



Bribery Act: Myth and Reality

February 2011

1. Introduction

- The Bribery Act received Royal Assent in April 2010 after being passed by the last Parliament with an all-party consensus.
- The Act was based on the Law Commission report of 2008 and the recommendations of the Joint Parliamentary Scrutiny Committee in 2009; there was extensive consultation and input from all stakeholders, particularly from the corporate sector, during both of those phases.
- The Act was due to commence in April 2011 as announced by the Ministry of Justice in July 2010; it has now been delayed due to intensive last-minute lobbying reportedly from some corporate circles against a background of negative coverage and misinformation disseminated by some sections of the media.
- This briefing note is intended to clarify key issues in order to increase public understanding of the Act and inform sensible, rational discussion of its implications.

2. Six myths about the Bribery Act

2.1 *Myth: It is 'gold-plated legislation'*

Reality:

- The UK's current antiquated anti-bribery legislation dates from 1889, 1906 and 1916.
- A new law was essential to fulfil the UK's obligations under the OECD's 1997 Anti-Bribery Convention, which requires all parties to pass laws that criminalise foreign bribery.
- The UK ratified the OECD Convention in 1998 but failed to modernize its anti-bribery law despite repeated recommendations from the OECD's Working Group on Bribery (WGB). The UK is therefore catching up with other OECD countries by updating its laws in line with the OECD Convention and is not doing more than its major OECD competitors.
- US anti-corruption legislation is equally strict – although the Foreign & Corrupt Practices Act of 1977 (FCPA) does not cover all areas covered by the Bribery Act, these are covered in other areas of US company law; in some areas the FCPA is stricter than the Bribery Act.
- The Chair of the OECD WGB, Prof. Mark Pieth has stated of the UK Bribery Act **"the new law is by no means stricter than the laws of other OECD member states"**.

2.2 *Myth: 'There has not been adequate consultation or time to prepare'*

Reality:

- **There has been extensive opportunity for the voice of business and other stakeholders to be heard. There have been 4 formal periods of consultation**, to each of which companies and industry bodies made submissions. These were:
 - The Home Office's review of bribery law in 2005/06
 - The Law Commission's review, published in 2008
 - The Joint Parliamentary Scrutiny Committee in June 2009
 - The Ministry of Justice consultation on guidance to companies on procedures for preventing bribery that closed in November 2010
- In addition, there was extensive informal consultation with business after the government introduced its draft Bribery Bill in the House of Lords in December 2009.
- Since the Act received Royal assent in April 2010, there has been plenty of time for business to prepare for the legislation coming into force.
- Moreover, bribery has always been illegal under UK law and bribery of foreign public officials was explicitly prohibited through Part 12 of the Anti-terrorism, Crime and Security Act in 2001. Hence, responsible, law-abiding companies should already have had adequate anti-bribery procedures in place.

2.3 *Myth: 'It is impossible to do business without making facilitation payments which the Bribery Act bans'*

Reality:

- **Facilitation payments are already illegal under current laws** so the Bribery Act is not creating a new bribery offence.

- A large majority of the 38 countries that are party to the OECD Convention ban facilitation payments, and those that legally 'permit' them usually only do so in specific or exceptional circumstances. They are, for example, permitted in very specific circumstances under the US FCPA.
- The OECD WGB recommended in 2009 that all parties to the OECD Convention, US included, should in future seek to eliminate facilitation payments.
- Because they are illegal in many countries, a large number of companies already outlaw them entirely, so as to be able to have a single company-wide code of conduct – proving that it is possible to do business without paying them.

2.4 Myth: 'Hospitality, gifts and promotional expenditure are a grey area in the Act – more clarity is needed'

Reality:

- Hospitality and related expenditure is often used as a way of paying a bribe. The Bribery Act is designed to prevent companies from paying bribes by these other means.
- However, much corporate hospitality is legitimate and not intended to bribe, and so the Act should obviously only prevent hospitality that is covert bribe-paying. This is adequately covered in the draft Guidance to Section 7 of the Bribery Act that the Ministry of Justice published for consultation last year:
 - It states that "reasonable and proportionate hospitality or promotional expenditure which seeks to improve the image of a commercial organisation, better to present products or services, or establish cordial relations, is recognised as an established and important part of doing business." The draft Guidance also notes that "corporate hospitality is a legitimate part of doing business at home and abroad".
- In reality, the appropriate level of hospitality for public officials is usually regulated by the laws and regulations in-country, as it is in the UK. Such laws recognise that corporate hospitality can easily be used as a bribe, and so needs to be kept in check.
- Excessive hospitality, such that it is intended as a bribe, is illegal under the FCPA, which permits hospitality that is 'reasonable, proportionate and bona fide.' Many UK companies are already in the ambit of the extra-territorial provisions of the FCPA, and should therefore already be exercising care over the levels of hospitality they offer.

2.5 Myth: 'Everyone else pays bribes. If British companies don't they are at a competitive disadvantage'.

Reality:

- **Many leading UK companies already operate a no-bribes policy**, and are able to operate competitively within the FCPA rules on 'reasonable, proportionate and bona fide' expenditure on gifts, hospitality and promotional expenditure.
- The Bribery Act is drafted – like the FCPA – such that it **would also enable prosecution of non-UK companies**. This creates a level playing field, as long as the UK and US authorities are willing to prosecute foreign companies. The US has done so several times in recent years.
- Many of the UK's competitors have argued that the **UK has not been operating a level playing field** because we were not prepared to prosecute our companies while those of other countries were being prosecuted.
 - The UK had 10 cases to the end of 2009 compared to 168 in the US, 117 in Germany and 30 in Switzerland.
- If a British company is willing to pay bribes, this is **likely to disadvantage a more honest British competitor**.
- The Act is part of a framework of similar legislation in other countries that are parties to the OECD Convention and the UN Convention Against Corruption (UNCAC) (148 parties). **It is by no means a unilateral initiative by the UK.**

2.6 Myth: 'The Bribery Act is bad for UK plc'

Reality:

- In addition to the strong moral argument for anti-bribery laws, corruption-free economies are overwhelmingly in the interests of business – and that is what creates a truly level playing field. **Corruption creates market distortions, leads to insecure contracts and adds costs to contracts that erode and sometimes eliminate their profitability.**

- There is no evidence that UK companies are systematically losing out to bribe-paying competitors. **Bribery is already illegal, and so UK companies should already not be paying bribes. The Bribery Act does not change this.**
- **If the UK is to exercise influence in areas such as corruption and good governance, it must first put its own house in order.** For example, its efforts to fight corruption in Afghanistan have much greater credibility when it is able to demonstrate that its own anti-corruption law is effective.

3. What should be done now?

The Government must resist any further pressure to delay the Bribery Act or to dilute some of its key provisions. The further delay in the Act's implementation and the absence of a commitment to a firm date for its commencement is causing great uncertainty which is harmful to business and the UK's international reputation.

Transparency International UK therefore urges the Government to make an immediate public commitment to:

- Publish final Guidance so that the Act, in its entirety and without any dilution of its key provisions, comes into force no later than May 2011; and
- Ensure that adequate resources will be allocated for the Act's effective enforcement and that any new institutional arrangements for enforcement will not downgrade the priority attached to prosecuting bribery.

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