

The new UK Bribery Act: why you need to be prepared

The UK government's new Bribery Act of 2010 will come into force on 1 July 2011 (the "Bribery Act"), and the Government on 30 March provided important guidance on how to comply with the new rules. The new law is extra-territorial in that it extends to some foreign companies and conduct outside the UK. Non-UK companies that carry on business, or part of a business in the UK, will need to prepare for this new law. There will also be implications for non-UK companies performing services, for example, on an outsourcing basis, for UK companies.

Why should you be concerned?

- The Bribery Act creates a new corporate criminal offence – *failing to prevent bribery by an associated person* - which applies even to non-UK companies and partnerships that carry on business (or part of a business) in the UK.
- There is only one defence to the new corporate offence: the commercial enterprise must prove that it had "*adequate procedures*" in place designed to prevent persons associated with it from undertaking acts of bribery.
- The Bribery Act also criminalises private-sector bribery and creates a new offence of bribing a foreign public official.
- The Bribery Act goes beyond the US's Foreign Corrupt Practices Act ("**FCPA**") in a number of ways, so even companies with robust FCPA compliance programmes need to check that those programmes would be viewed as adequate for the purposes of the Bribery Act.
- The penalties for corporations are high: criminal conviction, unlimited fines and - possibly - permanent exclusion from government contracts across the European Union (the "**EU**").
- UK prosecuting authorities have recently taken a much greater interest in prosecuting overseas corruption, and UK courts have said that UK fines for such corruption should be comparable with the heavy fines imposed by US authorities.

The Bribery Act in a nutshell

The Bribery Act abolishes the UK's existing anti-corruption laws and replaces them with:

- An offence of *bribing* (offering, promising or giving a financial or other advantage);
- An offence of *being bribed* (requesting, agreeing to receive or accepting a financial or other advantage);
- An offence of bribery of foreign public officials; and
- A corporate offence of failing to prevent bribery.

Key issues

The new Bribery Act in a nutshell

The Corporate Offence

Implementing "adequate procedures" to prevent bribery

Will a corporate conviction trigger a public procurement ban?

Facilitation payments and the foreign public official offence

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The first three offences apply to both individuals and corporations. Regarding the offence of bribing and the offence of bribery of foreign public officials, it does not matter whether the advantage is offered, promised or given directly or through a third party. Also – and unlike the FCPA - the Bribery Act applies to *private sector bribery* as well as *public sector bribery* and contains *no* exemption for facilitation payments or for corporate promotional expenditure.

However, it will be simpler to convict a company for the fourth offence (failure to prevent bribery) as it is essentially a strict liability offence: there is only one possible defence.

The Corporate Offence

Under the new Act, a commercial organisation will be guilty of a criminal offence if it fails to prevent a person associated with the organisation from bribing another person with the intention of obtaining or retaining business or an advantage in the conduct of business for that organisation (the "**Corporate Offence**").

The Ministry of Justice on 30 March 2011 published its long overdue final guidance on anti-bribery compliance procedures. The new guidance, 'Guidance about procedures which relevant commercial organisations can put in place to prevent persons associated with them from bribing (Section 9 of the Bribery Act 2010)' (the "Guidance"), which has been the subject of much press speculation in recent weeks, is intended to inform companies about their duties under the Act in more detail.

The Corporate Offence will apply to corporate bodies and partnerships incorporated and formed in the UK. As expressed in the Guidance, the Government's view is that charitable, educational and public sector entities will all come within the scope of the offence, if they engage in commercial activities.

However crucially, it will also apply to corporate bodies and partnerships incorporated or formed *outside* the UK if they carry on business, or part of a business, in the UK, even where the underlying conduct takes place outside the UK. It is currently unclear whether a non-UK company that has its equity or debt securities listed on a UK exchange is thereby at risk of being prosecuted under the Bribery Act, however, prosecutors will be pressed to take the approach that a UK securities listing brings foreign companies within the reach of the corporate offence. The Government's Guidance notes that "having a UK subsidiary will not, in itself, mean that a parent company is carrying on a business in the UK, since a subsidiary may act independently of its parent or other group companies".

For the purposes of this offence, a person is associated with a commercial organisation if he performs services for, or on behalf of, the organisation. Obvious examples of an associated person are employees, agents and subsidiaries that perform services for their parent company. The Guidance confirms that contractors, sub-contractors, suppliers, joint venture partners or a joint venture entity could all potentially be associated persons, but clarifies that where a joint venture entity pays a bribe, the members of the joint venture will not be liable "simply by virtue of them benefiting indirectly from the bribe through their investment in or ownership of the joint venture".

However, the government indicated during debates on the Bill that the definition had been deliberately drafted widely, and could include parties with which there was no formal relationship, including the lead partner in a consortium. It is clear from this that there is a real risk that companies may become criminally liable where an act of bribery has been committed by joint venture or consortia partners, or by agents of any sort. Where the joint venture is being conducted through a contractual arrangement and an employee of another participant in the joint venture pays a bribe, it will not necessarily be assumed that the bribe was intended to gain an advantage for any party other than the participant employing that individual.

The Corporate Offence does not require the associated person to be connected to the UK nor does it require an act to have taken place in the UK.

A bribe on behalf of a subsidiary by one of its employees or agents will not automatically involve liability on the part of its parent company, or any other subsidiaries of the parent company, if it cannot be shown the employee or agent intended to obtain or retain business or a business advantage of a parent company or other subsidiaries – even where the parent company or subsidiaries may benefit indirectly from the bribe: "liability will not accrue through simple corporate ownership or investment, or through the payment of dividends or provision of loans by a subsidiary to its parent".

The need to implement "adequate procedures" to prevent bribery

The Corporate Offence is essentially a strict liability offence. There is only one defence: the organisation will have to prove that it had "*adequate procedures*" in place designed to prevent persons who are associated with it from bribing.

Thus, unless it has "*adequate procedures*" in place, a non-UK company which does business in the UK could be prosecuted in the UK in relation to bribery carried out *wholly* outside the UK by a person *unconnected* to the UK.

The Guidance intends to inform companies' efforts in this regard. The Guidance will be essential reading for anyone tasked with implementing anti-bribery procedures. Although "departure from the suggested procedures ... will not of itself give rise to a presumption that an organisation does not have adequate procedures", prosecutors and courts will inevitably look at how corporate procedures stack up in relation to the principles outlined in the Guidance.

The guidance sets out six principles, summarized as follows:

Principle 1: Proportionate Procedures

The guidance advises that the organisation's anti-bribery policies and procedures should be clear, practical, accessible and enforceable. We suggest that accessibility should be readily achievable through the organisation's internal and external websites.

They should "take account of the roles of the whole work force from the owners or board of directors to all employees, and all people and entities over which the commercial organisation has control". The guidance proposes that financial and auditing controls, disciplinary procedures, performance appraisals and selection criteria can act "as an effective bribery deterrent", and recommends procedures to deal with incidents of bribery "in a prompt, consistent and appropriate manner".

Principle 2: Top level commitment

Reflecting the mantra that "it is tone at the top that counts", the guidance proposes that the management of an organisation should issue a statement of commitment to counter bribery in all parts of the organisation's operation. An organisation should also consider reflecting the commitment against bribery in the organisation's management structure, for example, through the appointment of an anti-bribery officer.

Principle 3: Risk Assessment

An assessment of an organisation's exposure to bribery risk is the starting point for introducing anti-bribery policies and procedures that are tailored to be proportionate to the risks the organisation faces. The guidance implicitly accepts that adequate procedures can be risk-based. However, a risk-based approach requires a careful choice of risk assessment procedures in order to identify internal risks and external risk factors such as country, transaction and business partnership risks.

Principle 4: Due diligence

Although the Bribery Act defence of adequate procedures only requires organisations to have procedures to prevent active bribery by the organisation and those who perform services for, or on its behalf, the guidance goes further in suggesting that due diligence policies and procedures should cover all parties to a business relationship, including the organisation's supply chain, agents and intermediaries, all forms of joint venture and similar relationships and all markets in which the organisation does business. The guidance lists examples of enquiries that might form part of this due diligence, including enquiries:

- About the risk of bribery in the country of operation and the types of bribery most commonly encountered;
- About the risks that a particular business opportunity raises (e.g. whether the project is to be undertaken at market prices, or has a defined legitimate objective and specification); and
- Into the reputation, past behaviour and anti-corruption policies of prospective business partners, and the risks where a public office holder is linked to such partners.

Principle 5: Communication (including training)

Embedding anti-bribery policies and procedures throughout the organisation ensures, the guidance says, that the development of policies and procedures "reflects the practical business issues that an organisation's management and workforce face when seeking to conduct business without bribery". An implementation strategy should cover:

- Who is to be responsible for implementation;
- How the policies and procedures will be communicated internally and externally;
- Training;
- Reporting to top management;
- External assurance processes, if any;
- Monitoring compliance;
- Timescale;

- A clear statement of the penalties for breaches of the policies and procedures; and
- The date of the next review.

The guidance suggests that larger organisations may need to tailor training for different functions within the organisation, and should consider offering or requiring the participation of business partners in anti-bribery training courses. It recommends organisations communicate their anti-bribery policies externally.

Principle 6: Monitoring and review

The guidance suggests larger organisations ensure they have financial monitoring, bribery reporting and incident management procedures, and that they may wish to disclose findings and recommendations for improvement in the organisation's Annual Report to shareholders. Organisations should ensure that their risk assessments and anti-bribery policies and procedures are updated to take into account events such as "government changes, corruption convictions, or negative press reports", as well as "external methods of issue identification and reporting as a result of the statutory requirements applying to their supporting institutions, e.g. money laundering regulations reporting by accountants and solicitors". Higher risk and larger organisations may also "wish to consider whether to commission external verification or assurance of the effectiveness of anti-bribery policies, or to seek membership of one of the independently-verified anti-bribery code monitored by industrial sector associations or multilateral bodies".

Will a corporate conviction trigger a public procurement ban?

Under the EU Public Sector and Utilities Procurement Directives, implemented in the UK by the Public Contracts Regulations 2006 and the Utilities Contracts Regulations, public authorities are required to exclude from public contracts all suppliers which have been convicted of, *inter alia*, a corruption offence. Hence, a corporate conviction for bribery, including a failure to prevent bribery, could potentially result in exclusion from contracts with EU member state governments. The Government has promised to clarify this before the Bribery Act comes into force.

The foreign public official offence

Under the Bribery Act it will also be easier to bring prosecutions for bribing a foreign public official. Likewise, commercial organisations will be at particular risk of the offence of failing to prevent bribery involving foreign public officials. The new foreign public official offence will be triggered even in circumstances where the conduct would not currently be characterised as improper or criminal. It will only be necessary to show (i) that the company or a person offered or gave a financial or other advantage at the request or with the consent of a foreign public official intending to influence him in his capacity as such, (ii) that the company or person intended to obtain or retain business or an advantage in the conduct of business, and (iii) that the official is neither permitted nor required by written law to be so influenced. Companies that are subject to the Bribery Act will be extremely cautious in their dealings not only with government officials but also with those who assist them obtain government business and approvals. Even where the advantage requested by a government official in negotiations does not appear to benefit any official or their families, it is expected that local law opinions will be commonly sought in order to establish that there are written laws permitting the official to be influenced. In this regard, the fact that such advantages are customary in business dealings in the country concerned will not protect against the risk of a charge of bribing a foreign public official.

Facilitation payments

Payments made to foreign public officials with the aim of expediting or securing the performance of a routine governmental action (often known as facilitation payments) will clearly be criminal offences under the Bribery Act.

The Guidance describe facilitation payments as "small bribes" and says that "exemptions in this context create artificial distinctions that are difficult to enforce ...". Nevertheless, the Guidance recognise "the problems that commercial organisations face in some parts of the world and in certain sectors". Prosecution is more likely where there are large or repeated payments, where facilitation payments are "planned for or accepted as part of a standard way of conducting business" and 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".

A Case Study (not officially part of the Guidance) sets out a number of steps a business should consider in dealing with hidden or overt facilitation payments. These include: building in extra time in project planning to cover potential delays as a result of non-payment; questioning the legitimacy of the payments; raising the matter with superior officials and/or the UK embassy; and the use of UK diplomatic channels or participating in "locally active non-governmental organisations" to apply pressure on the relevant governmental authorities.

Conclusion

The Bribery Act creates a broad scope of offences and, significantly, applies to non-UK companies carrying on business, or part of a business, in the UK. It also puts companies that carry on any part of their business in the UK at risk of prosecution for bribery by those performing services for them or on their behalf in connection with their business.

The Corporate Offence creates a compelling reason for foreign companies doing business in the UK to take strenuous precautions to guard against acts of bribery being committed on their behalf, and to ensure that their anti-corruption compliance programmes meet the highest standards and reflect the statutory guidance. It is also likely to trigger efforts by non-UK companies which do business in the UK to impose stringent anti-corruption controls on non-UK companies performing services for, or on their behalf. Even non-UK companies which have designed and put in place rigorous FCPA compliance programmes need to consider whether those programmes are sufficient for the purposes of the Bribery Act, in particular, whether they adequately address the risk of private sector corruption, prohibit the making of facilitation payments and impose adequate controls on corporate promotional expenditure.

This Client briefing does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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