



The United Kingdom Bribery Act 2010: Anti-Corruption Legislation with Significant Jurisdictional Reach

March 2011

LL File No. 2011-005397
LRA-D-PUB-000048

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UNITED KINGDOM

The United Kingdom Bribery Act 2010 –

Anti-Corruption Legislation with Significant Jurisdictional Reach

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Introduction

On April 8 2010, [the Bribery Act 2010](#)¹ (the Act) received [Royal Assent](#). It was enacted to replace the old and fragmented legal structure where the offense of bribery was criminalized under the common law and the Prevention of Corruption Acts 1889 – 1916.² The objective of the Act is to provide a modern legislation that effectively deals with the increasingly sophisticated, cross-border use of bribery,³ and make the prosecution of bribery by individuals and organizations both within the UK and overseas easier.⁴ The Act applies to the United Kingdom of Great Britain and Northern Ireland and is currently due to come into force in May 2011. This date, however, is likely to be pushed back as the final guidance on prosecuting Bribery Act offenses, jointly written by [the U.K. Serious Fraud Office](#) (SFO) and [the U.K. Crown Prosecution Service](#), has yet to be published. Once the authoritative guidance has been released, it will be followed by a three-month notice period before the Act acquires legal force.⁵

The first steps to reform the law on bribery dates back to 1995 and [the Nolan Committee's Report on Standards in Public Life \(Cm 2850\)](#)—set up in response to concerns about unethical conduct by persons in public office—when it was suggested that the statutory criminal law of bribery should be consolidated. The reason for consolidation has been succinctly addressed by [the Right Honorable Jack Straw, then Lord Chancellor and Secretary State of Justice](#) in [the Bribery Draft Legislation \(CM 7570\) of 2009](#):

¹ Bribery Act 2010, c. 23, available at <http://www.legislation.gov.uk/ukpga/2010/23/contents>.

² Public Bodies Corrupt Practices Act 1889, 52 & 53 Vict., c. 69, available at <http://www.legislation.gov.uk/ukpga/Vict/52-53/69/contents>; Prevention of Corruption Act 1906, 6 Ed. 7, c. 34, <http://www.legislation.gov.uk/ukpga/Edw7/6/34/contents>; and the Prevention of Corruption Act 1916, 6 & 7 Geo. 5, c. 64, <http://www.legislation.gov.uk/ukpga/Geo5/6-7/64/contents>.

³ Ministry of Justice, Impact Assessment of Bill on Reform of the Law of Bribery, available at <http://www.justice.gov.uk/publications/docs/bribery-bill-ia.pdf> (last visited Feb. 25, 2011).

⁴ Christopher R. Yukins, Comparative Efforts in Fighting Corruption in Procurement: Corporate Compliance—A Case Study in Convergence (paper delivered at the International Public Procurement Forum II, Beijing, China, Oct. 15, 2010), in American Bar Association (ABA), Section of International Law, The United Kingdom's Anti-Bribery Statute (Program Materials) at 31 (2010), available at http://www.abanet.org/intlaw/committees/ABA_UKAntiBribery_EBook.pdf.

⁵ *Guidance about Commercial Organisations Preventing Bribery (Section 9 of the Bribery Act 2010)*, MINISTRY OF JUSTICE, <http://www.justice.gov.uk/consultations/briberyactconsultation.htm> (last updated Nov. 9, 2010).

[T]here are inconsistencies of language and concepts between the various provisions and a small number of potentially significant gaps in the law. Furthermore, the exact scope of the common law offense is unclear. The result is a bribery law which is difficult to understand for the public and difficult to apply for prosecutors and the courts.⁶

A draft Corruption Bill was produced in 2003⁷ but failed for lack of broad support. Among other things, there was disagreement on whether to preserve the agent/principal relationship in the old law as the basis of the offense.⁸

The need for legislative reform was accentuated by a report of the Organization for Economic Co-operation and Development (OECD) where the U.K. came under criticism for failing to adequately implement the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions <<http://www.oecd.org/dataoecd/4/18/38028044.pdf>>. The OECW Working Group recommended that the U.K. should undertake to enact comprehensive legislation on bribery that clearly included bribery of a foreign public official.⁹ It specifically recognized that:

[T]he absence of specific case law on the bribery of foreign officials in a common law country makes it difficult to evaluate how effectively the current system works (with regards for instance to the scope of application, relevance and clarity of the terms used, efficiency of sanctions, etc.).¹⁰

In the end it was [the Law Commission's Bribery Bill, Reforming Bribery \(No. 313\) of November 2008](#) that became the model for U.K.'s new anti-corruption statute. Jack Straw concluded that:

[The Act] will provide the basis for a modern, clear and consolidated law that complements and supports [the UK's] international efforts and equips [the UK] courts and prosecutors to deal effectively with bribery of all kinds, wherever it occurs.¹¹

⁶ MINISTRY OF JUSTICE, BRIBERY DRAFT LEGISLATION, 2009, Cm. 7570, at 3, *available at* <http://www.official-documents.gov.uk/document/cm75/7570/7570.pdf>.

⁷ HOME OFFICE, CORRUPTION: DRAFT LEGISLATION, 2003, Cm. 5777, *available at* <http://www.archive2.official-documents.co.uk/document/cm57/5777/5777.pdf>.

⁸ Bribery Act 2010, c.23, Explanatory Notes – Background, *available at* <http://www.legislation.gov.uk/ukpga/2010/23/notes/division/3?type=en>.

⁹ OECD, DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS, UNITED KINGDOM: PHASE 2 – REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS para. 248 (Mar. 17, 2005), *available at* <http://www.oecd.org/dataoecd/62/32/34599062.pdf>.

¹⁰ *Id.* para. 15.

¹¹ MINISTRY OF JUSTICE, *supra* note 6, at 4.

Key Provisions

The Act creates four offenses of bribery: two general offenses of bribing another person or receiving a bribe; bribing foreign officials; and the strict liability corporate offense of failing to prevent bribery. Summaries of these offenses are provided below.

General Offenses

Sections 1 and 2 of the Act provide that it is an offense for a person either to (i) offer, promise, or give an advantage; or (ii) request, agree to receive, or accept an advantage. The provider of the bribe has to confer the advantage with a view that the advantage will induce the receiver to act improperly. The new statutory formulation abandons the agent/principal relationship in favor of a model based on an intention to induce improper conduct.¹² The agent/principal model defined bribery as the betrayal of a loyalty to an identified person, and by eliminating the need for an identified person, the standard was lowered to the betrayal of a duty in general.¹³

Bribery of Foreign Public Official

Section 6 of the Act provides for a discrete offense of bribing a foreign public official. The English courts have signaled their strong opposition to the proscribed act.¹⁴ In the recently decided *Innospec* case, during his sentencing remarks Lord Justice Thomas stated:

There can be no doubt that corruption of foreign government officials or foreign government ministers is at the top end of serious corporate offending both in terms of culpability and harm. It is deliberate and intentional wrongdoing. It causes serious harm.¹⁵

The new offense closely follows the requirements of the OECD Convention on Combating Bribery of Foreign Public Officials by incorporating definitions drawn directly from the Convention.

Unlike the general bribery offenses, it only criminalizes the act of bribing and not the acceptance of them. The fault element of the offense sets out that the person giving the bribe must intend to influence the recipient in the performance of his or her functions as public official.¹⁶ Also, the person giving the bribe must intend to obtain or retain business or an advantage in the conduct of business.¹⁷ There is, however, an available defense if the local laws of the country of the foreign

¹² *Id.* para. 10.

¹³ LAW COMMISSION, REFORMING BRIBERY, 2007, Con. P. No. 185, para. 4.43, available at <http://www.lawcom.gov.uk/docs/cp185.pdf>.

¹⁴ R v. Innospec Ltd., [2010] WL 3580845 (Mar. 26, 2010), available at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-thomas-lj-innospec.pdf>.

¹⁵ *Id.* para. 30.

¹⁶ Bribery Act 2010, c. 23, § 6(1), available at <http://www.legislation.gov.uk/ukpga/2010/23/contents>.

¹⁷ *Id.* § 6(2).

official permit or require them to be influenced in that way.¹⁸ Thus far, the SFO has not located a single jurisdiction with such written law.¹⁹

Failure of Commercial Organizations to Prevent Bribery

Section 7 of the Act introduces a new offense that applies to commercial organizations that fail to prevent bribery. Specifically, it creates a strict liability offense for commercial organizations failing to prevent a bribe being paid for or on their behalf by an [associated person](#). It applies to UK corporations and partnerships, as well as foreign corporations and partnerships performing any part of their business in the U.K.

This new corporate offense introduces, as the SFO itself has noted, “a novel concept under English law.”²⁰ It is a paradigm shift from the old law where the SFO had to prove that the “controlling mind” of a company was involved in the corruption. Under the new statutory offense, the fault element is negligence in preventing bribery, which means that the Act imposes vicarious liability on the company for acts of any employee, agent, or subsidiary. It makes it considerably easier for the SFO to prosecute the company.²¹

There is, however, a defense in the Act if the commercial organization can show it has in place adequate internal compliance programs to prevent bribery. The Secretary of State is [required by the Act to produce guidance](#) as to what will be recognized as “adequate procedures.” While the guidance is set to provide companies with information on how to go about establishing a “true anti-corruption culture,” it is not intended to be a checklist on how to avoid criminal liability of bribery.²²

Part of SFO’s strategy of dealing with corporate corruption is also the [system of self-reporting](#). Companies are encouraged to come forward and make full disclosure of events in which corruption may be suspected. In cases of self-reporting, the company will not receive blanket immunity from prosecution, but it may be considered for a civil, as opposed to a criminal, resolution.²³

¹⁸ *Id.* § 6(3)(b).

¹⁹ Richard Alderman, Director SFO, Speech on the Association of the British Pharmaceutical Industry Legal Day (Oct. 4, 2010), available at <http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2010/association-of-the-british-pharmaceutical-industry-legal-day.aspx>.

²⁰ Robert Amaee, SFO, Speech to World Bribery & Corruption Compliance Forum (Sept. 14, 2010), available at <http://www.sfo.gov.uk/about-us/our-views/other-speeches/speeches-2010/world-bribery-and-corruption-compliance-forum.aspx>.

²¹ Vivian Robinson QC, General Counsel, SFO, Speech at Breakfast Seminar with Grant Thornton (Nov. 10, 2009), available at <http://www.sfo.gov.uk/about-us/our-views/other-speeches/speeches-2009/bribery-bill--anti-corruption,-vivian-robinson-qc.aspx>.

²² Richard Alderman, Director SFO, Speech at the Corporate Investigations Group Seminar (Feb. 12, 2010), available at <http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2010/the--corporate-investigations-group-seminar.aspx>.

²³ Amaee, *supra* note 20.

Extraterritoriality

The Act has an [expansive jurisdictional reach](#); it has been noted as having a more far-reaching territorial application than [the U.S. Foreign Corrupt Practices Act of 1977](#) (FCPA).²⁴ Section 12 applies sections 1 (“Offenses of bribing other persons”), 2 (“Offenses relating to being bribed”), and 6 (“Bribery of foreign public officials”) of the Act to all U.K. citizens and corporations irrespective of where in the world the proscribed acts take place. In terms of non-U.K. nationals and corporations, the SFO, embodied as the primary enforcer under the Act, has jurisdiction whenever the provider of the bribe is deemed to have a “[close connection](#)” with the U.K.

In respect of the new corporate offense of failing to prevent bribery contained in section 7 of the Act, the SFO will have jurisdiction over corporations committing the proscribed omission, irrespective of where in the world the act takes place, provided they have some business presence in the U.K.²⁵ [Richard Alderman, Director of SFO, has said that](#) <<http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2010/the--corporate-investigations-group-seminar.aspx>> “in certain circumstances the SFO will have jurisdiction in respect of corruption by those corporates anywhere in the world.”²⁶

Penalties

An individual convicted under the Act will face a maximum of ten years’ imprisonment and/or a fine up to the statutory maximum of £5000 (£1000 in Scotland). For commercial organizations the maximum penalty is an unlimited fine with certain collateral consequences, such as director disqualification, asset confiscation, and ineligibility to bid for public contracts.

Although the SFO will gain considerable strength in prosecuting persons carrying out the proscribed acts of bribery, the old statutory law was not without teeth, which is evidenced by the [judgment against Julian Messent on October 27, 2010](#). Mr. Messent, former Chief Executive of a U.K. insurance company, who pleaded guilty to having paid bribes of £1.2 million to Costa Rican officials, received the most severe penalty yet under the Prevention of Corruption Act 1906 of twenty-one months’ imprisonment.

²⁴ Arnold & Porter (UK) LLP, Advisory: UK Government Announces Timing for Implementation of the Bribery Act 2010 (Aug. 2010), in ABA, *supra* note 4, at 40; Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1, et seq. (2000)), available at <http://www.justice.gov/criminal/fraud/fcpa/docs/fcpa-english.pdf>.

²⁵ Bribery Act 2010, § 12(5).

²⁶ Alderman, *supra* note 22.

Comments

Although bribery has been criminalized in the U.K. since the Magna Carta declared “We will sell to no man ... either justice or right,”²⁷ the offense has suffered from its piecemeal legislative structure and, in some instances, been criticized for being “unfit for purpose.”²⁸ The enactment of the new U.K. Bribery Act 2010 addresses these issues, while also going one step beyond. The significant extension of SFO’s jurisdictional reach, reminiscent of the U.S. FCPA, is what makes the Act a landmark piece of legislation in the battle against corruption.

²⁷ Magna Carta 1297, 25 Edw. 1, cc 1, 9, 29, c. 9.

²⁸ LAW COMMISSION, REFORMING BRIBERY, 2008, Law. Com. No. 313, at xiii, *available at* <http://www.lawcom.gov.uk/docs/lc313.pdf>.