

UK Bribery Act

27 April, 2011

Introduction

The UK Bribery Act received royal assent on April 8 2010 and is to come into force on the 1st of July 2011. The Bribery Act 2010 (“the Act”) represents a significant reform as it provides a comprehensive scheme of bribery offences intended to enable both the courts and prosecutors in the UK, convict more readily, corporate entities and individuals, of bribery offences committed in the UK or abroad. The peculiarity of the Act is in its extraterritorial applicability and the creation of a strict liability component, which is likely to have a monumental impact on the criminal liability of commercial organisations.

In sum, the Act creates four offences; (a) bribing another (b) accepting bribe; (c) bribery of foreign public officials and (d) failure of commercial organisations to prevent bribery.

Bribing Another

By the provisions of Section 1 of the Act, a person is guilty of the offence of bribing another person where he offers, promises or gives **financial or other advantage** to another person with the intention **to induce or reward the person** for the **improper performance** of a relevant function. In addition, a person is guilty of the offence of bribing another where he **knows** or **believes** that the acceptance of such advantage would induce the improper performance of the relevant function.

Being Bribed

By the provisions of Section 2 of the Act, a person is guilty of ‘being bribed’ where: (a) he requests, agrees to receive or accepts a financial or other advantage, intending that a relevant function or activity should be performed improperly; (b) the request, agreement to receive or accept a financial or other advantage constitutes the improper performance of a relevant function or activity; (c) the request, agreement, receipt or acceptance of the financial or other advantage is a reward for the improper performance of a relevant function or activity and (d) in anticipation of or in consequence of the request, or agreement to receive or accept a financial advantage, a relevant function or activity is performed improperly.

The offence provided by Section 2 has the characteristics of a strict liability offence.

Liability for all the offences arises even where the advantage is received through a third party for the benefit of the receiver of the advantage or for another party.

*It is immaterial that the recipient of the financial advantage/third party performing the function/activity **knows** or **believes** that the performance of such function or activity is improper.*

Section 3 (2) (a-c) provides that a relevant activity or function includes, (a) any function of a public nature, (b) any activity connected with a business, (c) any activity performed in the course of a person’s employment, and (d) any activity performed by or on behalf of a body of persons (whether corporate or unincorporated).

Bribery of Foreign Public Officials

By the provisions of Section 6 of the Act, a person is guilty of the offence of bribing a foreign public official where he directly or indirectly offers, promises or gives any financial or other advantage to a foreign public official or to another person at the request of, or with the assent or acquiescence of, the foreign public official. The intention of the offender must be to influence the foreign public official in his capacity as a foreign public official or to obtain a business or an advantage in the conduct of business.

The Act goes further to describe a foreign public official as an individual who holds a legislative, administrative or judicial position of any kind, whether appointed or elected, in a country or territory outside the United Kingdom or any subdivision of such a country or territory. A foreign public official is also a person who exercises a public function for or on behalf of a country or territory outside the United Kingdom or for any public agency or enterprise of such a country or territory (or subdivision) or is an official or agent of a public international organization.

Failure of Commercial Organisations to Prevent Bribery

The failure of commercial organisations to prevent bribery is a strict liability offence created by Section 7 of the Act. The offence is committed where a person associated with a commercial organisation bribes another person intending to obtain or retain business or an advantage in the conduct of the business, for the commercial organisation. It is important to note that the organisation would only be liable where the person associated with the commercial organisation is or would be guilty of the offence of bribing another person or bribing a foreign public official, whether or not such a person has been prosecuted for the offence.

An associated person has been defined by the Act as a person who performs services for or on behalf of the commercial organization and may include an employee, agent or subsidiary.

By Section 7 (2) it is a defence that the commercial organisation had in place, adequate procedures designed to prevent associated persons from undertaking such prohibited conduct.

In furtherance of the above provision and in accordance with the provisions of Section 9 of the Act, the British Secretary of State for Justice on 30 March 2011 published guidance on procedures to be put in place by commercial organisations in order to prevent bribery.

A reading of Section 6(3) (b) indicates that no offence would have been committed where the written law applicable to a foreign public official permits or requires him to accept the advantage given.

An offence is committed under Section 7 irrespective of whether the acts or omissions that formed part of the offence took place in the United Kingdom. However by Section 7 (2) the company will not be liable for the offence if it proves that it had in place, adequate procedures designed to prevent associated persons from committing bribery.

A commercial organization is defined in the Act as a body or partnership which is incorporated or formed under the law of any part of the United Kingdom and which carries on a business whether within the United Kingdom or elsewhere; and any other body corporate or partnership wherever incorporated or formed which carries on a business or part of a business in any part of the United Kingdom.

Ministry of Justice Guidance to Commercial Organisations

The guidance on procedures to be put in place by commercial organisations consist of six principles to wit:

- a) The procedures should be proportionate to the bribery risks faced by the organization and to the nature, scale and complexity of its activities. In addition, the procedures should be clear, practical, accessible, effectively implemented and enforced;
- b) Commitment of top-level management to the prevention of bribery by persons associated with the organization is advocated thereby fostering a culture antagonistic to bribery;
- c) The organisation should have a periodic and documented assessment of the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it;
- d) Establishment of due diligence procedures (using a proportionate and risk based approach) in respect of persons who perform or will perform services for or on behalf of the organization in order to mitigate identified risks is required;
- e) The organization is to ensure internal and external communication (including training) proportionate to the risks faced by it in order to ensure that the bribery prevention procedures are embedded and understood by the members of the organisation; and
- f) Review by the organization of its bribery prevention procedures in order to make improvements where necessary, is expected.

Extraterritorial Application of the UK Bribery Act

From a reading of Section 12(2) and (3) of the Act, an act or omission done or made outside the United Kingdom would form part of the offence under Sections 1, 2 and 6 of the Act, where such act or omission would have formed part of the offence stated in these sections if done within the United Kingdom and if the person committing such act or omission has a close connection with the United Kingdom.

According to the Act, a person has a close connection with the UK where, at the time of the commission of the acts or omissions, he was a (a) British citizen, (b) British overseas territorial citizen, (c) British National, (d) British Overseas citizen, (e) British subject under the British Nationality Act 1981, (f) an individual ordinarily resident in United Kingdom, and (g) a company incorporated in the United Kingdom or a Scottish partnership.

By the provisions of section 12 (5), an offence would be committed under section 7 (**Failure of a commercial organization to prevent bribery**), whether the acts or omissions forming part of the offence took place in the United Kingdom or elsewhere.

The implication of this provision is that the offence created by Section 7 of the Act has no jurisdictional restriction and as such a body corporate or partnership incorporated anywhere in the world may be found guilty of this offence where such entity carries on business or part of its business in any part of the United Kingdom. Thus, in effect, Nigerian companies or partnerships with a presence (such as subsidiaries) in the United Kingdom or which though incorporated in Nigeria, carry on business or part of their business in the United Kingdom, may be prosecuted for the offence of failure to prevent bribery where the act or omission takes place outside the United Kingdom. Conversely, a company or partnership incorporated or formed in the United Kingdom that has a subsidiary or branch in Nigeria may be prosecuted for the offence of failure to prevent bribery, where an *associated person* commits the act or omission in Nigeria for the benefit of the UK parent entity.

Defences

By the provisions of section 13, it is a defence for any person charged with an offence of bribery under the Act to prove that his conduct was necessary for the proper exercise of any function of an intelligence service or the proper exercise of any function of the armed forces when engaged in active service. This defence is however limited to the offences of bribery and being bribed under sections 1 and 2 of the Act.

In respect of the offence of failure of commercial organisation to prevent bribery, the Act provides that it is a defence for the commercial organisation to prove that it had in place adequate procedures designed to prevent associated persons from undertaking such conduct.

Penalties

By section 11 of the Act, individuals guilty of the general offences in Sections 1, 2 and 6 are liable:

- upon summary conviction to imprisonment for a term not exceeding 12 years or to a fine not exceeding the statutory maximum, or to both fine and imprisonment; and

Senior officers of companies are guilty of the bribery offences under sections 1, 2 and 6 of the Act where such offence was committed with their consent or connivance. Such senior officers must however have a close connection with the United Kingdom within the meaning of Section 12 (4) of the Act.

By the provisions of section 15, where a partnership is guilty of the offence of failure to prevent bribery, proceedings would be brought in the name of the partnership (and not that of any of the partners). In addition, the rules of court relating to service of documents would have effect as if the partnership were a body corporate.

Reference to Armed forces is to Her Majesty's forces within the meaning of the Armed Forces Act 2006.

The Act defines active service as service in an (a) action or operation against an enemy, (b) operation outside the British Islands for the protection of life and property, or (c) the military occupation of a foreign country or territory.

In addition, Intelligence service has been defined as the Security Service, the Secret Intelligence Service or GCHQ.

- on conviction on indictment, to imprisonment for a term not exceeding 10 years, or to a fine or both imprisonment and fine.

In addition, any other person guilty of an offence under the above sections is liable upon summary conviction, to a fine not exceeding the statutory maximum and on conviction on indictment, to a fine.

By section 11 of the Act, commercial organisations guilty of an offence under section 7 are liable on summary conviction or conviction on indictment, to a fine.

Conclusion

The Bribery Act 2010 has far reaching consequences. The Act has unwittingly drawn commercial organisations into the battle against corruption by creating a strict liability offence of failure to prevent bribery. In order for commercial organisations not to fall victim of this law, they must put in place adequate procedures to prevent corrupt practices all over the world.

Nigerian and other commercial organisations incorporated in the UK or carrying on business in the UK, must be more cautious in their dealings with corporates in other jurisdictions especially in countries like Nigeria where corruption levels are high and where there is a greater degree of pressure to offer financial inducement to secure legitimate entitlements, in order to minimise the risk of criminal prosecution.

With regards to commerce, business decisions would have to be rethought in 'setting up shop' in other jurisdictions.

In terms of enforcement, it is clear that the success of the Act would require global cooperation and possibly a reassessment of the practicalities of compliance and implementation. Cross border cooperation in investigation and prosecution is crucial in situations where the offences occur outside the UK. With the assistance of enforcement agencies in various jurisdictions, the UK Bribery Act might one step at a time; tighten the noose on corrupt practices worldwide.

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