
Memery Bank

Sit Up and Take Note of the Bribery Act 2010!

Peter Wilson reviews the offences and penalties outlined in the harsh new Bribery Act as well as its wide jurisdictional reach.

In April 2010, the UK passed a new law that makes bribery a crime wherever in the world it takes place. The maximum penalties are severe, ten years in prison or unlimited fines for companies. Prosecutions under the old laws have resulted in companies paying fines running into millions of pounds.

There are 4 offences under the Bribery Act 2010 as follows:

1. Bribing another person;
2. Receiving a bribe;
3. Bribing a foreign public official;
4. Failure of a commercial organisation to prevent bribery.

The drafting of the offences is complex and there are multiple ways in which each offence can be committed. By way of example, you would commit the offence of bribing another person if you give them money to induce them to do something they are employed to do improperly. However, you would also commit the offence if you were rewarding them for having done something improperly.

Alternatively, you would commit the offence if you merely offer or promise them some sort of financial or other advantage, not actually giving them anything, provided that in making the offer you had intended them to perform an activity improperly.

The offence of bribing another person is also committed where the very acceptance of an advantage would itself be improper performance e.g. in the case of a person who is prohibited from receiving commissions or other benefits.

The offence does not just relate to employees but covers public officials, agents, or any person who performs an activity in connection with a business. As you might expect, the bribe does not have to be offered to the same person who performs the activity you want to influence; it could be his boss. Likewise a person who commits the offence does not have to be involved in directly handing over or promising money as he could use an intermediary. It is often the case where large companies are involved in corruption that they use one or more third parties as intermediaries to disguise the trail back to them.



The offence with perhaps the widest application is the failure of a commercial organisation to prevent bribery.

The bribe might be offered or given anywhere in the world for an offence to be committed under UK law. There has to be some link with the UK in that (a) the activity taking place abroad would be a crime if it took place in the UK and (b) it involves a person with a “close connection” with the UK; broadly meaning that he is a UK national, or UK resident or a UK company.

And it is no excuse to say that there was no option but to pay something as that is how things are done in that country. The Act specifically states that any local custom or practice is to be disregarded. There is no exception for facilitation payments and no de minimis. This will be a matter for the prosecutor, although it is unlikely that anyone will be accused of bribery for reasonable corporate entertainment such as a lavish lunch. Companies will have to keep an eye on anything of greater value though. It is a defence if the payment or benefit given to gain influence is sanctioned by local law but I am not aware of any country in the world that has such laws.

The second offence mentioned above, of receiving a bribe, can also be committed in a whole variety of ways. For example, requesting or agreeing to receive a financial or other advantage in anticipation of performing a function improperly would be an offence even if you got nothing at the end of the day.

The third offence of bribing a foreign public official is clearly intended to be mostly committed abroad and is similar to US legislation under the Foreign Corrupt Practices Act (“FCPA”). The offence is committed if a person himself, or through a third party, offers, promises, or gives a bribe to a foreign public official, or to another, at the official’s request, intending to influence the official to obtain or retain a business advantage. A UK business would be liable wherever the bribe occurs in the world. A non UK business or individual would also be liable if some act forming part of the offence takes place in the UK.

The offence with perhaps the widest application is the failure of a commercial organisation to prevent bribery. A company would be guilty of the offence if a person associated with it bribes someone intending to obtain or retain business for the company or some advantage in relation to the company’s business.

A person is associated with a commercial organisation if he performs any services for or on behalf of the organisation. So he does not have to be an employee, or a consultant, or even have any contractual arrangement. The person could also be another company such as a subsidiary or an agent.

The offering or giving or receiving etc of a bribe could take place anywhere in the world. The new law has a wider jurisdictional reach than the FCPA and applies to non UK commercial organisations provided that they carry on some part of their business in the UK. If it’s a UK company involved then no corrupt activity need take place in the UK for the company to be liable for it.



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By way of example, a company incorporated in Costa Rica with a marketing office in the UK could be guilty of the offence of failing to prevent bribery if one of its affiliates in the Philippines paid a facilitation payment to someone.

If an organisation finds itself investigated, it will be a defence for it to prove that it has in place adequate procedures to prevent bribery. The Government will be publishing regulations on what those procedures should be, although it is understood that it will be guidance only, not a checklist, so the onus will remain on the business to prove that in any given scenario its procedures were adequate. The guidelines are likely to cover similar ground as the Organisation for Economic Cooperation and Development Anti-Bribery Convention to which the UK is a signatory and require a clear anti-bribery policy supported by senior management, an independent compliance structure, training and whistle blowing procedures.

In recent years there have been a growing number of bribery prosecutions and, particularly following the banking/investment crisis, there is considerable political will behind a drive against international corruption. The UK's Serious Fraud Office has the role of investigating foreign corruption and it is pushing a self reporting agenda. It has set up a separate "Anti-Corruption Domain", issued guidelines on self reporting and it promises, *"We are moving significant skills into this area (both from within the SFO and recruited externally) and are investing heavily in training. Ultimately, we intend to have 100 staff working in this area... We expect to conduct more criminal investigations and prosecutions in the future (particularly in light of the Bribery Act (2010) now having become law)."*

Self reporting is not a soft option though. In 2009 Mabey & Johnson, a UK company manufacturing steel bridging pleaded guilty to foreign corruption in relation to public contracts in Jamaica and Ghana between 1993 and 2001 and breaching UN Sanctions in the Iraq "Oil for Food" programme. The company had self reported to the SFO in 2007 and charges were brought after a two year investigation. The company had to pay over £6 million in fines, reparation and a Confiscation Order and another £600,000 in SFO legal costs and first year monitoring costs.

Self reporting is more attractive when one bears in mind that any prosecution for corruption is likely to lead to a custodial sentence. In April this year a former executive of DePuy (a subsidiary of Johnson & Johnson) pleaded guilty in the UK after admitting his involvement in £4.5 million corrupt payments to medical professionals within the Greek state healthcare system. Described variously as "incentives", or "commission", or "professional education", they were in reality bribes paid by a Greek intermediary company to persuade surgeons to use the company's products. Even though he is cooperating with the prosecution, the executive was still sentenced to 12 months imprisonment and the investigation into other suspects is ongoing.

The above cases were prosecuted under the old laws and when the new Bribery Act is implemented there will be more ways to fall foul of the law than ever before. It seems likely that anyone charged with a bribery offence might also be charged with a money laundering offence under the



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Proceeds of Crime Act 2002 (“POCA”) as POCA investigations accompany any financial crime investigations as regularly as night follows day. If so, that means the spectre of a pre-trial Restraint Order, the appointment by the Court of a Management Receiver over an individual and/or a company’s assets, and a post trial Confiscation and Compensation Order in the event of conviction.

Prevention is therefore hugely important and every company, whether in gaming or not, should make sure it has a policy in place in to prevent bribery. Here is the good news – apparently the Government will allow a period of six months from the publication of its regulations on the prevention of bribery until the new Act is implemented. This is to allow businesses to get themselves ready for the go live date so they are not caught unawares on the first day that the new offence of failing to prevent bribery is applicable.

And here is the opportunity – there is now a period available for businesses to get their own houses in order and make sure there is no bribery going on in the UK or abroad. It may well be an offence under the old law anyway (which in most cases already extends to bribes given abroad), and if it does, then self reporting should be considered before the new regime takes effect. Even if any greasing of palms abroad is not technically an offence under the old law, its time to think again about such activity as in all probability it may not escape the reach of the new harsher regime of the Bribery Act.



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Memery Crystal is a commercial legal practice specialising in corporate, dispute resolution, employment, intellectual property, real estate and tax. The firm has industry sector teams in gambling, financial services, digital media, retail, natural resources and education.

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