

PUTTING THE BRIBERY ACT 2010 INTO AN AVIATION CONTEXT



By Aofie O'Sullivan

Are you an aircraft management company with employees or consultants based in the UK? Does your company hire the services of a UK based pilot to fly your corporate aircraft? Are you a manufacturer with an approved maintenance facility in the UK? Do your brokers or aircraft sales agents base any part of their business out of the UK? Does your company (or anyone associated with your company) offer commissions, bribes, hospitality and goodwill gestures in return for services? Has your business ever facilitated or been aware of a broker or agent commission in the sale of an aircraft, which was not, made known to seller or buyer? Have you ever bought and sold an aircraft as a 'back to back' deal?

SUSPICION

If you parade an extravagant life style you might be suspected of being bribed.

If so, read on - you will be directly affected by new changes in UK anti-corruption legislation.

The UK Government has passed legislation, which is effectively the country's first major overhaul of anti-corruption legislation in over 100 years. The changes will bring the UK into line with the Organization for Economic Co-operation and Development's (OECD) recommendations in dealing with bribery and corruption.

The Bribery Act 2010 was passed in April 2010 and is due to come into force in April 2011. The Act is an important one, and not just for UK-based businesses. The Act will introduce changes in the law that will significantly impact conduct of business both in the UK and abroad.

The Act creates a new strict liability offence of failing to prevent bribery. An organization will only have a defense to this if it can show that it had implemented "adequate" anti-corruption compliance procedures. More so, the scope of the Act is extensive and has significant reach beyond the UK.

Bribery Offences

The four new offences can be summarized as follows:

Bribing Another Person

It will be an offence to offer or give a financial or other advantage to a person

- With the intention of inducing them to behave improperly;

- As a reward for that person to behave improperly; and

- Knowing or believing that the recipient's acceptance of the "advantage" would constitute improper behaviors.

Being Bribed

It will be an offence to receive a bribe if the person receiving it agrees to or receives an 'advantage' to act in an improper manner. The offence occurs where the bribe is either paid directly or through a third party. In many cases it does not even matter if the recipient knows that his or her acceptance would constitute a bribe.

Bribery of Foreign Public Officials

It will be an offence to offer or give any advantage to a foreign public official with the intention of influencing

them in their capacity as a public official and to obtain or retain business or a business advantage from them. There is no requirement under this heading for the advantage to be 'improper' and there is a guarded exemption where the law permits payments to officials.

Failure of Commercial Organizations to Prevent Bribery

For businesses, the new corporate offence will make companies liable if anyone acting under its authority commits a bribery offence, including employees, agents, subsidiaries, partners and consultants.

Furthermore, the offence does not need to take place in the UK. So companies that have a UK office or operate

of both culpability and harm caused."

'Senior officers' (which is broadly defined and will include directors and key management; possibly even shadow or non-executive directors) can also be convicted of an offence where they are deemed to have given their consent or connivance to giving or receiving a bribe or bribing a foreign



A company or a partnership will be automatically liable for any bribe offered or given in connection with its business unless it can show that it has in place adequate procedures designed to prevent bribery.

Who Does the Act Apply to?

The Act is far-reaching and extends to cover bribery committed worldwide by individuals who are UK nationals or are ordinarily resident in the UK, as well as organizations that conduct some portion of their business in the UK. The Serious Fraud Office (SFO) will be able to take a more wide-ranging approach to investigating and prosecuting corporations and individuals involved in corruptive practices in the UK and abroad. 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). In fact, US companies with a presence in the UK will now not only have to comply with their local Foreign Corrupt Practices Act (FCPA), but will also need to comply with the Bribery Act, which is more extensive.

in the UK or even simply hire a UK resident will be liable under this Act. All that is needed is a UK presence.

The offence is a strict liability offence – meaning there is no need to prove negligence or the involvement and guilt of the company.

What are the Sanctions Under the Act?

Convictions under the Act include jail and/or unlimited fines for individuals. Companies can receive unlimited fines that are likely to be substantial. The recent case of *R v Innospec* in the Crown Court set out some guidance on the scale of fines for corruption offences. As an indication of the judiciary's approach to such offences, Lord Justice Thomas commented: "The courts have a duty to impose penalties appropriate to the serious level of criminality that are characteristic of this offence. For example, one of its many effects is to distort competition; the level of fines in cartel cases is now very substantial and measured in the tens of millions. It is self-evident that corruption is much more serious in terms

public official. Importantly, it is possible that omitting to act might be regarded as consent or connivance and lead to prosecutions, fines and/or imprisonment. A director convicted of a bribery offence is also likely to be disqualified from holding a director position for up to 15 years.

What Should Companies Do?

A company commits an offence if a person associated with it bribes another person for that company's benefit. 'Association' is loosely defined to include people who perform services for or on behalf of the company, regardless of the capacity in which they do so. It does not stop at your employees and will include agents, consultants and suppliers. The only way to avoid criminal liability under the Act is for companies to establish a system of 'adequate procedures' designed to prevent bribery.

The term 'adequate procedures' is not defined in the Act, but is currently undergoing a consultation process, the results of which will be published as guidelines in early 2011.

SANCTION

A director convicted of bribery can be disqualified from holding a director position for up to 15 years.



Worldwide Governance Indicators website. Transparency International is a non-governmental organization that sets out corruption risks in countries around the world.

Do you interact with public officials and do you provide corporate hospitality as a way of encouraging business with your company? Do you make use of agents in high-risk jurisdictions and do they ever tender for business? What processes do you have in place to ensure these people are not engaging in corruptive practices? Do you have commission agreements and do they include warranties and undertakings from the various parties as to anti-corruptive compliance?

Conduct a group-wide survey of employees and officers of the company in positions where they may be exposed to bribery.

Principle 2: Top Level Commitment

Immediately issue a clear statement of anti-corruption culture at the highest levels of management. Stick to it and ensure the message is not only given, but also shown to be followed – lead by example. The anti-corruption statement should be clearly published and accessible, both internally and externally. Put it on your website and clearly state your zero tolerance approach to corruption.

Principle 3: Due Diligence

Put in place processes for auditing the anti-corruption program at all levels. Carry out an audit regularly – spot-check arrangements with suppliers and brokers. Are your sales teams aware of their duties? Are they reporting back, and is your response team effective in dealing with the reports?

Review your contracts and assess the structure you have in place for appointing agents, the purpose of their appointment and the way they are remunerated. Appoint a compliance officer.

Clear, Practical and Accessible Policies and Procedures

Ensure all persons associated with your business are aware of your stance and have a system of reporting in place. Train staff and update them regularly on anti-corruptive practices. Make clear statements about your company's stance on gifts and hospitality, payments to advisers and agents,

and political contributions. Check your stance on paying officials simply to secure the performance of their normal duties (e.g. granting a license). These acts are commonplace around the world, but may now constitute an offence under the Act.

Effective Implementation

Your system should include a process for investigating reports and set out your strategy on disciplinary action. Incorporate this strategy in your commercial contracts at all levels – employee contracts, pilot and crew arrangements, service and supply arrangements, sales and management agreements, etc.

Conclusion

All of the above aside, a reasonable and measured approach needs to be taken towards any sensible risk assessment. Just because someone is paid a commission does not make your company guilty of corruption. Yes, your company will be guilty if your sales brokers agree to pay back-handers to chief pilots to ensure their employer buys your aircraft. However, you don't have to stop taking clients and customers out to lunch to discuss business – the lunch being on board a private jet to Monaco may be a step too far, but please put it all in context – the requirement under the bribing offences is an element of 'improper behavior'. Take a reasoned and systematic approach to your compliance strategy, but above all else, make sure you implement it and ensure that it doesn't sit on the shelf gathering dust.



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The essence of the guidelines is six basic principles designed to give commercial organizations a basis for planning and implementing their regime to combat corruption. These principles must be followed and be in place by April 2011:

Principle 1: Risk Assessment

Conduct a risk assessment on your global business and identify areas of high risk. Do you operate in countries where corruption is perceived to be high (e.g. Africa, Russia, and India)? The World Bank provides up-to-date data on corruption risks in its

PENALTY
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