

UPDATE ON THE BRIBERY ACT 2010

Introduction

On 1 July 2011 the Bribery Act 2010 (“the 2010 Act”) entered into force in the United Kingdom. The intention of the 2010 Act was to strengthen the UK anti-corruption regime by following the objectives and approaches taken by the United States in the Foreign Corrupt Practices Act of 1977. The purpose of that legislation was to give extra-territorial effect to a strong regime aimed at tackling corruption and bribery – which is, of course, a truly global problem.

This Note begins by explaining the provisions of the 2010 Act, before providing an update regarding recent prosecutions and, importantly, Deferred Prosecution Agreements (“DPAs”) utilised in furtherance of the UK anti-corruption regime.

The Bribery Act 2010 – Objectives and Key Provisions

The Explanatory Notes to the 2010 Act explain that “the purpose of the Act is to reform the criminal law of bribery to provide for a new consolidated scheme of bribery offences to cover bribery both in the United Kingdom (UK) and abroad”.

As such the 2010 Act replaced previous bribery and corruption offences both under pre-existing statutes and at common law. The previous law had been based on (and, in some ways, restricted by) the agent/principal relationship. Under the 2010 Act, two general offences were created: (1) offences of bribing another person; and (2) offences of being bribed. The new law is thus based on an intention to induce improper conduct.

The 2010 Act also creates new specific offences of: (1) bribery of a foreign public official; and (2) where a commercial organisation fails to prevent bribery.

The 2010 Act also:

- (a) replaces the requirement for the Attorney General to consent to the prosecution of a bribery offence with a new requirement that the prosecution of offences in the 2010 Act may only be instituted by (or with the consent of) the Director of the relevant prosecuting authority;
- (b) imposes a maximum penalty of 10 years’ imprisonment for all the bribery offences (except the offence relating to commercial organisations’ failure to prevent bribery, which carries an unlimited fine);
- (c) creates extra-territorial jurisdiction for the prosecution of bribery committed abroad by persons ordinarily resident in the UK as well as UK nationals and UK corporate bodies; and
- (d) creates a defence in respect of the UK intelligence services or armed forces engaged on active service whereby conduct that otherwise would constitute a bribery offence was necessary for the proper exercise of their functions (Section 13).

Section 1 – Offences of bribing another person

Section 1 of the 2010 Act defines the offence of bribery as it applies to the person who offers, promises or gives a “financial or other advantage” to another. The meaning of “financial or other advantage” is left to be determined by courts or tribunals.

Section 1 distinguishes between two cases:

- (1) cases in which the advantage is intended to bring about an improper performance by another person of a “relevant function or activity”, or to reward such “improper performance” (Section 1(2)); and
- (2) cases in which a person knows or believes that the acceptance of the advantage offered, promised or given in itself constitutes the improper performance of a function or activity (Section 1(3)).

The offence is committed where the offeror had the requisite intention to induce or reward impropriety in relation to a function or activity falling within Section 3(2)-(5). It is not necessary that the person to whom the advantage is offered, promised or given be the same person as the person who is to engage in the improper performance of an activity or function, or who has already done so (Section 1(4)).

It is irrelevant whether the advantage was offered, promised or given directly or through a different person (Section 1(5)).

Section 2 – Offences relating to being bribed

Section 2 of the 2010 Act defines the bribery offence as applicable to the recipient (or potential recipient) of the bribe. There is a general requirement that the recipient “requests, agrees to receive or accepts” an advantage, but it is not necessary for the recipient to actually have received the advantage.

Section 2 distinguishes between four cases:

- (1) cases where the recipient may intend improper performance to follow as a consequence of the request, agreement to receive or acceptance of the advantage (Section 2(2));
- (2) cases where requesting, agreeing to receive or accepting the advantage may itself amount to improper performance of the relevant function or activity (Section 2(3));
- (3) cases where the advantage may be a reward for performing the function or activity improperly (Section 2(4));
- (4) cases of improper performance by the recipient in anticipation or in consequence of a request, agreement to receive or acceptance of an advantage (Section 2(5)).

Section 3 – Function or activity to which bribe relates

Section 3 of the 2010 Act defines the types of “relevant function or activity” that can be improperly performed for the purposes of Sections 1 and 2.

The Explanatory Notes provide that the purpose of Section 3 is to ensure that the bribery laws are applied equally to public and selected private functions without discrimination.

Therefore “relevant functions or activities” include all functions of a public nature and all activities connected with a business, trade or profession.

Section 4 – Improper performance to which bribe relates

Section 4 of the 2010 Act defines “improper performance” as performance which breaches a relevant expectation (that the functions will be carried out in good faith, or impartially), as mentioned in Sections 3(3)-(4) or any expectation as to the manner in which a function or activity carried out by a person in a position of trust will be performed. Improper performance may be carried out by act or omission.

Section 5 – Expectation test

Section 5 of the 2010 Act provides the test to be used when deciding what the “expectations” are of a person performing a function or activity for the purposes of Sections 3 and 4. The test is what a reasonable person in the UK would expect of a person performing the relevant function or activity.

Section 6 – Bribery of foreign public officials

Section 6 of the Bribery Act 2010 creates a separate offence of bribery of a foreign public official.

The Section 6 offence only covers the offering, promising or giving of bribes, not the acceptance of them.

The offeror of the bribe must intend to influence the recipient in the performance of his or her functions as a public official, and must intend to obtain or retain business or a business advantage.

Section 6(5) defines “foreign public officials” as including both government officials and those working for international organisations, drawing on definitions taken from the Organisation for Economic Cooperation and Development’s (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

An offence under Section 6 may be committed in a number of ways (Section 6(3)).

First, if a person offers, promises or gives any advantage to a foreign public official with the requisite intention (as defined in Sections 6(1), (2) and (4)), and the written law applicable to that foreign public official neither permits nor requires them to be influenced in their capacity as a foreign public official by the offer, promise or gift, then the person offering the bribe commits an offence.

Section 6(7) provides the rules for determining what is the “written law” applicable to the foreign public official.

Secondly, the Section 6 offence will also be committed if the advantage is offered to someone other than the foreign public official, if this happens at the request of the foreign public official, or with their assent or acquiescence.

The offeror of the bribe must have intended to influence a foreign public official in the performance of their functions as a public official, including any failure to exercise those functions and any use of their position, even if they do not in fact have authority to use the position in that way.

The offeror of the bribe must also intend to obtain or retain business or an advantage in the conduct of business.

Section 7 – Failure of commercial organisations to prevent bribery

Section 7 creates an offence of failing to prevent bribery which can only be committed by a “relevant commercial organisation”, which means: (a) a body incorporated under the law of any part of the UK and which carries on business whether there or elsewhere; (b) a partnership that is formed under the law of any part of the UK and which carries on business there or elsewhere; or (c) any other body corporate or partnership wherever incorporated or formed which carries on business in any part of the UK.

The Section 7 offence is committed where a person associated with the commercial organisation bribes another person with the intention of obtaining or retaining business or an advantage in the conduct of business for the commercial organisation.

The commercial organisation has a defence if it can show (on the balance of probabilities) that it had adequate procedures in place to prevent persons associated with it from committing bribery offences.

The „failure to prevent“ offence relates only to the offering of bribes, not failing to prevent the taking of bribes.

In *Serious Fraud Office v Standard Bank plc (now ICBC Standard Bank plc) (Preliminary)* [2016] Lloyd’s Rep FC 91, the Serious Fraud Office applied for a preliminary declaration under Paragraph 7(1) of Part 1 of Schedule 17 of the Crime and Courts Act 2013 that entering into a DPA with the respondent bank was likely to be in the interests of justice and that the proposed terms were fair, reasonable and proportionate. The bank was charged with an offence of failing to prevent bribery contrary to Section 7(1) of the Bribery Act 2010. In the course of project finance raising by the Government of Tanzania from the respondent bank and its sister company, which raised £600,000, an additional 1% fee was paid to a “local partner” which was a Tanzanian company of which a serving government member was a director and shareholder. The Serious Fraud Office and the respondent bank reached a provisional agreement as to the terms of a DPA. The issues were whether (i) entering into the DPA was likely to be in the interests of justice; (ii) the proposed terms were fair, reasonable and proportionate.

The court granted a declaration that the following terms of the DPA were reasonable:

- (a) payment of compensation of \$6,000,000 plus interest;
- (b) disgorgement of profit on the transaction of \$8,400,000;
- (c) payment of a financial penalty of \$16,800,000;
- (d) past and future cooperation with the relevant authorities in all matters relating to the conduct arising out of the circumstances of the draft indictment;
- (e) at the respondent’s expense, commissioning and submitting to an independent review of

its internal anti-bribery and corruption controls, policies and procedures regarding compliance with the Act and other anti-corruption laws;
(f) payment of the SFO's costs.

In *Serious Fraud Office v Standard Bank plc (now ICBC Standard Bank plc) (Final)* [2016] Lloyd's Rep FC 102, the court definitively approved the DPA. The agreement was effective for 3 years, after which, subject to compliance with its terms, the Serious Fraud Office would discontinue proceedings against the bank.

Section 10 – Consent to prosecution

A prosecution under the 2010 Act in England & Wales can only be brought with the consent of the Director of one of the three senior prosecuting authorities (or another person designated in writing by the Director to exercise these functions): (a) the Director of Public Prosecutions; (b) the Director of the Serious Fraud Office ("the SFO"); and (c) the Director of Revenue and Customs Prosecutions.

Section 11 – Penalties

Any offence under the 2010 Act committed by an individual under Sections 1, 2 or 6 is punishable either by a fine or imprisonment for up to 10 years (12 months on summary conviction in England & Wales), or both.

An offence committed by a person other than an individual is punishable by a fine. In either case, the fine may be unlimited.

Section 12 – Offences under this Act: territorial application

Section 12 of the 2010 Act provides that offences under Sections 1, 2 or 6 are committed in any part of the UK if any part of the conduct element takes place in that part of the UK.

Even if all the actions in question take place abroad, they still constitute the offence if the person performing them is a British national or ordinarily resident in the UK, a body incorporated in the UK or a Scottish partnership (Section 12(2)-(4)).

Selected Prosecutions and DPAs

Innospec Ltd

In March 2010, Innospec Ltd were prosecuted under Section 1 of the Criminal Law Act 1977 (the offence of conspiracy to corrupt) in relation to US\$2.9m in kickbacks to Indonesian nationals paid for a contract of US\$160m in the chemicals sector. Innospec's financial penalties totalled US\$12.6m, of which US\$5m was to be paid to the UN Development Fund for Iraq. Additionally, further penalties were imposed in the form of an SFO-appointed monitor, for which Innospec were ordered to pay the costs for a period of up to 3 years.

Mr Munir Yakub Patel

In October 2011, Munir Yakub Patel became the first person to be convicted under the Bribery Act 2010 when he pleaded guilty to a charge of receiving a bribe contrary to Section

2 of the Bribery Act 2010. Mr Patel, a court clerk, received bribes of up to £500 to help more than 50 offenders avoid prosecutions relating to driving offences. Originally, Mr Patel was sentenced to 3 years for bribery and 6 years for misconduct in a public office (the sentences were to run concurrently). On appeal, the Court of Appeal reduced his sentence from 6 years to 4 years.

Mr Mawia Mushtaq

In December 2012, Mawia Mushtaq offered a £200 sum (later increased to £300) to an Oldham Council licensing officer after he failed a driving test that he needed in order to get a taxi licence. The council officer refused the bribe and the matter was reported to the police. Mr Mushtaq was prosecuted under Section 1 of the Bribery Act 2010 and given a 2 month suspended sentence and a curfew order.

Mr Yang Li

In April 2013, Yang Li was found guilty of an offence contrary to Section 1 of the Bribery Act 2010 when he offered £5,000 to a university professor after he failed an examination. Mr Li had also taken an imitation firearm to the meeting at which he had attempted to bribe the professor. Mr Li was given a 12 month jail sentence and ordered to pay £4,800 in costs.

Sustainable AgroEnergy plc – Mr Gary West, Mr James Whale and Mr Stuart Stone

In December 2014, Gary West (of Sustainable AgroEnergy plc), James Whale and Stuart Stone were found to have paid a US\$2.2m bribe to obtain a business advantage of £23m of investment funds between April 2011 and February 2012. Mr West and Mr Stone were prosecuted under Sections 1 and 2. Mr West was acquitted of one count contrary to Section 1 but convicted of two counts of bribery contrary to Section 2; Mr Stone was convicted of two counts of bribery contrary to Section 1.

Mr West was given a 13 year prison sentence and was disqualified from acting as a director for 15 years. Mr Whale was given a 9 year prison sentence and was also disqualified from acting as a director for 15 years. Mr Stone was given a 6 year prison sentence and was disqualified from acting as a director for 10 years. The SFO pursued further compensation and confiscation orders: all three were ordered to pay confiscation orders which totalled £1.36m.

Standard Bank plc

In November 2015, following an internal investigation, Standard Bank plc entered into a DPA relating to allegations that they were contravening Section 7 of the Bribery Act 2010 in respect of a US\$6m bribe paid concerning a business advantage gained of US\$8.4m contractual profits. The contract concerned contracts to which the Government of Tanzania were party. Standard Bank was ordered to disgorge the profits, to pay a fine of US\$16.8m and pay US\$7m in compensation to the Tanzanian Government. Further terms of the DPA included the launching of an independent review of its existing anti-bribery and corruption controls and paid £330,000 of the SFO's costs. This was the first DPA obtained by the SFO under the Bribery Act 2010. (The case is referred to above under the Section 7 heading).

Sweett Group plc

In December 2015, Sweett Group plc (the UK's only listed quantity surveyor at that time) pleaded guilty to an offence contrary to Section 7 of the Bribery Act 2010 for failing to prevent £680,000 of bribes paid to win and retain a contract related to the building of a £63m luxury hotel in Dubai. Sweett Group had informally agreed to plead guilty – because it had covertly attempted to subvert the SFO's investigation, the SFO refused to enter into a formal DPA with Sweett Group in order to convey the message that only those fully eligible for a DPA would get one. HHJ Beddoe ordered Sweett Group to pay £1.4m plus a £851,000 confiscation order and £95,000 costs.

The SFO's second reported DPA

In July 2016 it was reported that the SFO had secured its second DPA. However, the names of the individuals and companies involved are not in the public domain. What is known is that, unlike the Standard Bank case referred to above, this matter involves exposing the culpability of two very senior management figures. Further, unlike the Standard Bank case, there was a series of bribes paid over a series of 8 years (rather than a one-off bribe), the firm in question was already attempting to overhaul its compliance and anti-bribery programme even before the wrongdoing was discovered.

Concluding Remarks

The Bribery Act 2010 has been described as constituting the strongest anti-corruption legislation in the world. However, this strength has also been a cause of criticism – namely, that the 2010 Act will have the effect of hampering UK business entities operating internationally.

Although the 2010 Act has now been in force for 5 years there have still been relatively few successful prosecutions under it. The 2010 Act does not apply retrospectively, and thus there are still a comparatively large number of actions taking place under other existing laws and the old laws (i.e. those which were replaced or repealed by the entry into force of the 2010 Act).

These include, since July 2011 (when the Bribery Act 2010 entered into force): 6 actions under the Financial Services and Markets Act 2000, 11 actions under the Proceeds of Organised Crime Act 2002, 7 actions under the Criminal Law Act 1977, 5 actions under the Prevention of Corruption Act 1906, and 1 action each under the Public Bodies Corrupt Practices Act 1889 and the Fraud Act 2006. Bribery allegations, and factual findings that bribery has occurred, have also featured in the wider context of civil proceedings concerning, inter alia, breach of fiduciary duty and conspiracy.

As the jurisprudence on the provisions of the Bribery Act 2010 develops, there will be increased certainty as to its application and effect.

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