

BRIBERY ACT 2010: JOINT PROSECUTION GUIDANCE OF THE DIRECTOR OF THE SERIOUS FRAUD OFFICE AND THE DIRECTOR OF PUBLIC PROSECUTIONS

Contents

- Introduction
- The Act in its wider context
- The legal framework
 - Transitional provisions
- The offences and application of the Code for Crown Prosecutors
 - Scope of the Act
 - General approach to bribery prosecutions
 - Key terms used in the Act
 - Offers and requests
 - Financial or other advantage
 - Improper performance
 - Associated person
 - Section 1: Offences of bribing another person
 - Section 2: Offences relating to being bribed
 - Section 6: Bribery of foreign public officials
 - Facilitation payments
 - Hospitality and promotional expenditure
 - Section 7: Failure of commercial organisations to prevent bribery
 - The defence of adequate procedures
 - Section 9 Guidance
- Obtaining the consent of the DPP or Director SFO

Introduction

The Bribery Act 2010 (“the Act”) will come into force on a day to be notified by the Secretary of State for Justice. The Act applies to the whole of the UK and provides for wide extra-territorial jurisdiction to deal with bribery committed outside the UK.

In England and Wales, proceedings for offences under the Act require the personal consent of the Director of Public Prosecutions or the Director of the Serious Fraud Office. They will make their decisions in accordance with the [Code for Crown Prosecutors](#) (“The Code”) applying the two stage test of whether there is sufficient evidence to provide a realistic prospect of conviction and, if so, whether a prosecution is in the public interest.

The purpose of this guidance is to set out the Directors’ approach to prosecutorial decision-making in respect of offences under the Act. The guidance is not intended to be exhaustive and prosecutors should be mindful of the wide range of circumstances and culpability which may arise in any particular case.

This guidance is subject to the Code for Crown Prosecutors and when considering corporate prosecutions, it should be read in conjunction with the [Guidance on Corporate Prosecutions](#), which sets out the approach to the prosecution in England and Wales of corporate offenders.

Scotland and Northern Ireland are separate legal jurisdictions and this guidance therefore does not apply to decisions about prosecutions in those jurisdictions. However, there has been liaison with the Lord Advocate and the Director of Public Prosecutions for Northern Ireland during the development of this guidance.

The Act in its wider context

In his foreword to the 2004 United Nations Convention against Corruption (UNCAC) the then UN Secretary General (Kofi Annan) described the serious effects of corruption:

“Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organised crime, terrorism and other threats to human security to flourish ... Corruption is a key element in economic under-performance and a major obstacle to poverty alleviation and development.”

The UK is a signatory to a number of international anti-corruption instruments including the [UN Convention against Corruption](#), the [OECD Convention on Combating Bribery of Foreign Public Officials \(1997\)](#) and the [Council of Europe Criminal Law Convention on Corruption \(1998\) and additional Protocol \(2005\)](#).

The Act reflects the UK's continued commitment to combat bribery and provides a modern, comprehensive scheme of bribery offences. The Act covers all forms of bribery but there is a clear focus on commercial bribery, evidenced by the fact that two of its four offences are business related. The Government intends that over time the Act will contribute to international and national efforts towards ensuring a shift away from a culture of bribery that may persist in certain sectors or markets and help ensure high ethical standards in international business transactions.

The Serious Fraud Office is the lead agency in England and Wales for investigating (jointly with the police in some cases) and prosecuting cases of overseas corruption. The SFO promotes active engagement with businesses and "self-reporting" by companies (see [Approach of the SFO to dealing with overseas corruption](#)). The Crown Prosecution Service also prosecutes bribery offences investigated by the police, committed either overseas or in England and Wales.

The statutory "adequate procedures" defence to a failure of commercial organisations to prevent bribery (section 7) encourages such bodies to put procedures in place to prevent bribery by persons associated with them. The Act is not intended to penalise ethically run companies that encounter an isolated incident of bribery. Section 7 and, to a degree, section 6 (bribery of foreign public officials) are designed to balance corporate responsibility for ensuring ethical conduct in the modern international business environment with the public interest in prosecuting where appropriate.

The legal framework

The Bribery Act 2010 received Royal Assent on 8 April 2010. A full copy of the Act and its Explanatory Notes can be accessed at: www.legislation.gov.uk

In summary, the Act:

- provides a revised framework to combat bribery in the public or private sectors, removing the need to prove acts were done corruptly or dishonestly;
- abolishes the offences of bribery at common law and the statutory offences in the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1906 (s17 and Schedule 2);
- creates two general offences of bribing another person ("active bribery") (s1) and being bribed ("passive bribery") (s2);
- creates a discrete offence of bribery of a foreign public official (s6);
- creates a new offence of failure of commercial organisations to prevent bribery by persons associated with them (s7);
- requires the Secretary of State to publish guidance about procedures that relevant commercial organisations can put in place to prevent bribery by persons associated with them (s9);
- replaces the need for Attorney General's consent (for the statutory offences abolished) with the requirement for the consent of the Director

- of the relevant prosecuting authority (for the new offences under the Act) (s10);
- provides a maximum penalty of 10 years' imprisonment or an unlimited fine for all the offences for individuals, and an unlimited fine only for commercial organisations (s11);
 - provides jurisdiction to prosecute bribery committed abroad by any person (individual or corporate) who has a 'close connection' with the UK (s12);
 - provides a limited defence for certain action taken by an intelligence service or by the armed forces (s13);
 - provides that senior officers of a body corporate may be prosecuted if an offence is proved to have been committed by a corporate body with their consent or connivance (s14);
 - applies equally to individuals in the public service of the Crown as it applies to other individuals (s16) but not to Crown bodies.

Transitional provisions

Prosecutors should note that the Act does not affect any liability, investigation, legal proceeding or penalty in respect of the common law offence of bribery or the statutory offences under the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1906 committed wholly or partly before the commencement of the Act (s19).

The offences and application of the Code for Crown Prosecutors

Scope of the Act

The Act takes a robust approach to tackling commercial bribery, which is one of its principal objectives. The offences are not, however, limited to commercial bribery. There may be many examples outside the commercial sphere where individuals attempt to influence the application of rules, regulations and normal procedures. Examples would include attempts to influence decisions by local authorities, regulatory bodies or elected representatives on matters such as planning consent, school admission procedures or driving tests.

General approach to bribery prosecutions

Bribery is a serious offence. There is an inherent public interest in bribery being prosecuted in order to give practical effect to Parliament's criminalisation of such behaviour. As with other criminal offences, however, prosecutors will make their decisions in accordance with the Full Code Test as set out in the Code for Crown Prosecutors. It has two stages: (i) the evidential stage; and (ii) the public interest stage. The evidential stage must be considered before the public interest stage.

A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be. Where there is sufficient evidence to justify a prosecution, prosecutors must always go on to consider whether a prosecution is required in the public interest. Assessing the public interest is not simply a matter of adding up the number of factors on each side and seeing which side has the greater number. The absence of a factor does not necessarily mean that it should be taken as a factor tending in the opposite direction. Each case will have to be rigorously considered on its own facts and merits in accordance with the Code.

Prosecutors dealing with bribery cases are reminded of the UK's commitment to abide by Article 5 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions:

"Investigation and prosecution of the bribery of a foreign public official ... shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved".

Key terms used in the Act

Offers and requests

The Act uses everyday language of offering, promising or giving ("active bribery"), requesting, agreeing to receive or accepting an advantage ("passive bribery").

This language is wide enough to include cases in which an offer, promise or request can only be inferred from the circumstances. The Law Commission used the example of an interview held over an open briefcase full of money that could be seen as an implied offer. It will be a matter for the tribunal of fact to decide whether such an inference can be drawn from the evidence in each case.

It is also clear that, except where the allegation is that an advantage was given or received, there is no need for a transaction to have been completed. The Act focuses on conduct not results.

Financial or other advantage

All the offences under the Act refer either directly or indirectly to a "financial or other advantage". The Act does not define the term. It is left to be determined as a matter of common sense by the tribunal of fact.

Prosecutors should therefore approach prosecutions under the Act on the basis that "advantage" should be understood in its normal, everyday meaning.

Improper performance

The concept of improper performance (section 4) is central to the general bribery offences and also indirectly to the offence of failure of commercial organisations to prevent bribery, since an offence under section 7 requires a general bribery offence to have been committed.

Improper performance involves a breach of an expectation of “good faith”, “impartiality” or “trust” (section 3(3) to (5)) in respect of the function or activity carried out. The test of what is expected is a test of what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned (section 5(1)).

The Law Commission (*Reforming Bribery, Law Comm No 313*) was confident of the jury’s ability to apply this test on the basis of the ordinary meaning of the words rather than as something that needed to be defined in the Act:

“...the expectation in question is that which would be had, in the circumstances by people of moral integrity ... it will be for the tribunal of fact to decide what that expectation amounted to, in the circumstances” (paragraph 3.176).

Associated person

A commercial organisation (‘C’) can be liable only for bribes by an “associated person” (‘A’) as defined in section 8.

Whether A is associated with C is determined by the nature of what is done (disregarding any bribe under consideration) rather than the capacity in which it is done. It is necessary to take into account all the relevant circumstances, not just the nature of the relationship. Services can be performed by one legal person on behalf of another legal person.

A may therefore, for example, be the commercial organisation’s employee, agent or subsidiary of the organisation. Where A is an employee it is presumed that A is performing services for or on behalf of C unless the contrary is shown.

Section 1: Offences of bribing another person

The legal elements

The ways in which the offence of bribing another person can be committed are contained in two ‘Cases’ set out in section 1(2) and 1(3) of the Act. The necessary conduct element is when a person “offers, promises or gives” a “financial or other advantage”, either directly or through a third party. The offence also requires a “wrongfulness element”.

In Case 1, the wrongfulness element is committed where the advantage is intended to induce (or be a reward for) improper performance of a relevant function or activity.

In Case 2, the wrongfulness element is committed where the person knows or believes that the acceptance of the advantage offered, promised or given in itself constitutes the improper performance of a relevant function or activity.

Prosecutors will need to consider any direct evidence (documentary or otherwise) there may be of actual intention (Case 1) or knowledge or belief (Case 2) as well as whether they can be inferred from the circumstances including the value of the advantage.

Prosecutors should draft separate charges or counts based on Cases 1 and 2 to avoid duplicity, as their wrongfulness elements are different; and should also make it clear if charges or counts are alternatives.

Public Interest Considerations

A prosecution will usually take place unless the prosecutor is sure that there are public interest factors tending against prosecution which outweigh those tending in favour.

Factors tending in favour of prosecution:

The Code sets out a number of general factors tending in favour of prosecution. When applied in the context of bribery offences, the following may be particularly relevant:

- A conviction for bribery is likely to attract a significant sentence (Code 4.16a);
- Offences will often be premeditated and may include an element of corruption of the person bribed (Code 4.16e and k);
- Offences may be committed in order to facilitate more serious offending (4.16i);
- Those involved in bribery may be in positions of authority or trust and take advantage of that position (Code 4.16n).

Factors tending against prosecution:

The factors tending against prosecution may include cases where:

- The court is likely to impose only a nominal penalty (Code 4.17a);
- The harm can be described as minor and was the result of a single incident (Code 4.17e);
- There has been a genuinely proactive approach involving self-reporting and remedial action (additional factor (a) in the Guidance on Corporate Prosecutions).

Section 2: Offences relating to being bribed

The legal elements

Section 2 provides a number of ways in which the offence of being bribed can be committed and distinguishes four 'Cases', namely Case 3 to Case 6 as set out in section 2 (2) to (5). The Explanatory Notes to the Act explain in more detail how the offence may be committed. Section 2 uses the same concepts as in section 1 of "financial or other advantage"; "relevant function or activity"; and "improper performance".

Prosecutors should draft separate charges or counts based on Cases 3 to 6 to avoid duplicity, as their wrongfulness elements are different; and should also make it clear if charges or counts are alternatives.

Public Interest Considerations

The factors tending in favour of and against prosecution for section 1 (see above) are equally applicable to the offence under section 2.

Section 6: Bribery of foreign public officials

The legal elements

Section 6 creates a discrete offence of bribery of a foreign public official (as defined in section 6(5)).

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.

That person must also intend to obtain or retain business or an advantage in the conduct of business. The official must be neither permitted nor required by the applicable written law (section 6(7)) to be influenced by the advantage).

Bribery of foreign public officials may also be prosecuted, in appropriate cases, under section 1, making use of the extended extra-territorial jurisdiction. This may be the case, for example, if it is difficult to prove that the person bribed is a foreign public official. It should be noted, however, that under section 1 it will be necessary to prove the improper performance element.

Specific issues under section 6 (note they may also apply to section 1 offences)

Facilitation payments

Facilitation payments are unofficial payments made to public officials in order to secure or expedite the performance of a routine or necessary action. They

are sometimes referred to as 'speed' or 'grease' payments. The payer of the facilitation payment usually already has a legal or other entitlement to the relevant action.

There is no exemption in respect of facilitation payments. They were illegal under the previous legislation and the common law and remain so under the Act.

Public Interest Considerations

Prevention of bribery of foreign public officials is a significant policy aspect of the Act. In the context of facilitation payments, the following public interest factors tending in favour of and against prosecution may be relevant. A prosecution will usually take place unless the prosecutor is sure that there are public interest factors tending against prosecution which outweigh those tending in favour.

Factors tending in favour of prosecution:

- Large or repeated payments are more likely to attract a significant sentence (Code 4.16a);
- Facilitation payments that are planned for or accepted as part of a standard way of conducting business may indicate the offence was premeditated (Code 4.16e);
- Payments may indicate an element of active corruption of the official in the way the offence was committed (Code 4.16k);
- Where a commercial organisation has a clear and appropriate policy setting out procedures an individual should follow if facilitation payments are requested and these have not been correctly followed.

Factors tending against prosecution:

- A single small payment likely to result in only a nominal penalty (Code 4.17a);
- The payment(s) came to light as a result of a genuinely proactive approach involving self-reporting and remedial action (additional factor (a) in the Guidance on Corporate Prosecutions);
- Where a commercial organisation has a clear and appropriate policy setting out procedures an individual should follow if facilitation payments are requested and these have been correctly followed;
- The payer was in a vulnerable position arising from the circumstances in which the payment was demanded.

Hospitality and promotional expenditure

Hospitality or promotional expenditure which is reasonable, proportionate and made in good faith is an established and important part of doing business. The Act does not seek to penalise such activity.

Hospitality and promotional expenditure could, however, form the basis of offences under s1 (bribing another person) or s6 (bribing a foreign public official) and constitute a bribe for the purpose of s7 (failure to prevent bribery). Under section 1 there must be an element of “improper performance”. Under section 6, it will be necessary to show that the provision of hospitality or promotional expenditure was intended to influence the foreign public official so as to obtain or retain business, or an advantage in the conduct of business.

The more lavish the hospitality or expenditure (beyond what may be reasonable standards in the particular circumstances) the greater the inference that it is intended to encourage or reward improper performance or influence an official. Lavishness is just one factor that may be taken into account in determining whether an offence has been committed. The full circumstances of each case would need to be considered. Other factors might include that the hospitality or expenditure was not clearly connected with legitimate business activity or was concealed.

Public Interest Considerations

Prevention of bribery of foreign public officials is a significant policy aspect of the Act. When considering the public interest stage, the factors tending in favour of and against prosecution referred to in respect of “active bribery” (section 1) are likely to be relevant. A prosecution will usually take place unless the prosecutor is sure that there are public interest factors tending against prosecution which outweigh those tending in favour.

Section 7: Failure of commercial organisations to prevent bribery

The legal elements

A “relevant commercial organisation” will be liable to prosecution if a person associated with it bribes another person intending to obtain or retain business or an advantage in the conduct of business for that organisation, but only if the associated person is or would be guilty of an offence under section 1 or 6 (section 2 “passive bribery” is not relevant to a section 7 offence).

Section 7 does not require a prosecution for the predicate offences under section 1 or 6, but there needs to be sufficient evidence to prove the commission of such an offence to the normal criminal standard. For this purpose it is not necessary for the associated person to have a close connection with the United Kingdom (section 7(3)(b)).

The jurisdiction for this offence is wide (see section 12 of the Act). Provided that the commercial organisation is incorporated or formed in the UK, or that the organisation carries out its business or part of its business in the UK, courts in the UK will have jurisdiction, irrespective of where in the world the acts or omissions which form part of the offence may be committed.

The offence is not a substantive bribery offence. It does not involve vicarious liability and it does not replace or remove direct corporate liability for bribery. If it can be proved that someone representing the corporate 'directing mind' bribes or receives a bribe or encourages or assists someone else to do so then it may be appropriate to charge the organisation with a section 1 or 6 offence in the alternative or in addition to any offence under section 7 (or a section 2 offence if the offence relates to being bribed).

The defence of adequate procedures

It is a defence if a relevant commercial organisation can show it had adequate procedures in place to prevent persons associated with it from bribing. The standard of proof the defendant would need to discharge in order to prove the defence is on the balance of probabilities. Whether the procedures are adequate will ultimately be a matter for the courts to decide on a case by case basis.

As stated in the Code (4.5) prosecutors must consider what the defence case may be, and how it is likely to affect the prospects of conviction, under the evidential stage. Clearly, the defence under s7(2) of adequate procedures is likely to be highly relevant when considering whether there is sufficient evidence to provide a realistic prospect of conviction.

Prosecutors must look carefully at all the circumstances in which the alleged bribe occurred including the adequacy of any anti-bribery procedures. A single instance of bribery does not necessarily mean that an organisation's procedures are inadequate. For example, the actions of an agent or an employee may be wilfully contrary to very robust corporate contractual requirements, instructions or guidance.

Section 9 Guidance

Section 9 of the Act requires the Secretary of State to publish guidance on procedures that relevant commercial organisations can put in place to prevent bribery by persons associated with them. "*Guidance about commercial organisations preventing bribery (section 9 of the Bribery Act 2010)*" has been published by the Ministry of Justice. Prosecutors must take it into account when considering whether the procedures put in place by commercial organisations are adequate to prevent persons performing services for or on their behalf from bribing.

The Ministry of Justice's guidance also provides some explanation of the Government policy behind the formulation of the offences and gives

assistance on the particular concepts relevant to the application of sections 1, 6 and 7 in the context of commercial bribery. Prosecutors may find this helpful when reviewing cases involving commercial bribery.

Public Interest Considerations

The factors tending in favour of and against prosecution referred to above in respect of section 1 may be equally applicable to the section 7 offence. The additional factors in the Guidance on Corporate Prosecutions will also be particularly relevant in determining whether or not it is in the public interest to prosecute.

Obtaining the consent of the DPP or Director SFO

The DPP or the Director of the Serious Fraud Office must give personal consent to a prosecution under the Act as set out in section 10 of the Act. Prosecutors should follow any relevant internal procedures when submitting cases for consideration.

Useful links

[Bribery Act 2010 and Explanatory Notes](#)

[Code for Crown Prosecutors](#)

[Guidance on Corporate Prosecutions](#)

[Approach of the SFO to dealing with overseas corruption](#) (currently being revised)

[OECD Convention on Combating Bribery of Foreign Public Officials \(1997\)](#)

[UN Convention against Corruption](#)