

fact sheet

CORPORATE AND COMMERCIAL DEPARTMENT

The Bribery Act 2010

BACKGROUND

The Bribery Act 2010 (the "Act") is expected to come into force in April 2011.

The Act forms part of the UK's new hard line approach in the fight against corruption, which has also seen a more proactive approach of the Serious Fraud Office ("SFO") in investigating corruption allegations and enforcing anti-corruption laws. However, the final result of this new law is not without controversy and could have worrying consequences for a commercial organisation operating in the UK.

So what does the new Act mean for companies (both in the UK and abroad) and what do they need to do to prepare for it? And does the Act provide a welcome clamp down on corruption or does it go too far?

OVERVIEW

In summary, the Act:

- is not retrospective in effect;
- replaces the UK's existing fragmented bribery laws, which are considered to be outdated and inconsistent with the OECD Bribery Convention;
- sets out four main offences, including two new offences:
 - bribing another person (Section 1);
 - being bribed (Section 2);
 - bribing a foreign public official ("FPO")(Section 6); and
 - failure by a commercial organisation to prevent bribery (Sections 7 to 9). It is this new offence that has, in particular, hit the headlines;
- has an extremely wide territorial effect, particularly in relation to the offence of failing to prevent bribery which catches overseas companies with only a minor presence in the UK regardless of where the bribery was actually committed;

- provides that senior officers may be found liable for bribery offences committed by their company and any person associated to it (subsection 14(2));
- prohibits facilitation payments;
- requires companies to have 'adequate procedures' in place to prevent bribery, although exactly what constitutes 'adequate procedures' remains unclear (subsection 7(2)) (see below).

The offences are considered in more detail below, together with some suggested steps to assist companies prepare for the Act.

THE GENERAL BRIBERY OFFENCES: WHAT CONSTITUTES BRIBERY?

A person commits the offence of bribing or being bribed if:

- a financial or other advantage (financial or otherwise) is promised, requested, offered, agreed, accepted or given to another person, either directly or through a third party; and
- he intends or knows that the advantage constitutes, induces or rewards the improper performance of a relevant function by the person receiving the bribe or another person.

The general bribery offences require some form of intention to induce or reward improper performance. They can capture acts of bribery committed overseas. **Improper performance** is widely defined and requires a failure to meet an expectation (on the basis of what a reasonable person in the UK would expect) of good faith, impartiality or the behaviour expected from a position of trust.

Notably, the general bribery offences can be committed in relation to both the public and private sectors.

BRIBING A FOREIGN PUBLIC OFFICIAL/FPO (A/THE "FPO OFFENCE")

This new offence only applies to offering or giving bribes, and not to accepting them. An offence will be committed if:

- the person giving the bribe intends to influence the FPO and to obtain or retain business or a business advantage; and
- the bribe is not permitted by the local written law. Custom or tolerance will not suffice. Cultural differences are not a defence.

The general bribery offences and the FPO Offence are committed if:

- any act or omission forming part of the offence takes place in the UK; or
- the offence takes place outside of the UK by a person who has a close connection with the UK (which includes UK incorporated companies, British citizens and individuals ordinarily resident in the UK).

CONSENT AND CONNIVANCE – SENIOR OFFICER LIABILITY

Section 14 of the Act also sets out circumstances in which organisations may be found guilty of the "individual offences" under Sections 1, 2 and 6 of the Act. Section 14 provides that where:

- an offence is committed by a body corporate under Sections 1, 2 or 6; and
- that offence is proved to have been committed with the consent or connivance of either a senior officer of the body corporate or someone purporting to act in that capacity,
- the senior officer or person (as well as the body corporate) is guilty of the offence (Section 14(1) and (2) of the Act).

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In this situation, the body corporate and the senior manager are both guilty of the main bribery offence.

A senior officer is widely defined to include directors, company secretaries, managers or similar officers or any person acting in that capacity. However, where the offence is committed outside of the UK, the senior officer will only be liable if he has a close connection with the UK (which includes British citizens and individuals ordinarily resident in the UK).

Senior officers cannot, however, be held liable for the company's failure to prevent bribery under the "Strict Liability" Corporate Offence set out below.

THE "STRICT LIABILITY" CORPORATE OFFENCE

It is this offence which is of most concern to companies.

Under the existing law, the offences related to bribery require an active involvement of the commercial organisation itself, through its "directing mind and will".

Section 7 introduces a new strict liability offence for commercial organisations where someone performs services on the corporation's behalf in any capacity with the intention to obtain or retain business or a business advantage for the company. The only defence is for the company to show (on the balance of probabilities) that it had "adequate procedures" in place to prevent bribery. If it fails to show adequate procedure to prevent bribery, the commercial organisations will be liable. There is no requirement from the prosecution to show "intent" or "knowledge".

This new offence catches commercial organisations incorporated in the UK as those being of "foreign origin" but who carry on a business or part of a business in the UK. Therefore it is not crucial where the acts of bribery occur, but where the corporate conducts business. No explanation has yet been given of what is meant by "part of the business".

Some practitioners perceive that an overseas company with even a minor business presence in the UK could therefore become liable under the Act if its agent, employee or other associated person is involved in bribery anywhere in the world, even if the bribery itself has no connection with the UK.

It is essential that overseas companies, as well as UK companies, are aware of the provisions of the Act and ensure they are adequately prepared for when it comes into force.

Please note that if a foreign subsidiary is acting entirely on its own account it would not normally make the UK parent company liable under the "Corporate Offence" (it would not be performing services for the UK parent). However, the UK parent could still be liable for the actions of its subsidiaries in other ways, depending on the facts and its knowledge of the subsidiary's wrongdoing. For example, the UK parent could be liable for false accounting offences (where the accounts of the subsidiaries are consolidated with its own accounts) and/or money laundering under relevant legislation (as bribes, together with any business obtained through bribes, may amount to the proceeds of crime).

"Adequate Procedures"

The Government has recently produced "Draft Guidances" for consultation purposes. Factors to be taken into account in determining what is adequate in the circumstances, include a company's size, the business sectors it operates in and the risks it is likely to be exposed to. Existing anti-corruption guidelines published by the OECD, Transparency International and the GC100, for example, are likely to be reflected in the Government guidance (see below).

There are six key principles of a bribery free business regime which are illustrated with case studies. It is intended to complement other guidance for countering corruption, such as that published by the Financial Services Authority for the financial services industry, the SFO and the City of London Police. The key

principles are intended to give all commercial organisations a starting point for planning, implementing, monitoring and reviewing their bribery free business regime. They are likely to be more useful to smaller and medium sized commercial organisations that may not previously have addressed the prevention of bribery than larger organisations which may already have a policy and procedures in place.

The draft Guidance does not address the issue as to whether bodies created by statute as corporate bodies fall within the scope of the "Corporate Offence". However, some commentators have suggested that bodies created by statute as corporate bodies may fall within the scope of the Section 7 offence.

For further details, please consult: <http://www.justice.gov.uk/consultations/docs/bribery-act-guidance-consultation1.pdf>

FACILITATION PAYMENTS

Despite much debate during the consultation process, facilitation payments are prohibited under the Act. Facilitation payments are generally understood to be payments of small sums of money to expedite the performance of certain administrative functions (e.g. the release of goods from customs), and are seen by many as a necessary part of business in some jurisdictions. The SFO has clearly stated that it considers that facilitation payments are unjustifiable and should not be made.

While facilitation payments are technically illegal now and will remain so under the new Act, it does not follow that their payments will be prosecuted in every case. Discussions in the House of Commons seem to have led to the conclusion that the SFO has discretion on whether to prosecute based on the facts and merits of such prosecution and the public interest. This gives companies caught by the Act little comfort.

CORPORATE HOSPITALITY

The Act does not exempt reasonable expenditure for corporate hospitality. There remains the risk, therefore, that ordinary corporate hospitality could be in breach of the Act. This is particularly the case in relation to the FPO Offence which requires an intention to influence a foreign public official to obtain or retain business or a business advantage.

In the case of promotional expenditure involving public officials, while the "Corporate Offence" requires a certain intention on the part of the bribe-payer, it does not require any form of impropriety to create the offence. Almost any form of hospitality could trigger this offence, unless it was permitted by the written law of the "Corporate" (which is unlikely).

The UK Government accepts that ordinary corporate hospitality may technically be in breach of the Act, but considers that it is sufficient to rely on the prosecutor to decide whether any corporate hospitality goes beyond what is legitimate (i.e. excessive or unreasonable) and so should be prosecuted under the Act. This leaves companies in a position of uncertainty as to what level of corporate hospitality is acceptable and many may be uncomfortable relying on the prosecutor's discretion, particularly given the seriousness of the penalties that may be imposed. It is to be noted that the Government does not intend to give any assistance on this issue.

PENALTIES

An offence under the Act is punishable by an unlimited fine or (for individuals) up to 10 years' imprisonment (or both).

Companies convicted of an offence under the Act also risk being permanently debarred from tendering for public sector contracts (the EU public contracts) under Public Contracts Regulations 2006 and the Utilities Contracts Regulation 2006, as well as suffering severe reputational damage.

Other possible serious consequences of being found guilty of an offence under the Act, include confiscation under proceeds of crime legislation, which seeks to take

away the entire benefit obtained by the wrongdoer as a result of his offence. This may mean the entire revenue of a corporate for several financial years, in addition to any fine levied under the Act.

STEPS TO BE TAKEN

Companies should, as a matter of urgency, review their existing anti-bribery procedures, carry out a risk assessment and put additional procedures in place to be able to rely on the "Adequate Procedures" defence in appropriate circumstances.

By doing so, boards would be complying with their corporate governance and other obligations by seeking to protect the company, so far as possible from potential liability under the Act.

The steps a company should take will depend on its size, the sectors and locations in which it operates and the risks it may be exposed to, but may include some or all of the following:

- ensuring the board of directors and senior management are informed of the impact of the Act (including the risk of personal liability for offences committed by the company) and adopting a "zero tolerance culture" where bribery is not acceptable;
- implementing appropriate and consistent disciplinary procedures;
- implementing an anti-corruption policy and a clear code to prevent bribery (or updating existing regimes in the light of the Act), communicating it to employees and partners and appointing a senior individual or a committee of senior individuals to be responsible for overseeing compliance;
- undertaking regular full and global risk assessments of the company;
- carrying out due diligence checks on business partners, agents and, in some circumstances, employees (as companies risk being liable for the actions of an "associated person");

- including or reviewing any appropriate anti-corruption provisions in standard form contracts for business partners and employees;
- implementing clear codes of conduct to prevent bribery (including in relation to gifts, corporate hospitality, whistleblowing, donations and lobbying, contracts with third parties and code of ethical conduct) and establishing anti-corruption training programmes and report procedures for employees;
- creating a system of checks and controls within the financial management system to ensure implementation of the policies.

CONCLUSION

While the Act represents a long needed overhaul of the UK's anti-bribery laws, there remain some significant concerns, particularly in the context of corporate hospitality. Much depends on the Government guidance, which will hopefully clarify some of these uncertainties. What is clear, however, is that companies cannot afford to wait for this guidance before reviewing their anti-corruption procedures.

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