enjoy hospitality at a venue and the hospitality constitutes a bribe, is the booking agent or the venue also committing an offence under the Act? In general, the answer is “no” because the business, not the agent or the venue, is providing the hospitality. Furthermore, the agent and venue are not usually in a position to know whether the hospitality constitutes a “bribe” because they do not know the details of the relationship between the business and the recipient of the hospitality, so they cannot know whether the hospitality is reasonable and proportionate. The agent or venue would be committing an offence only in very unusual special circumstances: such as if the venue or agent knew that the hospitality constituted a bribe, and if the agent or hotel stood to benefit directly from the relationship between the business and its client.

Conclusion

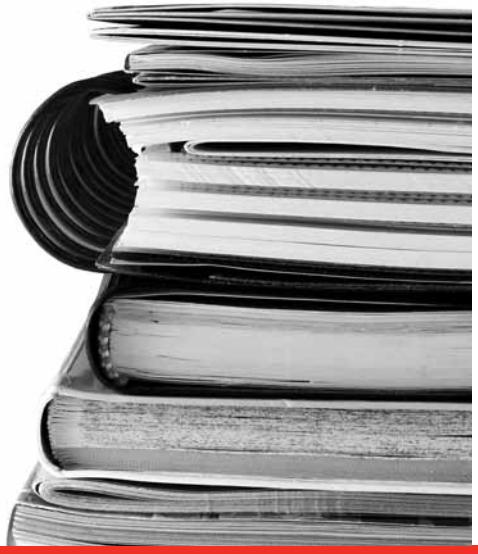
Despite the weight of material published, it is unclear how the prosecutors and the courts will interpret the Act. The SFO is expected to bring several test cases in order to establish the boundaries of what types of behaviour are and are not acceptable under the Act. The Act has a potentially wide scope, but the consent of the Director of the SFO or the Director of Public Prosecutions must be obtained before any prosecution. Their initial focus is likely to be on high-profile cases in “high risk” industries (such as mining and infrastructure).

The aim of the Act is to provide a fairer business environment which should not hamper legitimate business. A number of industries use commission as their standard form of remuneration and they are all considering their business models in light of the Act. In the hotel and venue booking industry there are numerous types of special/override commission arrangements, incentives and marketing funds provided by venues to agents. Complete transparency to the client is advisable in order to avoid the appearance of impropriety. However, the possibility remains that special/override commission and other incentives and funds, even if they are disclosed, may fall foul of the Act. Payment of the industry standard level of commission, which represents a fair reward for the quality of the work done, is unlikely to present a problem.

Appendix One

Norton Rose briefing on Government guidance on the UK Bribery Act

Ten things you should know about the UK Bribery Act - Norton Rose



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Ministry of Justice Guidance on the UK Bribery Act

FINANCIAL INSTITUTIONS • ENERGY • INFRASTRUCTURE AND COMMODITIES • TRANSPORT • TECHNOLOGY

Briefing

March 2011

Summary

The UK Ministry of Justice has published its final guidance under Section 9 of the Bribery Act 2010 regarding the "adequate procedures" required to defend successfully a prosecution for "failing to prevent bribery".

Introduction

The UK Ministry of Justice has published its final guidance under Section 9 of the Bribery Act 2010 (the Act) regarding the "adequate procedures" that must be in place if a commercial organisation is to successfully defend a prosecution for "failing to prevent bribery" under Section 7 (the Guidance). This offence will also apply to any foreign business which carries on part of its business in the UK. In addition to clarifying the scope of the new corporate offence of failure to prevent bribery by persons associated with an organisation, the Guidance also addresses the question of which foreign companies will fall within the scope of the offence, advises how commercial organisations should approach the provision of corporate hospitality and discusses further the issue of "facilitation payments".

In addition, the Director of the Serious Fraud Office (the SFO) and the Director of Public Prosecutions have produced joint guidance for prosecutors (Joint Prosecution Guidance) to encourage a broad consistency of approach to the Act between the police, the Crown Prosecution Service and the SFO and to set out the factors to be taken into account when making a decision to prosecute. This joint guidance is equally significant, given that a prosecution may only be brought with the consent of one of the Directors. The Act will come into force on 1 July 2011.

Application to foreign businesses

As the offence of "failing to prevent bribery" will apply to any foreign business which may be considered to be carrying on part of its business in the UK, such organisations should consider the Guidance closely to ensure that the policies and procedures which they have in place to prevent bribery are consistent with what is required by the Guidance. If they do not currently operate policies of the kind suggested by the Guidance, then they need to have these in place by 1 July 2011.

Adequate procedures

The Guidance emphasises that an organisation's procedures to prevent bribery should 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 (associated persons) worldwide. The risk might increase because of the countries where business is carried out, the sector concerned, the type of transaction, the significant value of a particular project, or the business relationship concerned. The Guidance provides examples in each case. Internal factors may also impact the level of risk to which the organisation is exposed, for instance a bonus culture that rewards excessive risk taking, or lack of anti-bribery commitment from senior management.

The Guidance sets out Six Principles for adequate procedures:

- Proportionate procedures
- Top-level commitment
- Risk assessment
- Due diligence
- Communication (including training)
- Monitoring and review.

Commentary and case studies are included in the Guidance to demonstrate how the Six Principles might work in practice.

In a recent speech, the Director of the SFO has publicly addressed a perceived misconception about the defence of adequate procedures. Some people have commented that if bribery occurs it means that the procedures were by definition inadequate – the Director recognises that "it is perfectly possible for a business to have adequate procedures and yet to find that there is a problem about bribery somewhere in its globalised operations." If that business had adequate procedures in place across its global network, it will have a complete defence to the offence of failing to prevent bribery by associated persons.

Associated persons

The definition of an "associated person" remains a broad one (namely, someone who "performs services" for a business), although the Guidance has provided some much-needed clarification in this respect. For example, the Guidance has confirmed that a subsidiary will not always be the "associated person" of its parent company (for example, if it merely remits

dividends to its parent). The Guidance also explains that an organisation is only liable for the actions of its associated person if the bribe was intended (by such an associated person) to benefit the organisation directly. It clarifies that a bribe paid by an employee of a subsidiary is normally intended to benefit the subsidiary and not the parent company, even though the parent may benefit indirectly. Thus a parent will not always be caught by bribes paid by or on behalf of a subsidiary.

There has also been concern among commentators that every entity in a chain of sub-contractors or suppliers might be an associated person of the entity at the top of the chain. However, the Guidance explains that a contractor or a supplier will generally be deemed to perform services only for the entity with which it has a direct contractual relationship.

A further concern for many businesses has been their responsibility in the case of joint ventures. The Guidance considers two different types of joint ventures. In the case of a joint venture through ownership of a separate legal entity, the Guidance notes that an employee of the joint venture entity is likely to be performing services for that entity only and will not be associated with the participants in the joint venture. In addition, a bribe paid on behalf of the joint venture may be deemed to benefit the joint venture entity only, even though the owners may benefit from it indirectly. Thus shareholders may not be held liable for all activities of the joint venture company. The situation becomes more complicated if the employee of the joint venture entity was seconded by (and remains an employee of) one of the joint venture participants.

Where the joint venture is conducted through a contractual agreement, the Guidance states that an employee of one of the parties is likely to be associated with his direct employer only, and a bribe paid by the employee is probably paid for the benefit of that party only. The degree of control that each party has over the joint venture arrangement will be a relevant factor in this respect.

In addition, the Guidance states (and the Director of the SFO has acknowledged) that applying procedures retrospectively to existing associated persons, such as existing joint venture partners or existing contractors, might be difficult, but that it should be done over time. Accordingly, initially they will expect a higher standard of procedures in respect of new joint ventures as opposed to existing ones.

Of course, the question of who is deemed to be an associated person and whether a bribe can be said to have been paid on behalf of the commercial organisation will ultimately depend on the particular circumstances of each case.

Jurisdiction

The Guidance clarifies which foreign companies will fall within the scope of the offence of failing to prevent bribery. The Guidance states that a foreign company with a subsidiary in the UK is not necessarily "carrying on a business or part of a business" in the UK and so may not, by that mere fact alone, be subject to the jurisdiction of the Act. The Guidance also suggests that a company will probably not be carrying on business in the UK merely because it is listed on a UK stock exchange.

The Director of the SFO, on the other hand, has indicated on a number of occasions that the SFO intends to take a wide view of the extra-territorial jurisdiction of the Act. He has said that in order to protect ethical British businesses and ensure an international level playing field, he wishes to pursue their foreign competitors who pay bribes. The Joint Prosecution Guidance is, however, deliberately high-level and remains silent on this point. Ultimately, the territorial scope of the Act will be a matter for the English courts to decide and the SFO's future prosecutions will be informed by the first cases to be decided by the courts.

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 Act or to influence a foreign public official. The Guidance provides examples of acceptable hospitality, such as taking a client to a sporting event, or paying for a foreign public official 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.

Facilitation payments

The Act provides no exemption for facilitation payments which, in common with the vast majority of international legal systems, will amount to bribery (with the exception of legally required administrative fees, or fast-track services). The elimination of facilitation payments remains a UK 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 Director of the SFO has said publicly that some companies have not yet eradicated facilitation payments and he is prepared to be sympathetic, provided that the company is "genuinely committed to achieving zero tolerance" of facilitation payments and "there is meaningful commitment within a reasonable timeframe."

Joint Prosecution Guidance

The Joint Prosecution Guidance explains that as with other criminal offences, prosecutors apply the two-stage test of

- whether there is sufficient evidence to provide a realistic prospect of conviction and
- whether a prosecution is in the public interest.

So, for example, whereas an act of bribery being committed by somebody in a position of authority or trust may suggest prosecution, minor harm resulting from a single incident of bribery or the adoption of a proactive approach involving self-reporting and remedial action may outweigh the first consideration and tend against a prosecution being pursued.

Conclusion

The message from the Guidance is that a commercial organisation can demonstrate that it has "adequate procedures" by conducting regular risk assessments and implementing proportionate measures to address the risks identified. The Guidance has a strong commercial focus and provides much-needed clarification on the issues of corporate hospitality and facilitation payments. However, it remains the case that the Guidance may have limited weight in the English courts: the Guidance does not have the force of law and can be revised by the Secretary of State at any time. The effect of the 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 strictly than the Guidance suggests.

Finally, whether or not a company's activities come within the scope of the UK Act, strict bribery laws are becoming more commonplace around the world. China, for instance, has recently introduced measures to combat the bribery of foreign public officials and other countries are expected to follow suit (see our March 2011 briefing note on this topic). A further incentive for all companies to address their bribery risks as a matter of urgency is that their business partners, for their own protection and reputation, will increasingly expect to see evidence that a business has in place adequate procedures. If such evidence is not forthcoming, the possibility of certain business relationships being lost, or at least, affected, cannot be ruled out. ■

Notes

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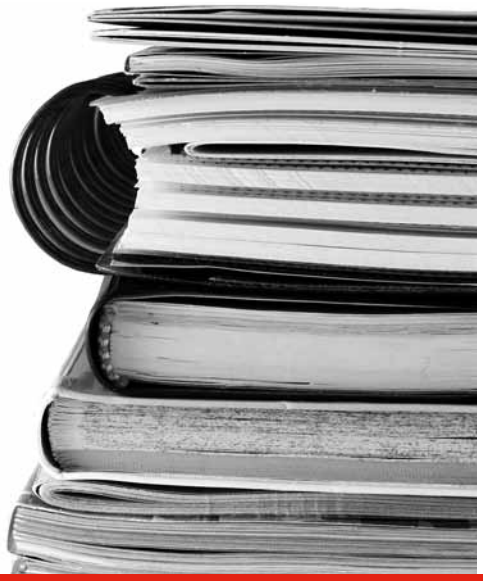

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Briefing

April 2010

UK Bribery Act: Ten things you should know

Introduction

The corporate community has become accustomed to the US authorities frequently investigating and prosecuting offences under the US Foreign Corrupt Practices Act (FCPA). Until recently, the same could not be said about investigations and prosecutions by the UK authorities. In part, the historic failure to investigate and prosecute corruption offences has been attributed to a lack of impetus by the Serious Fraud Office. However, to some extent, the lack of action has been a result of the antiquated and piecemeal nature of the UK law on bribery and corruption.

However, with the enactment of the Bribery Act (the Act) on 9 April 2010, with its wide-ranging changes and significant extra-territorial reach, one of the impediments to the bringing of successful prosecutions will be reduced.

The Act is wider in scope than the FCPA in a number of respects. Below are some key points that all corporates should be aware of in relation to the Act.

Strict liability

The Act creates a new strict liability offence for corporates and partnerships of failing to prevent bribery occurring within the organisation. The only defence is if the corporate had put in place "adequate procedures" designed to stop incidences of corruption.

The meaning of "adequate procedures" is not defined in the Act; as with many issues, context is all. The standards that are expected of a small private company will not be the same as those expected of a large multi-national.

The Secretary of State is required to provide formal guidance on the extent and meaning of "adequate procedures". However, this will not be prescriptive, and will not set out a fail-safe check list of requirements for corporates to implement. There is likely to be a focus on the "culture" of an organisation, and it will be expected that there is a "tone from the top" of zero tolerance to bribery and corruption, which is adopted at all levels within the organisation.

Extra territorial jurisdiction

The failure to prevent bribery offence applies to any corporate or partnership (wherever it is registered, incorporated or conducts its main activities) as long as it carries on a business, or part of a business, in the UK. It also applies to conduct that takes place outside of the UK. This means that, as long as it carries on business in the UK, a foreign company can commit the failure to implement "adequate procedures" offence in relation to conduct in a foreign country that is not connected with any business undertaken in the UK. The Act's extra territorial reach is broader than that of the FCPA.

Extra territoriality in matters relating to financial crime more generally will become increasingly common throughout the world as time passes. It is therefore imperative that corporates take local law advice in each jurisdiction in which they operate. Corporates should seek to apply, as a bench mark, the most stringent applicable standards. "FCPA compliance" alone will not be sufficient.

Associated persons

Corporate entities can be guilty of an offence of bribery under the Act. They can also be guilty of a failure to prevent bribery offences if an "associated person" carries out an act of bribery on their behalf. Unlike under the FCPA, an "associated person" is not defined by reference to the nature of the relationship with, or control exercised over, the associated person.

In the Act, an "associated person" is one which performs services on behalf of the principal. The definition of performing services is vague; the Act states that it will be determined by reference to all the relevant circumstances. It is far from clear what level of supervision by the principal would be necessary to help satisfy the adequate procedures defence in a case based on the acts of a distributor, sub-contractor or joint venture. There is, and will continue to be, much debate on this subject.

What this means is that where a company has operations carried out by another individual or entity on its behalf, even in small part, particularly in difficult jurisdictions, it is important to ensure that the third party is aware of and commits itself to the anti-bribery policies of the principal, that it is made aware of a zero tolerance culture within the organisation, and that it is subject to appropriate due diligence and monitoring.

Private bribery and bribery of a foreign public official

UK law has, for over 100 years, outlawed bribery of private persons. The Act continues to make such conduct illegal. The Act also includes a separate offence of bribery of a Foreign Public Official.

Improper performance

A key element of the new bribery offences is that the intention of the briber is that the person being bribed improperly performs his/her duties. Improper performance is defined by reference to a failure to perform one's duties in line with a relevant expectation. These relevant expectations are:

- that the function will be performed in good faith
- that the function will be performed impartially or
- that the function imports a position of trust.

Improper performance will arise if it is intended that, by paying the bribe, the recipient of the bribe would be expected to act otherwise than in good faith, an impartial manner or in accordance with a position of trust. Expectations are judged by UK, not local, standards.

Influencing a person to perform their duties improperly, for example by behaving partially, is a low threshold to meet, and would cover a wide range of scenarios (for example, inducing the recipient to breach his contract with a third party). This has been raised in the course of Parliamentary debate. The Government's response has been to maintain that prosecutorial discretion would prevent "non-criminal" cases being prosecuted. Whilst this filtering system may work in practice, it does not give much comfort to corporates, and underscores the need to adopt a zero tolerance attitude to corrupt behaviour.

Foreign public officials

By contrast, bribery of an FPO does not need to include an intention that the FPO will improperly perform his duties, nor does the payment need to be made "corruptly" as required by the FCPA. The elements of this offence are:

- an intention to influence the FPO in his official capacity
- an intention to obtain/retain business, or an advantage in the conduct of business and
- the act is not permitted by local written law.

Indirect bribery

Like the FCPA, the Act prohibits all corrupt payments, regardless of whether they are paid directly by the corporate, or on its behalf by a third party.

Individual liability

It is not just corporates who need to fear prosecution under the Act. Individuals guilty of one of the principal offences are liable on conviction to imprisonment for up to 10 years, or to a fine, or to both. The Act also

penalises those senior officers of the corporate with whose "consent or connivance" the bribery was committed (although where the bribery takes place overseas, they must have a "close connection with the UK"). This could be committed by the passive acquiescence of a director, if in practice that amounted to consent to the bribery. In addition, failure to maintain "adequate procedures" could render directors vulnerable to civil claims.

Facilitation payments

The FCPA makes an exception for small facilitation, or "grease", payments paid to officials to smooth relevant processes of official actions. The Act makes no such exception; all payments, no matter how small or routine, or expected by local customs, would be illegal.

It is often commented that this is impractical; in some jurisdictions it is impossible to get business done without these types of payment. However, other organisations have commented that this state of affairs makes it easier to present a zero tolerance culture within their organisation. This provides for clearer policies and greater understanding amongst employees as to what constitutes compliance.

Public procurement

It is currently a point for debate whether a corporate convicted of a bribery offence, particularly the failure to implement adequate procedures offence, will be debarred from participating in future public contracts in light of the EU Public Procurement Directive. Although the answer is not yet certain, it is a serious potential risk that should not be discounted or under estimated, and is yet another reason to ensure compliance with the Act.

We would be happy to provide further detailed and specific advice on compliance with the Act. Our Corporate Integrity Review service provides organisations with an assessment of their key governance risks and recommendations for the management of these issues.

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