



The Bribery Act 2010 – The Travel Perspective

Introduction

The travel industry is known for hosting and offering corporate hospitality, events and educational trips as part of the on-going drive to promote travel. In addition, commission payments, such as agency commissions, are a normal everyday occurrence which are paid and handled internationally. If you are one of the many travel companies who offer or participate in such activities you will be directly affected by new changes in UK anti-bribery legislation and should be aware of how this will affect you and your business.

In a major overhaul of UK anti-bribery legislation, the Bribery Act 2010 (the “Act”) was brought into legislation by the Government. The changes are intended to bring the UK in line with the Organisation for Economic Co-operation and Development’s (OECD) recommendations in dealing with bribery and corruption.

The Act came into force on 1st July 2011 and is important for both UK and international businesses. The changes brought about by the Act will significantly impact the conduct of business both in the UK and abroad.

Most notably the Act creates a new strict liability offence of **failing to prevent bribery** by a commercial organisation. An organisation will only have a defence if it can show that it has implemented “adequate” anti-bribery compliance procedures.

Comparisons have also been drawn between the Act and the US Foreign Corrupt Practices Act (the “FCPA”) and the notable differences between the two pieces of legislation. It is evident that the Act is stricter than the FCPA, arguably leaving us with the strictest anti-bribery laws worldwide (this is further examined below).

The Offences

In summary, the main provisions of each offence are:

1) Bribing another person (Active Bribery) – Section 1

It is an offence to offer, promise or give a financial advantage or benefit in an effort to encourage another person to perform a relevant function or activity improperly or to reward them for doing so.

2) Being bribed (Passive Bribery) – Section 2

It is an offence to request, agree to receive or accept a bribe as an inducement to perform a relevant function or activity improperly or as a reward for the improper performance.

3) Bribery of Foreign Public Officials – Section 6

An offence will be committed where the intention is to influence an official in his capacity as a foreign public official. The offence does not include the ‘acceptance’ of bribes but deals with offering, promising or giving bribes.

4) Failure of Commercial Organisations to Prevent Bribery – Section 7

An offence will be committed by a commercial organisation where a person “associated” with the organisation bribes someone with the intention of obtaining or retaining business or a business advantage for the commercial organisation. **This offence can be committed in the UK or overseas.** A commercial organisation will be able to avail themselves of a defence where it can show that it had adequate procedures in place to



prevent bribery (the “Adequate Procedures” defence – which is explained in further detail below). Please note that this is a strict liability offence and as such, no evidence of any wrongdoing by the commercial organisation needs to be demonstrated in order for the offence to be committed. It is also important to note that a commercial organisation could be charged with an offence as a result of an act committed by an “associated” person i.e. an employee, agent or subsidiary.

The terms ‘improper performance’ and ‘relevant activity or function’ are defined within the Act but in simple terms, an ‘improper performance’ is a breach of expectation that a person will act in good faith, impartially or in accordance with a position of trust. A ‘relevant activity or function’ includes any activity connected with a business or performed in the course of a person’s employment or any function of a public nature.

Where and to whom does the Act apply?

The Act, whilst enshrined in UK legislation, applies where:

1. The offence or any act or omission related to the offence takes place in part of the UK; and/or;
2. Where the offence or an act or omission related to the offence **does not** take place in the UK but the person’s act or omission would constitute an offence in the relevant country and they have a “close connection” with the UK.

The Act therefore impacts on both UK and overseas activity where potential bribery offences are concerned. As a result the Serious Fraud Office (the “SFO”) will be able to take a wide ranging approach to investigating and prosecuting corporations and individuals facing allegations of bribery in the UK and abroad. It is important to note that the SFO (or alternatively the Director of Public Prosecutions and/or the Director of Revenue and Customs Prosecutions) will have prosecutorial discretion in seeking to press charges against any offending individuals or businesses. It is also likely that an SFO investigation may increase the risk of parallel investigations in other jurisdictions with countries that have a close working relationship to the UK (e.g. the US). The intention is for the SFO and the US Department of Justice (the “DoJ”) to cooperate on any possible breaches of the Act and FCPA where both jurisdictions come into play.

One point to note (and a major difference between the UK and US legislation) is the provision of facilitation payments which are permitted, to a limited extent, by the FCPA but are prohibited under the Act. For the avoidance of doubt, a facilitation payment is a payment that is made to a foreign public official to facilitate or expedite a routine government action i.e. the renewal of a local operating licence; it is in effect payment for something you are entitled to receive. These payments are often referred to as ‘grease payments’ and whilst they are permitted by the FCPA there is no specific exemption for such payments to be made under the Act and any such payments would be considered an offence. It is likely that the issue of facilitation payments will continue to be a bone of contention especially when dealing with higher risk jurisdictions until commercial organisations have ensured they have adequate procedures to deal with the issue of facilitation payments and, where they continued to be requested, reporting procedures are put in place.

In respect of a commercial organisation, it is important to note that an offence may be committed where it has been carried out with the consent or connivance of a ‘senior officer’ of the organisation. The definition of a senior officer includes directors, senior managers and the company secretary. An individual could therefore find themselves prosecuted under Section 1 as well as triggering the corporate offence under Section 7. The individual offence is separate to the corporate offence.

It is therefore imperative for a business to put in place adequate anti-bribery policies and procedures in order to protect the business. This is particularly important in view of the strict liability basis of the offence. The corporate offence is triggered by the failure of the commercial organisation to prevent bribery by someone 'associated' with the business (which extends to employees, agents and subsidiaries). A commercial organisation can be prosecuted even if an offending individual cannot be charged but the prosecution can demonstrate that a Section 1 or 6 offence has been committed. The Adequate Procedures defence will therefore be a key factor in defending any allegations of bribery.

What are the penalties?

Criminal sanctions under the Act include:

- Jail and/or unlimited fines for individuals;
- Commercial organisations can also receive unlimited fines which are likely to be substantial;
- Both a commercial organisation and its directors/senior officers could be subject to criminal penalties;
- A director convicted of a bribery offence is also likely to be disqualified from holding a company directorship for up to 15 years;

How is this relevant to the travel industry?

It is common practice for tour operators, travel agents and airlines to provide and receive all expenses paid familiarisation trips to new destinations or invitations to corporate events for various reasons. In addition, commission for services is a normal industry practice that to date has not been questioned. Whilst there is nothing to suggest that any of these activities will fall foul of the anti-bribery measures the Act is intended to cover, it is essential for companies to understand the potential risks of falling foul of the provisions of the Act. In view of the international nature of the travel industry and the international reach of the Act it is also important to ensure that employees, agents and suppliers fully understand the measures implemented by the Act in order to avoid prosecution for offences which may be inadvertently committed due to a lack of understanding and training.

The Act itself is very broadly drafted and reading it in isolation, it is difficult to see how ANY corporate hospitality could be permitted. However, the main point is to review and understand what is expected or what could be inferred by the corporate hospitality or expenditure i.e. where the hospitality or expenditure is in excess of what might be **reasonable** under a particular set of circumstances. Where such hospitality or expenditure is in the normal expectation of the parties involved it should not, in theory, lead to allegations of bribery.

The UK Ministry of Justice published guidance on 30 March 2011 to assist commercial organisations in implementing anti-bribery policies and procedures. The guidance very usefully addresses concerns regarding hospitality, gifts and expenses which we would encourage every business to review. Within the guidance a detailed analysis of sections 1, 6 and 7 is provided as well as a set of principles designed to give commercial organisations a basis for planning and implementing their regime to combat bribery and corruption.

In the case of an Active Bribery offence (Section 1), the guidance clearly states that the prosecution would have to show that any hospitality was **intended** to bring about the improper performance and that this would be judged by what a reasonable person in the UK would expect. It is therefore seen as unlikely that taking clients to, say, a sporting event, would be an offence **unless** there was an underlying intention to encourage or achieve



something other than a genuine social event with clients i.e. timing may be viewed as a relevant factor when considering the intention of the expenditure, particularly if the expenditure is excessive, and/or in relation to a contract that is due for renewal and/or where new business is about to be agreed.

As regards the potential offence of Bribing a Foreign Public Official (Section 6), the guidance states that the intention behind the Act is not to criminalise bone fide, proportionate and reasonable hospitality, promotional and other business expenditure which is aimed at better public relations. However this sort of expenditure can amount to a bribe if it is accompanied by the intention to **influence** the official to secure a business advantage. The prosecution will have to demonstrate a sufficient connection between the advantage given and the intended influence.

The guidance suggests that while an organisation is reviewing policies and procedures for the purposes of the defence under Section 7 (Failure of an Organisation to Prevent Bribery), it should also establish proper standards for hospitality and other similar expenditure. The guidance reiterates the Adequate Procedures defence available to companies and provides further detail as to what this means in practice in accordance with the six principles indicated below.

How can companies protect themselves?

The guidance sets out six principles which are all designed to give commercial organisations a basis for planning and implementing their regime to prevent bribery.

Principle 1: Proportionate procedures

Procedures to prevent bribery by persons association with a business should be implemented and should be proportionate to the risks faced by the business in consideration of the nature, scale and complexity of the business activities. The procedures should be clear, practical and a system of implementation and enforcement should form part of the procedures.

Principle 2: Top-level commitment

This in itself is self-explanatory – the top-level management of the business must buy into the culture that bribery is not acceptable under any circumstances. There should be a clear statement that the management are committed to the prevention of bribery and will adopt and enforce the policies and procedures implemented by the business.

Principle 3: Risk assessment

A business should carry out a risk assessment in view of the commercial activities that are carried out and the potential risks it faces, for example when dealing with possible geographical areas of high risk. The assessments should be carried out regularly and be documented. The risk assessment should identify any potential flash points which need to be addressed.

Principle 4: Due Diligence

The business should apply adequate due diligence procedures in respect of anyone who will or is likely to perform services on behalf of the business to identify and mitigate any potential bribery risks. The procedures should be proportionate and risk based in order to ensure they are adequate for the business.

Principle 5: Communication (including training)

The business should implement a policy and procedure regarding the communication (both internal and external) of the anti-bribery measures it has implemented. This should include



adequate training in order to ensure that the policies and procedures are fully adopted and understood by employees and those associated with the business.

Principle 6: Monitoring and review

The business should continue to monitor and review the policies and procedures implemented on an on-going basis. Any changes or improvements identified should be made quickly in order to deal with any potential risks and in keeping with the changing face of the business.

Conclusion

Based on the analysis of the legislation, corporate hospitality and payments made in the usual course of business and within reasonable expectations should not be caught by the Act. Beware of anything that seems excessive or lavish based on past experiences with a client or supplier especially where a contract renewal or new business is due for discussion.

It is important to implement the six principles identified by the guidance in order to avail your business of the Adequate Procedures defence and this should be implemented as a matter of policy at the highest level. Businesses should be vigilant to any changes or potential risks and should implement on-going audits to identify any high risk areas. A compliance officer should be appointed and a robust manual detailing the policies and procedures applicable should be in place and properly communicated to employees, agents and subsidiaries.

Check that you have adequate Directors and Officers Liability insurance in place which should provide cover for legal defence costs in respect of Bribery Act allegations for senior officers. Directors and Officers Liability insurance does not extend to the payment of any fines imposed or any claims arising from a criminal act but it should cover the cost of a criminal legal defence. Your insurance broker should be able to offer guidance on your policy and whether it extends to Bribery Act allegations.

The practicalities of how the Act will impact on commercial organisations going forward will only be truly evident once the authorities responsible for enforcing the Act attempt to bring prosecutions through the courts. The Act is widely drafted but it is hoped that the authorities will apply a common sense approach in dealing with the practical issues businesses face on a day to day basis.

Joanna Kolatsis is a Partner in the Commercial Department at Gates and Partners, London.

Please note: This document is intended for use as a guidance note only and cannot be used as a substitute for specific advice.

Contact Details

Joanna Kolatsis
Partner

T: 020 7337 0390
M: 07825 795 706
F: 0844 692 4901
E: jkolatsis@gatesandpartners.com
W: www.gatesandpartners.com

GATES AND PARTNERS
5th Floor, Capital House
85 King William Street
London
EC4N 7BL