

Working with the Bribery Act 2010

By Neill Blundell



The Bribery Act, which received Royal Assent on 8 April 2010, will come into force in April 2011 but will not have retrospective effect. The Act makes sweeping changes to UK bribery and anti-corruption legislation and will have a huge impact on UK companies in all sectors as well as companies operating a branch or subsidiary in the UK. The existing legal framework relating to corruption is complex, antiquated and fragmented, which is why new legislation has been introduced. It will make the UK anti-bribery regime one of the strictest in the world.

This article by **Neill Blundell**, Head of the **Eversheds Fraud Group**, summarises the Act and gives recommendations to boards on actions to be taken.

The Bribery Act 2010 is a new set of laws intended to cut down on corruption in the UK. The Act itself, which replaces the UK's old anti-bribery legislation, is comprised of four key sections: Active Bribery, Passive Bribery, Bribery of a Foreign Public Official and Failing to Prevent Bribery.

KEY AREAS

The key areas for UK companies to be aware of are:

- The offences of bribing another person (section 1) or being bribed (section 2)
- The corporate offence of 'failing to prevent' bribery (section 7) and the defence of 'adequate procedures'
- Bribery of a Foreign Public Official (FPO) (section 6)
- The illegality of facilitation payments
- The extra territorial scope of the Bribery Act
- The potential criminal liability of senior officers and managers
- The potential for debarment from public procurement contracts if convicted

* A consultation exercise is currently going on relating to what 'Adequate Procedures' constitutes. Finalised guidance will be published in January 2011.

Active Bribery is promising, offering or giving a bribe which could be in the form of hospitality or a gift intending to induce the recipient into committing improper conduct.

Passive Bribery is requesting, accepting or agreeing to receive a bribe (payment or other advantage) in return for improper conduct.

Bribery of a Foreign Public Official involves inducing a Foreign Public Official (or any legislative, administrative or judicial power) to act to your advantage or the advantage of your business in their official capacity.

Failing to Prevent Bribery is a new law that gives corporate responsibility to businesses to stop bribery. They must stop anyone associated to the business from committing bribery for its benefit. The law also includes facilitation payments, meaning that, even if the bribe is not taken for improper conduct, the business can still be held accountable.

AWARENESS AND CONSEQUENCES

Forty-one per cent of businesses surveyed for our [Corruption Clampdown: An Eversheds Report on the Bribery Bill 2010](#), were not aware that it is illegal to give, promise or offer an advantage to help secure business.

This ignorance of the Bribery Act also applies to its consequences, with 91 per cent of businesses not knowing the maximum jail sentence for bribery. Twenty-nine per cent also thought the new legislation goes too far - showing precisely how tough it really is.

One in four directors were not actually aware that they could face prosecution. So will the new legislation make the UK a more or a less attractive place to do business? 26 per cent said it would be more attractive, while 24 per cent said less.

PENALTIES

A violation of anti-corruption laws may result in:

- Criminal penalties and possible unlimited fines for the company
- Directors and employees of the company facing huge fines themselves and/or jail sentences of up to 10 years
- Directors may be disqualified from holding a director position for up to 15 years
- Disgorgement of the company's profits
- Loss of reputation, public trust and business for the company
- Debarment from public procurement contracts (Article 45 of the EU Public Sector Procurement Directive 2004)
- Investigation costs
- Diversion of valuable management time

fine and a maximum prison sentence of 10 years. For Failing to Prevent Bribery, a company will also face an unlimited fine. Directors convicted of being involved with bribery face a maximum of 15 years disqualification from any directorial position. Not only this, but there is also a possibility of being banned from both European Union and United States procurement lists.

However, the consequences of bribery go beyond punishments. The negative publicity of bribery can send reputations and, thus, share prices through the floor, as the company becomes associated with corruption. Private relations are also affected, with businesses less likely to enter into relationships with companies associated with bribery.

Further, if anti-corruption procedures are not introduced and an incident happens, then the company will be forced to pay much more in extensive internal investigations and audits.

PREPARATION

It seems that the UK is almost completely unprepared for this new set of laws - 60 per cent of businesses appear totally unaware of them; one in five admit their organisation have no bribery policy at all and 45 per cent of board directors admit they have no provisions in place to prevent bribery. Consequently, the UK's companies are likely to be hit hard - particularly as the Serious Fraud Office has said that it will enforce the laws aggressively.

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You may ask that, if this many people do not know the more common bribery laws, then how many will know about the new corporate responsibility? 60 per cent of all respondents were unaware that failing to prevent bribery is a corporate offence. This means that those who are aware have an advantage in that they have time to prepare before the legislation takes effect. This preparation will help save expenditure and time as well as allowing those companies the luxury of not being under pressure.

In terms of specific penalties, for Active Bribery, Passive Bribery or Bribery of a Public Foreign Official, there is an unlimited

SO, WHAT IS TO BE DONE?

Two important words, when introducing an anti-corruption policy, are 'due' and 'diligence'. It may be impossible to prevent corruption in your business, but what you must prove to the court is that you had taken all conceivable anti-corruption options prior to the case.

The first, and most important, step is the introduction of an anti-corruption policy by the board of directors - a policy that should include a clear code of conduct. It is also advisable that the CEO makes a statement about expected behaviour and the consequences of non-adherence.

WHAT DO YOU NEED TO DO?

UK companies will need to consider the following:

- Appoint a senior person, who reports into the board, and who will have responsibility for the company's anti-corruption programme
- A 'risk based' audit of corruption risks faced by the company
- Review current relationships with agents, intermediaries and joint venture partners
- Ensure adequate due diligence is undertaken on all new business relationships (including agents, intermediaries and joint venture partners) and that those relationships are properly monitored on an on-going basis
- Develop an anti-corruption programme (see below) which will include an anti-corruption policy, procedures around gifts and entertainment, whistleblowers, sponsorship and charitable donations. These policies and procedures need to be integrated and visible throughout the organisation
- 'Risk based' training of staff throughout the organisation on corruption risk and on the new policies and procedures
- Consult with employees/agents in worldwide sites and obtain advice on local laws and customs

DRAFT GUIDANCE

Recently published draft guidance indicates 6 principles around which the anti-corruption programme needs to be based:

1. Risk assessment
2. Top level commitment
3. Due diligence
4. Clear, practical and accessible policies and procedures
5. Effective implementation
6. Monitoring and review

Decisions should not be made informally and, in areas where corruption is more likely, it is advisable that a more senior member of the company takes them.

Businesses are responsible if an agent or employee is corrupt in their name. This means that if an employee, a foreign subsidiary or even a third-party intermediary, is responsible for a bribe, the UK company (or company with business in the UK) can be found accountable.

Supply and contracting is therefore an area that is particularly susceptible to corruption. Minimise this exposure through in-depth research and sound risk management before appointing any sub-contractors and suppliers.

As the company is responsible for their actions, employee awareness is a key issue. Yet, two-thirds of the people we asked as part of the Corruption Clampdown Report were either unsure if they had an anti-corruption procedure, or did not have one at all. For this awareness, it is important to incorporate training on your anti-corruption policy, not only for relevant employees, but also for the Board of Directors. Remember that, as part of the new law, directors can be held responsible if they fail to report corruption.

As an organisation, therefore, it is not only business contracts that must be altered, but also employment contracts. By including contractual obligations and penalties, it is much easier to manage corruption in employees. A further step would be to have a disciplinary procedure in place which would allow the company to take action against employees who break the law.

All business contracts should be carefully analysed especially when through an agent - ensuring that there are anti-corruption clauses included.

Larger businesses should have an anti-corruption programme with a Senior Officer in charge who has the authority to investigate properly. This program can also involve 'whistleblowers', meaning that, if an employee has uncovered corruption and feels uncomfortable reporting it, they can do so to these 'whistleblowers' who can then progress it further.

Financially, regular internal audits are advisable, as this helps to keep a tight control on the finances of your company and, thus, further reduce the risk of corruption.

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