

PaulHastings

StayCurrent

A Client Alert from Paul Hastings

April 2010

No Room for Complacency in Corruption Crackdown

BY MICHELLE DUNCAN, HANNAH KEEVER, AND SAMANTHA KAKATI

Introduction

The United Kingdom's Bribery Act 2010 (the "Act") received Royal Assent on 8 April 2010 and is now law. The Act represents a long awaited overhaul of the United Kingdom's bribery laws and replaces offences at common law and under the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916. The purpose of the Act is to reform the criminal law of bribery and to provide for a new, consolidated scheme of offences to cover bribery, both in the United Kingdom and abroad.

As can be seen from the summary below, the Act is in many ways broader than the United States' regime under the Foreign Corrupt Practices Act 1977 "FCPA". For example, it is not restricted to bribes to foreign public officials and there is no exemption for facilitation payments. Therefore US entities that conduct any business activities in the United Kingdom will need to review their FCPA compliance to ensure it is also adequate to protect them in relation to the Act. Such entities should pay particular attention to any guidance that is issued in relation to what constitutes "adequate procedures" (as discussed below) and in the meantime ensure that they do everything they can to develop such procedures in line with existing guidance.

Offences under the Bribery Act

The Act replaces the common law offences of bribery and the old statutory provisions with two general statutory offences of bribing and being bribed. It also creates two new offences, the offence of bribing a foreign public official and a strict liability corporate offence of failing to prevent bribery.

Offering or Accepting a Bribe

Clauses 1 and 2 of the Act make it an offence to bribe or be bribed in connection with the improper performance of a "relevant function". A bribe is not limited to a financial reward, but includes any "financial or other advantage".

The definition of "relevant function" is wide and includes activities of a business as well as those of a public nature and activities performed in the course of employment. However, a function or activity will only be covered where it is expected to be performed in good faith or impartially or where performance of the function creates a position of trust.

The test for improper performance is an objective test based on what a reasonable person in the United Kingdom would expect. Any local custom or practice is to be disregarded unless it is permitted by the written law of the relevant country.

The offence will be committed whether or not the bribe is actually received and whether or not the person being bribed is different to the person whose performance is affected. The offence also covers bribes made through a third party or an agent.

Bribery of a Foreign Public Official

It is an offence to bribe a person who holds a legislative, administrative or judicial position, or who exercises a public function of any kind in a country outside the United Kingdom or who acts as agent of a public international organisation. The bribe can be direct or through a third party, but there must be an intention to influence the recipient of the bribe in his public capacity. The offence will not be committed if the written laws of the applicable country allow the relevant official to be influenced by the advantage.

The provisions of this offence closely follow the wording and requirements of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. It was decided to deal with this offence separately rather than deal with such conduct in the general bribery offence in Clause 1 of the Act so as to make a clear statement about the United Kingdom's commitment to compliance with its obligations under the OECD Convention. The offence does not cover accepting bribes, only offering, promising or giving bribes.

Corporate Offence of Failing to Prevent Bribery

The Act introduces a new offence for companies and partnerships that fail to prevent bribery by persons undertaking activities on their behalf. The offence is based on strict liability so there is no need to prove negligence; just that a person associated with the company has bribed another person with the intention of obtaining business or another advantage for the company.

The question of who is associated with a company is one of fact. Therefore a company will potentially be liable for the activities of a wide range of people that perform services for it. This is a significant area of risk and one that companies and partnerships that operate through sales agents, advisers, business operators or distributors should focus on.

The offence is subject to a defence that the relevant organisation had adequate procedures in place to prevent bribery. The Act does not contain guidance as to what would satisfy the adequate procedures test. The Ministry of Justice is expected to publish such guidance in June or July of this year. In the meantime, the Ministry of Justice has pointed to a draft paper provided by representatives of GC100 (a group of senior legal officers of over 85 FTSE 100 companies) as indicative of the types of areas that companies will need to focus on. The main points that arise from this draft paper are described below:

- (a) Ensuring that the board of directors takes responsibility for establishing a corporate culture in which corruption is eradicated and that senior management are involved in this process. There should be a clear statement from the top down as to the culture that is expected at all levels.
- (b) A senior officer should be given responsibility for oversight of the anti corruption programme.
- (c) A clear and unambiguous code of conduct that addresses corruption should be developed and published externally and internally.

- (d) Risk management procedures should be put in place and implemented.
- (e) Employment procedures should be reviewed to ensure that compliance is met. For example, where possible, employees should be vetted; employment contracts drafted so that they include obligations in respect of bribery and corruption; and clear disciplinary systems should be put in place and enforced.
- (f) Training programmes should be developed.
- (g) Due diligence should be undertaken before entering into any project or relationship.
- (h) Decision making processes should be reviewed so that areas where there is greater risk of bribery require sign off by more senior managers.
- (i) Financial controls should be enforced to prevent the risk of a corrupt individual being able to bribe or accept a bribe.
- (j) Procedures should be implemented in respect of the business's supply chain to minimise the opportunity for corruption by subcontractors and suppliers.
- (k) Reporting and investigation procedures should be developed and implemented.

Commencement

The Act is now law, but will come into force at a date determined by the Secretary of State. It is expected that this date will be June 2010 for the general offences and 1 October 2010 for the corporate offence, but this is not yet confirmed. The Act does not have retrospective effect.

Senior Officers of a Corporate Liable as Individuals

If an offence of offering or accepting a bribe or of bribing a public official is found to have been committed by a body corporate with the consent or connivance of a senior officer or a person purporting to act as a senior officer, that individual is liable to be prosecuted for the offence as well as that body corporate if that person has a "close connection" with the United Kingdom (as described below).

Penalties

The Act imposes severe penalties for individuals and commercial organisations.

An individual guilty of offering or accepting a bribe, or bribing a public official is liable to imprisonment for up to 10 years and an unlimited fine.

A company or partnership guilty of any offence is liable to an unlimited fine.

Territorial Application

Offences in relation to the two general bribery offences and the bribery of a foreign official offence will not only be committed when any relevant act or omission takes place in the United Kingdom, but also where a person who is "closely connected" with the United Kingdom commits such an act or omission, wherever that is.

The Act contains a full list of persons who will be determined as having a “close connection” with the United Kingdom. This list includes British citizens and various other categories of British passport holders, British overseas territories citizens, British residents and UK incorporated bodies.

The corporate offence goes even further in its territorial reach. It applies to all UK incorporated companies or partnerships, wherever they do business and irrespective of where the offence takes place.

In addition, the offence covers any “relevant commercial organisation” wherever incorporated that carries out business or part of a business in the United Kingdom. This is so even if the relevant act or omission did not take place in the United Kingdom. Therefore a foreign corporate that did some business in the United Kingdom would be criminally liable in the United Kingdom if an agent, employee or subsidiary were to pay or accept a bribe anywhere in the world, even if such activities did not involve the body’s United Kingdom office.

Who Can Prosecute

Clause 10 provides that any prosecution under the Act can only be brought with the consent of one of the following prosecuting authorities:

- (a) the Director of Public Prosecutions;
- (b) the Director of the Serious Fraud Office; or
- (c) the Director of Revenue and Customs Prosecutions.

This clause prevents private groups from launching their own criminal prosecutions. For example, development groups or environmental campaigners could not bring such a prosecution. The Attorney General is not included in the list of authorised parties; parliamentary debate suggested that this was a result of international pressure from groups like the OECD to remove political influence from the prosecution of bribery cases.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

London

Michelle Duncan
44-20-3023-5162
michelleduncan@paulhastings.com

Milan

Bruno Cova
39-02-30414-212
brunocova@paulhastings.com

Shanghai

K. Lesli Ligorner
86-21-6103-2968
lesliligorner@paulhastings.com

Los Angeles

Thomas A. Zaccaro
213-683-6285
thomaszaccaro@paulhastings.com

Francesca Petronio
39-02-30414-226
francescapetronio@paulhastings.com

Washington

Timothy L. Dickinson
202-551-1858
timothydickinson@paulhastings.com