

Fact sheet - Bribery Act 2010

Introduction

The Bribery Act 2010 (“the Act”) received royal assent on 8 April 2010 and is set to come into force in April 2011. When in force it will repeal and replace England’s much-criticised, old laws on bribery with a new comprehensive anti-bribery code.

The current “Old” law

The law covering acts of bribery has developed piecemeal via legislation and case law. Given that some of the law is over 100 years old, it is no surprise that reform has been debated for more than a decade. The current law is considered patchy and difficult to enforce except in the most extreme cases.

Changes under the Bribery Act 2010

The purpose of the Act is to reform the criminal law of bribery to provide for a new consolidated scheme of bribery offences to cover bribery both in the UK and abroad.

There are two general bribery offences created under the Act:

- **Active bribery** (i.e. bribing someone): it will be an offence to offer or give a financial or other advantage to another person with the intention of inducing that person to perform a “**relevant function or activity**” “**improperly**”, or to reward that person for doing so.
- **Passive bribery** (i.e. being bribed): it will be an offence to receive or request a financial or other advantage with the intention that a “**relevant function or activity**” should be performed “**improperly**” as a result.

These two bribery offences are not new offences. However the Act has updated and modified the law in relation to these pre-existing offences.

“Relevant function or activity” includes any function of a public nature and any activity connected with a business. The function or activity need have no connection with the UK and may be carried out in a country or territory outside the UK. The person performing that activity/function must be expected to perform it in good faith, with impartiality or be in a position of trust.

“Improper performance” will occur if it is intended that, by paying the bribe, the recipient of the bribe would be expected to act otherwise than in good faith, in an impartial manner or in accordance with a position of trust.

In addition to modifying the two general bribery offences, the Act also creates a new corporate offence and makes the offence of bribing foreign officials separate for the first time:

- **Failure of commercial organisations to prevent bribery:** The Act creates a new strict liability offence for commercial organisations (companies and partnerships) of failing to prevent bribery within their organisations. This offence is absolute; all payments (no matter how small) if made with the requisite intention to bribe will be classified as a bribe, and the commercial organisation will be liable for failure to prevent the payments being made on its behalf. The Company’s only defence to such charges is to show that it had adequate procedures in place to prevent bribes being paid.

The Act further states that a corporate organisation can be guilty of failing to prevent bribery if an “associated person” carries out an act of bribery on its behalf. An “associated person” is defined as a person who performs services on behalf of the principal- a deliberately vague definition, designed to catch anyone who performs functions on a company’s behalf.

Under the current old law, a company was only likely to be guilty of a bribery offence if a very senior member of management was involved in the bribes. The new Act however provides that a company may be found liable for a bribery offence even if no one within the company knew about the bribery and it was performed by an entity undertaking work on behalf of the company.

- **Bribery of foreign public officials:** This offence will be committed if a person offers or gives a financial or other advantage to a foreign public official with the intention of influencing the foreign public official and obtaining/retaining business, where the foreign public official was neither permitted nor required by written law to be so influenced.

Territorial Application of the Act to Cruise Ship Operators

From the shipping industry's perspective, one of the most important elements of the Act is its far reaching scope. All of the new offences created under the Act will have extra-territorial application. The offences may be prosecuted if undertaken by a British national or corporate, or by a person who is ordinarily resident in the UK regardless of whether the act/omission took place outside the UK.

In addition, the failure to prevent bribery offence can be committed by a corporate entity, whether or not incorporated in the UK, which carries on business or part of a business in the UK, even if the act of bribery was committed outside the UK, and even if the UK based part of the business was not in any way involved in the bribery. It is possible to carry on a business in the UK through the company's associated persons, for example a subsidiary, an agent, a joint venture or a distributor.

Consequently any commercial organisation which has a business presence in the UK will be caught by the Act.

How do the provisions of the Act affect Cruise Ship Operators?

- The Act places an obligation on Cruise Ship Operators based in the UK or with a "business presence" in the UK to implement stringent anti-bribery policies throughout their entire organisation in order to prevent committing a bribery offence. Cruise Ship Operators now face the possibility of committing an offence through an "associated person" acting on the company's behalf as well as a direct company worker. The Act therefore places a burden on Cruise Ship Operators to ensure that their anti-corruption procedures are sufficiently robust to stop any employees, agents or third parties acting on the operators' behalf from committing bribery.
- The offence of corporate liability is an *absolute* offence. Therefore even the most minimal payments are categorised as bribes under the Act, if made with the requisite intention that the person bribed improperly performs his relevant duties. Further, the definitions of "improper" and "relevant functions or duties" have been left deliberately vague, so that there is a risk that they could catch certain types of business practice considered as normal in the shipping industry. For example the Act catches any payments made to a person in "a position of trust".
- Many normal business practices in the shipping industry, which have until now been considered as wholly legal, will face falling foul of the Act. Payments paid to officials to ease the processes of official actions, or payments required by local

custom would be unlawful as they would be considered as payments made with an intention to encourage an individual to act improperly. For example, in the event that the ship's master or the shipowner's agent makes a small "gift" to port officials (for example cigarettes or alcohol) during customs clearance discussions, or to obtain access to a canal or lock, such gifts may now be considered as a breach of the Act.

- There is no de minimis level- any corrupt payment, however minimal, will constitute a breach of the law. The fact that the vessel's voyage may be delayed and that refusing to make such payment can have an impact on an operator's reputation in certain jurisdictions is no defence.
- Only if there is a requirement in written local law to make such payments is it permitted. Although a single payment or gift is unlikely to be investigated, an ongoing process of making such gifts may well, over time, accumulate to a serious breach of the law and may result in investigation and the risk of prosecution by the authorities.
- The only defence to a charge of a failure to prevent bribery is to show that the Company had adequate anti-bribery procedures in place. It will therefore be crucial that cruise ship operators with a UK business presence ensure that they employ firm-wide anti-bribery policies throughout their **entire** organisations including the operator's subsidiaries or agents.

Penalties for non-compliance

A failure to comply with the provisions of the Act can result in a Cruise Ship Operator facing an unlimited fine. Directors and individuals found guilty of the substantive offences of active or passive bribery, or bribery of Foreign Public Officials, can face a prison sentence of up to ten years.

Steps to be taken by Cruise Ship Operators to ensure compliance with the Act

Although the Act is yet to come into force, Cruise Ship Operators must commence the implementation of "adequate procedures" to ensure that their company will be in compliance with the Act in time for April 2011 to avoid any possible breaches. Compliance should be ingrained in company mentality from the outset via training, monitoring and sanctions.

The Act fails to provide a definition of what constitutes "adequate" defence procedures. The Act provides that the government is obliged to issue guidance on

“procedures that relevant commercial organisations can put in place” however such guidance is not set to be issued until January 2011.

Whilst companies await further guidance, it is recommended that Cruise Ships Operators comply with the following **6 Key Principles**:

Principle 1: Risk Assessment

- Cruise Ship Operators must review their existing procedures, decision-making processes and financial controls in order to assess the risks of bribery faced by them in their market and sector. In particular, operators which regularly operate in ethically high risk environments, and where responsibility is passed down to agents in these jurisdictions, must carefully consider the risk of falling foul of the Act.
- Consider:
 - Whether those undertaking the assessment are adequately skilled and equipped to do so;
 - How best to perform the risk assessment.
- Key bribery risks:
 - Internal risks (deficiencies in employee knowledge of the organisation’s business profile, lack of training or skills set);
 - External risks (country risk/transaction risk/partnership risk)

Principle 2: Top Level Commitment

- Cruise Ship operators must establish a culture across their organisation in which bribery is unacceptable. It is vital to make the message clear, unambiguous and regular to all staff and business partners.

Principle 3: Due Diligence

- Knowing who you do business with, knowing why, when and to whom you are releasing funds and seeking reciprocal anti-bribery agreements.
- Operators must be proactive and make relevant enquiries.

Principle 4: Clear, Accessible and Practical Policies and Procedures

- Applying the policies and procedures to everyone you employ and business partners under your effective control.

Principle 5: Effective Implementation

- Going beyond “paper compliance” to embedding anti-bribery in your organisation’s internal controls, recruitment and remuneration policies, operations, communications and training on practical business issues.

Principle 6: Monitoring and Reviewing

- Regular auditing, monitoring and review of policies and procedures and financial controls that are sensitive to bribery are vital to ensure compliance with the Act.

Conclusions

In light of the provisions of the Bribery Act 2010, Cruise Ship Operators must seek to enforce policies and procedures dealing with bribery and corrupt practices, and express a zero tolerance attitude throughout their organisations. Such action is the only way to prevent bribery from taking place on their behalf.

Concluding Checklist

- **Conduct a full audit**
- **Review existing written policies and update**
- **Review existing procedures and update**
- **Training for staff across the board**
- **Monitor procedures/policies and be prepared**
- **Come clean, self-report and seek leniency**