



Taking a view on The Bribery Act 2010

A bad law, an unnecessary law, or a rare combination of the two? We question the need for such an Act, then ask a commercial lawyer for advice on how your business can avoid falling foul of this draconian legislation

There are *bad* laws; laws which are obscure in their purpose or impossible to enforce. They might simply be alien in concept; an attempt, perhaps, to conform with legislation which was ‘not invented here’ and which is not part of our legal or social fabric. Human Rights legislation is a prime example.

And then there are *unnecessary* laws which add nothing to legislation which might have evolved over decades. They are more often than not a misguided foray into ‘tidying up’ and consolidating those existing laws. That process often fails the test of scrutiny in the Courts and legislation finds its way back into the queue for amendment.

Scoring on both counts

The Bribery Act 2010 – which took effect on 1 July this year - has the rare distinction of being both *bad and unnecessary*.

It will limit the flexibility of businesses to manoeuvre their way through the contract negotiating process in countries where the payment of facilitation fees is a fundamental part of commercial life.

There has long been a body of opinion which holds that any attempt to distort the commercial process by the payment of money or other incentives is morally wrong and should be stamped out. But the 2010 Act brings little new to the table: such practices were already illegal, as several UK companies have found to their cost. The illustrious BAE Systems, for exam-

ple, was fined £500,000 with £225,000 costs in December 2010 for alleged irregularities in obtaining a government contract in Tanzania.

This publication would never condone a breach of UK law. But it is understandable that senior executives should try to justify the payment of facilitation fees overseas in terms of the jobs that would be retained or created in Britain; the extra tax revenue for the Treasury and the benefits to shareholders.

No less important is that the new Bribery Act gives the Serious Fraud Office wide powers to prosecute British and foreign companies, even where those companies are not actively committing bribery, or are even aware of it. On that ground alone, it breaches natural justice.

Existing protection in public sector

It could be argued that only where UK public funds and abuse of public office are involved should the State take a hand in regulating commercial conduct. But within that area, the Act is unnecessary because there already exists a framework of legislation and conventions designed to prevent corruption. It may have been ‘opaque’ but it was fit for purpose when deemed necessary.

Corruption in a public office, for example, as would be the case if members of the Police were to accept payment for passing on information gained during their official duties, or accept bribes to persuade them not to proceed has been a statutory offence for a century.

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We have come a long way from the John Poulson bribery scandal of the '60s and '70s. This saw the unqualified architect and property developer jailed in 1974 - with his partners in the local council - for the bribery of council officials in the North East.

It led to the disgrace of Reginald Maudling, the former Chancellor and Home Secretary. This was not the first incident of its kind, but the implication of such senior individuals triggered a further round of changes in how businesses interface with the public sector.

As an illustration of how far this culture has reached without the new legislation, even parish councillors - the lowest tier of elected administration - routinely declare membership of charitable organisations like The National Trust in the remote possibility that a conflict of interest could arise.

Drafted by a political culture which shows no evidence of understanding the *mores* of business practice at home or abroad, the Bribery Act makes uncomfortable reading: it has been described as the toughest anti-corruption legislation in the world, more rigorous than its American counterpart, the FCPA.

It is an ill wind . . .

The Act will have two unintended consequences. Like the Health & Safety and Money Laundering legislation before it, the Bribery Act is a complex piece of legislation which is creating good business for companies running

expensive courses to tell executives how to avoid being trapped in its net.

And, of course, it will provide a lucrative income for the defence lawyers whose clients will have been put on trial as test cases for the Courts to define the boundaries of what is acceptable under the new legislation.

Working within guidelines

In response to questions about whether tickets to Wimbledon or the Royal Opera House could constitute bribery - and therefore find such traditional acts of generosity eased out of established business practice - the Ministry of Justice drew up guidelines within which businesses can operate safely.

In addition, the SFO, the Director of Public Prosecutions and the Crown Prosecution Service published prosecutorial guidance.

Before you turn the page . . .

This feature is an editorial viewpoint which draws heavily on the published opinions of politicians and the business community. It is necessarily controversial in its tone.

Overleaf, we ask a commercial lawyer to suggest how companies can organise their affairs to avoid falling foul of the Act. It is fair to note, and quite understandable, that the lawyer did not accept - and could not be associated with - the tenor of the argument put forward on these pages. §

Will you have to change the way in which your business operates either in the UK or abroad, simply to comply with the new Act? Please email us and we will publish your comments in the next edition.

On the **right side** of the law

To bring some clarity to the new legislation, we asked **Dominic Sedghi**, a corporate and commercial law specialist at international law firm SNR Denton to outline some of the effects of this potentially draconian piece of legislation.

The old law on corruption, it appears, was a mixture of the unwritten common law and legislation. The environment had been described variously as obscure, complex, inconsistent and insufficiently comprehensive. The legislators argued that change was necessary because it found companies being prosecuted for corruption under other laws, such as accounting legislation.

In 2002, the Labour Government of the day announced its intention to underscore its commitment to the OECD Anti-Bribery Convention.

After eight years of consultation, Parliamentary debate, lobbying by the CBI and vociferous opposition by the Conservative Party, the Bribery Act 2010 passed into law.

Hopes that the new government would repeal the Act, or delay its implementation indefinitely, were dashed when Ken Clarke announced that it would take effect from 1 July 2011.

Consolidation and new measures

The Act consolidates the law into one place and introduces what appear at first sight to be strict new measures. Despite objections on several fronts, it has now come into force by drawing together

Until the **Bribery Act 2010** has been repealed or amended, UK executives have to keep a close eye on their activities

existing law on the subject into three criminal offences, those of bribing, being bribed and bribing a foreign public official.

As Dominic Sedghi noted, “The common theme is the concept of influencing someone in the performance of their duty: ‘Offering or giving someone an ‘advantage’ with the intention that someone will act improperly is a bribe and a criminal offence. Similarly, accepting or requesting an advantage in the knowledge or belief that someone will act improperly constitutes ‘being bribed’.”

Clear enough? Apparently not, as advantages are not limited to cash payments. The definition includes non-monetary gestures – hotel accommodation, a flight in a luxury jet, a promise of promotion or a lucrative contract. “Nor does it matter how valuable that advantage might prove, so that the gift of a bottle of wine would be held to be a bribe if it causes someone to act improperly.

“It is also possible to commit an offence abroad. A UK national, resident or company that pays or accepts a bribe abroad can be prosecuted. The Ministry of Justice has confirmed that so-called ‘facilitation payments’, paid to local officials to ‘grease the wheels’, will be caught by the Act.”

Established custom and practice

These payments are seen a fact of life in many countries where UK companies and individuals have to trade. And while this kind of behaviour has been technically illegal for years, highlighting its prohibition in the new Act has alarmed several sectors of the business community for whom ‘considerations’ remain a



necessary step to securing contracts under different regimes and moral codes.

Dominic Sedghi noted that the legislators – if not the law – are prepared to take a commonsense approach to more conventional acts of entertaining. “In his role as Justice Secretary, Ken Clarke has confirmed that routine corporate hospitality such as taking a client to Twickenham will continue to be acceptable, provided it is reasonable and merely to maintain good business relations. In this respect, the Act introduces nothing particularly new.”

Changes in practice

What has caused concern throughout the business community is Section 7 of the Act, as Sedghi went on to explain. “This creates a new offence, applicable only to companies and partnerships, of failing to prevent bribery. In broad terms, if a person ‘associated with’ an organisation proffers a bribe, the organisation itself is also automatically criminally liable for that bribe and can be punished accordingly.

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Dominic Sedghi, SNR Denton

even knew about the bribe. As long as the briber is associated with the organisation, the organisation is in the firing line.”

Associates are people or entities that provide services for or on behalf of the organisation. This automatically includes employees (unless proven otherwise), but could also include

- directors and officers,
- agents, representatives and local advisers,
- joint venture partners
- subsidiaries & other group companies
- suppliers

Open ended list of associates

“The list is open-ended”, Mr Sedghi noted: “If services are being provided, there *may* be an association. The offence is not restricted to U.K. organisations, however. Foreign organisations that carry on a business in the UK are potential targets.

“But the Ministry of Justice has confirmed that this should not include organisations that merely list their securities on a UK stock exchange. How much further this net extends is not yet known. One thing is clear, however: it is not just British organisations that need to take note of the Act.”

This has led to understandable concern as the Act seems to require organisations to police people over whom they have little or no control in jurisdictions where bribery (particularly facilitation payments) are the norm, or even required, in order to do business.

According to Sedghi, there is one defence under Section 7. “An organisation

would not be guilty if it had ‘adequate procedures’ in place to prevent bribery. The Ministry published draft guidance on what this means back in September 2010.

“Since then, organisations including Transparency International, the FSA, the City of London Law Society, the British Bankers’ Association, the GC100, the BVCA and the Association of Investment Companies have published their own suggestions.”

Guidance from the Ministry of Justice appeared in March 2011. Despite being 43 pages long, it does not give definitive details on what procedures an organisation should put in place. Ultimately, the measures that an organisation will need to implement depend on its size and business sector, the kind of people it deals with and, crucially, where it does business.

Mr Sedghi believes that no two businesses will conform with the law in quite the same way: “Only you know your business on an intimate level. What are the real risks facing you? How much transparency is there in relation to actions taken by your agents? When you pay money to your local adviser, do you know where it goes next? Who *are* your local advisers?”

Protecting your interests

It is clear that there is no prescriptive list of tests, but executives should consider a broad spectrum of actions which will help demonstrate that you have taken all reasonable steps:

- Put an anti-bribery policy in place. Publish it on your website. Send copies to your business partners.

- Track your payments. Insist on invoices and ledgers from your local reps. Ask for details of people to whom they have made payments. Ensure your money is being used properly.
- Investigate your potential partners, agents and people on the ground. Conduct due diligence. Commission a specialist risk assessment. Manage your exposure from day one.
- Communicate your policies to your staff. Hold regular training sessions. Make it clear that corruption will not be tolerated. Implement disciplinary procedures for those found bribing.
- Set up an audit or compliance committee. Give your employees access by setting up an anonymous ‘whistle-blowing’ hotline.
- Check out published guidance on the Internet. There is plenty of it, from the MOJ guidance itself (which can be found at <http://bit.ly/jWITLn>) to specialist notes produced by law firms.
- Speak to your lawyer. The scope of the Act appears broad, but not every organisation is within that net. If you are based in the UK, the chances are you come within the Act’s jurisdiction, but if your organisation is based abroad, a quick call may establish that you have little to do.

By putting the right measures in place and monitoring your organisation’s operations, you can keep on top of your business and out of the SFO’s way. §

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