



TITLE BRIBERY ACT 2010

From: Criminal Law Policy Unit
Ministry of Justice

Distribution date: 27 June 2011

Implementation Date: 1 July 2011

For further information contact: Matthew Pyne
matthew.pyne@justice.gsi.gov.uk
020 3334 5023

Broad subject: Criminal Justice

Sub category: Legislation - Bribery and corruption

This circular is for: Lord Chief Justice, Deputy Chief Justice, Senior Presiding Judge for England and Wales, Justices of the Supreme Court, Lords Justices of Appeal, Crown Court Judges, District Judges (Magistrates' Courts), Chairmen of the Justices Clerks to the Justices, Crown Court Managers Director of Public Prosecutions, Director of the Serious Fraud Office, Chief Crown Prosecutors Chief Officers of Police.

Copied to: Attorney General's Office, Sentencing Council Legal Services Commission, Council of Circuit Judges, Magistrates Association, Justices Clerks Society, HM Chief Inspector of Constabulary, ACPO, The Law Society The Bar Council, The Criminal Bar Association.

Introduction

This circular relates to the commencement of the Bribery Act 2010 on 1 July 2011 and provides a brief explanation and commentary on key provisions. Further explanation of the details of all the provisions of the Act can be found in the Explanatory Notes to the Act published around the time the legislation was passed in April 2010 (See “Useful Links” at end of this circular). The Government has also published guidance on bribery prevention for commercial organisations under section 9 of the Act, which also contains an explanation of Government policy on operation of the offence relating to failure of commercial organisations to prevent bribery at section 7 of the Act (again see “Useful Links”).

2. The Act extends to England and Wales, Scotland and Northern Ireland (section 18). This circular does not deal with the nature and conduct of investigations or criminal proceedings under the Bribery Act 2010, other than provision for England and Wales and Northern Ireland relating to Consent to Prosecution at section 10. For further detail on procedural matters readers are referred to information made available by the relevant investigative and prosecutorial authority (see “Useful Links” at the end of this circular).

Overview

3. The Bribery Act replaces the 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 (known collectively as the Prevention of Corruption Acts 1889 to 1916) with a new consolidated scheme of bribery offences. The key provisions of the Act are:

- Two general offences covering the offering, promising or giving of an advantage, and the requesting, agreeing to receive or accepting of an advantage;
- A discrete offence of bribery of a foreign public official to obtain or retain business or an advantage in the conduct of business;
- A new offence of failure by a commercial organisation to prevent a bribe being paid for or on its behalf. It will be a defence if the organisation has “adequate procedures” in place to prevent bribery.
- A maximum penalty of 10 years imprisonment for all the offences, except the offence relating to commercial organisations, which will carry an unlimited fine;
- Extra-territorial jurisdiction to prosecute bribery committed abroad by persons ordinarily resident in the UK as well as UK nationals and UK corporate bodies;
- A defence for conduct that would constitute a bribery offence where the conduct was necessary for the proper exercise of any function of the intelligence services or the armed forces engaged on active service.

Consent to Prosecution

4. The current requirement in England and Wales and Northern Ireland for the Attorney General's consent to prosecute a bribery offence is replaced by the Act. In England and Wales, the offences in the Act may only be instituted by, or with the consent of, the Director of the Serious Fraud Office, the Director of Public

Prosecutions or the Director of Revenue and Customs. This is a personal, non-delegable responsibility. The relevant Director is required to exercise the consent function personally, unless he or she is unavailable and another person has been designated in writing.

5. In Northern Ireland, prosecution of offences in the Act may only be instituted by, or with the consent of, the Director of Public Prosecutions or the Director of the Serious Fraud Office but section 10(8) of the Act also makes provision for the Deputy Director of Public Prosecutions to consent personally to proceedings in accordance with section 30(4) or (7) of the Justice Act (NI) 2002. As is the position in England and Wales, this is a personal non-delegable responsibility. The relevant Director is required to exercise the consent function personally, unless he or she is unavailable and another person has been designated in writing, in which case the other person gives consent in a personal capacity.

6. In Scotland, it will be for the Crown Office and Procurator Fiscal Service, as Scotland's sole prosecution authority, to make decisions whether to prosecute offences under the terms of the Act. (see "Useful Links" at the end of this circular for further information on how the Crown Office makes such decisions).

Liability of individuals

The offence of bribing another person (section 1)

7. Section 1 creates an offence of offering, promising or giving a "financial or other advantage" to another in one of two possible circumstances set out as two separate "Cases".

Case 1 is where 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.

Case 2 is where the person offering, promising or giving the advantage knows or believes that the acceptance of the advantage itself constitutes the improper performance of a relevant function or activity.

8. "Improper performance" is defined at sections 3, 4 and 5. In summary, this means performance which amounts to a breach of an expectation that a person will act in good faith, impartially, or in accordance with a position of trust. The test used is what a reasonable person in the UK would expect of a person performing the relevant function or activity. Local practice or custom is to be disregarded, unless permitted or required by local written law. The offence applies to bribery relating to any function of a public nature, connected with a business, performed in the course of a person's employment or performed on behalf of a company or another body of persons. Therefore, bribery in both the public and private sectors is covered. The function or activity may be carried out either in the UK or abroad and need have no connection with the UK.

9. Under section 12, jurisdiction exists to prosecute offences under section 1 committed in the UK, as well as offences committed outside the UK where the person committing them has a close connection with the UK by virtue of being a British

national or ordinarily resident in the UK, a body incorporated in the UK or a Scottish partnership. The offence applies to individuals in the public service of the Crown.

Offences relating to being bribed (section 2)

10. Section 2 creates an offence covering a person (R) who requests, agrees to receive or accepts a financial or other advantage in one of four possible cases linked to the improper performance of a relevant function or activity.

Case 3 is where R intends improper performance of a relevant function or activity to follow as a consequence of the request, agreement to receive or acceptance of an advantage.

Case 4 is where the request, agreement to receive or acceptance of the advantage itself constitutes the improper performance of a relevant function or activity.

Case 5 is where the advantage is a reward for improper performance of a relevant function or activity.

Case 6 is where a relevant function or activity is performed improperly by R (or another person at R's request) in anticipation or in consequence of a request, agreement to receive or acceptance of an advantage.

It does not matter whether it is R, or someone else through whom R acts, who requests, agrees to receive or accepts the advantage.

11. The definitions of a relevant function or activity and the meaning of improper performance are the same as described for section 1 above. Jurisdiction to prosecute is also the same as for the section 1 offence.

Bribery of Foreign Public Officials.

12. Section 6 is designed to deal with the corruption of decision making in publicly funded business transactions through the personal enrichment of foreign public officials by those seeking business opportunities. The offence is committed where a person offers, promises or gives a financial or other advantage to a foreign public official with the intention of influencing the official in the performance of his or her official functions. There must also be an intention to obtain or retain business or a business advantage on the part of the perpetrator. However, the offence is not committed where the official is permitted or required by the applicable written law to be influenced by the advantage. Section 6 (7) defines the meaning of local written law for the purposes of section 6.

13. The section 6 offence is a discrete offence, although it may capture the same conduct as section 1 (it is very likely for example to involve conduct which amounts to 'improper performance' of a relevant function or activity to which section 1 applies). Unlike section 1, however, the commission of a section 6 offence does not require the prosecution to show there has been an improper performance of a relevant function or activity or an intention to induce it.

14. The section provides a very wide definition of a “foreign public official” at section 6 (5) and (6) but by virtue of section 12, jurisdiction exists to prosecute offences committed outside the UK only where the person committing them has a close connection with the UK by virtue of being a British national or ordinarily resident in the UK, a body incorporated in the UK or a Scottish partnership.

15. The offence applies to individuals in the public service of the Crown.

Penalties for individuals

16. Under section 11, the maximum penalties across the UK that can be imposed on an individual convicted of an offence under section 1, 2 or 6 is an unlimited fine and imprisonment for up to 10 years.

17. In England and Wales, where the offence is committed before section 154 of the Criminal Justice Act 2003, which sets the maximum sentence that can be imposed by a Magistrates Court at 12 months, comes into force, the maximum sentence when the offence is prosecuted summarily is limited to 6 months. In Scotland, the maximum penalty when an offence under section 1, 2 or 6 is prosecuted summarily is 12 months imprisonment. In Northern Ireland, the maximum custodial sentence when prosecuted summarily is limited to 6 months. The statutory maximum fine for a summary conviction is £5000 in England and Wales or Northern Ireland and unlimited on indictment. The statutory maximum fine for a summary conviction is £10,000 in Scotland and unlimited on indictment.

Corporate liability

18. The Bribery Act includes a new form of corporate criminal liability where there is a failure to prevent bribery perpetrated on behalf of a “relevant commercial organisation” (section 7). This new corporate liability for bribery, described below, does not in any way change the existing common law principle governing the liability of corporate bodies for criminal offences that require the prosecution to prove a fault element or ‘mens rea’ in addition to a conduct element. This common law principle, sometimes referred to as the “identification principle”, will therefore continue to operate so that where there is evidence to prove that a person who is properly regarded as representing the “directing mind” of the body in question possessed the necessary fault element required for the offence charged the corporate body may be proceeded against. Readers are referred to other legal sources for detail on the operation of the “identification principle”.

Section 14

19. Although section 14 is concerned with the liability of individuals it is very closely linked to corporate liability and is therefore briefly considered in this section. It provides that where a corporate body or Scottish partnership has committed an offence under section 1, 2 or 6 upon, for example, the application of the identification principle, any “senior officer” will be guilty of the same offence if he or she has consented to or connived in the commission of the offence. This is a form of secondary liability and is not a separate offence.

20. This section applies to circumstances in which a “senior officer” has consented to or connived in the commission of an offence under section 1, 2 or 6 by a corporate body or Scottish partnership outside the UK but only where the “senior officer” has a close connection to the UK as defined in section 12(4) of the Act.

Section 7

21. The offence at section 7 of the Act creates a new form of corporate criminal liability. The offence applies only to a “relevant commercial organisation” as defined at section 7(5) and focuses on a failure by such an organisation to prevent a person “associated with” it from committing a section 1 or 6 bribery offence in order to obtain or retain business or an advantage in the conduct of business for that organisation. It creates direct rather than vicarious liability and its commission does not amount to the commission of a substantive bribery offence under section 1 or 6. A commercial organisation will have a full defence if it can show that despite a particular case of bribery it nevertheless had adequate procedures in place designed to prevent persons associated with it from bribing.

22. Section 7(5) defines a “relevant commercial organisation” as a body or partnership (also defined at section 7(5)) which is incorporated or formed in the UK irrespective of where it carries on a business, or an incorporated body or partnership which carries on a business or part of a business in the UK irrespective of the place of incorporation or formation. Section 12(5) provides that an offence is committed under section 7 irrespective of whether that offence was committed in the UK or elsewhere (there is no need to show a close connection to the UK as for the other offences). The key question in relation to an organisation incorporated or formed outside the UK, therefore, is whether it “carries on a business or part of a business” in the UK. Although section 7(5) provides that a trade or profession is to be regarded as a “business” for the purposes of section 7 there is otherwise no definition of the phrase “carries on a business” and it should therefore have its ordinary meaning. The Government’s intention is that a common sense approach to its interpretation should be applied so that those organisations that have a demonstrable commercial presence in the UK will be caught irrespective of their place of incorporation. This is explained in considerable detail in the guidance published under section 9 of the Act (see “Useful Links”). The Government also considers that commercial activities relating to charitable or educational bodies or the commercial activities of public bodies are likely to be caught by the phrase.

23. A person “associated with” a commercial organisation for the purposes of section 7(1) is defined at section 8 as a person who “performs services” for or on behalf of the organisation. This will always be a matter of substance rather than form and all of the surrounding circumstances will be taken in to account, although if a person is an employee of an organisation there is a presumption that he or she is “performing services” for the employer. The concept of a person who ‘performs services for or on behalf of’ the organisation is intended to give section 7 broad scope so as to embrace the whole range of persons connected to an organisation who might be capable of committing bribery on the organisation’s behalf. There are, however, limits. For example, the perpetrator of the bribery must be performing services for the organisation in question and must also intend to obtain or retain business or an advantage in the conduct of business for that organisation. The Government’s policy on this aspect of the operation of section 7 is also set out in the guidance published under section 9 of the Act.

24. As mentioned above section 7 requires the commission of a section 1 or 6 bribery offence on behalf of an organisation. However, for the purposes of section 7 the territorial jurisdictional requirement of “a close connection with the United Kingdom” in respect of those offences when committed by individuals or corporate bodies outside the UK as set out at section 12 does not apply (section 7(3)(b)). This means that a relevant commercial organisation that carries on a business in the UK may be liable under section 7 for failing to prevent bribery on the part of a person associated with it where that person is a non-UK national or not ordinarily resident in the UK wherever the bribery takes place.

25. A section 7 offence can only be tried upon indictment and the penalty is an unlimited fine (section 11(3)). By virtue of the general rule on Crown immunity Crown bodies are not subject to section 7.

Defence for certain bribery offences

26. Section 13 provides a defence where a person charged with a relevant bribery offence can prove it was necessary for:

- The proper discharge of any function of one of the intelligence services; or
- The proper discharge of any functions of the armed forces when engaged on active service.

27. The intelligence services and the armed forces are required to have arrangements in place to ensure that the conduct of any member of the service is necessary for a function set out above.

28. The defence is available only in respect of an offence under section 1 or 2, but not a section 1 offence which would also amount to an offence under section 6. This excludes from the scope of the defence bribery of a foreign public official to obtain or retain business or a business advantage.

29. The standard of proof applicable in order to prove the defence is the balance of probabilities.

Useful Links

Bribery Act 2010 and Explanatory Notes

<http://www.legislation.gov.uk/ukpga/2010/23/contents>

Guidance under section 9 about commercial organisations preventing bribery

<http://www.justice.gov.uk/guidance/making-and-reviewing-the-law/bribery.htm>

Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions

http://www.cps.gov.uk/legal/a_to_c/bribery_act_2010/index.html

Role of the Crown Office and Procurator Fiscal Service

<http://www.copfs.gov.uk/about/about-crown-office-and-procurator-fiscal-service>

<http://www.copfs.gov.uk/about/how-does-prosecution-system-work>

Contact details:

Roderick Macauley Tel: 020 3334 5010 roderick.macauley@justice.gsi.gov.uk

Matthew Pyne Tel: 020 3334 5023 matthew.pyne@justice.gsi.gov.uk

Or Bribery.Act@justice.gsi.gov.uk

Criminal Law Policy Unit

Ministry of Justice

7.41

102 Petty France

London SW1A 3AJ