Client Advisory

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Bribery Act 2010: Statutory Guidance Published

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All persons doing business in the UK will need to consider the implications of the UK Bribery Act 2010 (the Act), which is scheduled to come into force on 1 July 2011.

On 30 March 2011, the UK Ministry of Justice published guidance on the operation and enforcement of the Act (the Guidance). Some of the key points are summarised below.

What seems clear, though, is that affected businesses should now focus on implementing appropriate policies and procedures (including reporting structures) and training staff.

Extra-territoriality

The new law will have broad and extra-territorial effect, applying to UK companies, UK citizens, UK-resident individuals and foreign companies doing business in the UK, regardless of whether the act or omission constituting bribery occurs in or outside the UK. However, the Ministry has chosen not to clarify exactly the range of entities covered by the Act. For instance, the Guidance states that a London stock market listing for a foreign company will not *automatically* require that company to comply with the Act. It will be left to the courts to decide whether a company falls under the jurisdiction of the Act, which is not ideal for businesses seeking certainty.

"Improper performance"

Section 1 of the Act makes it an offence to give, offer or promise a "financial or other advantage" to procure or reward "improper performance" of a public or business activity. Section 2 contains the corollary offence of requesting, accepting or receiving a bribe.

The Guidance explains "improper performance" as that which amounts to a breach of the expectation that a person will act in good faith, impartially or in accordance with a position of trust. Functions in both the public and private sectors are covered. The test will be an objective one, i.e. what a reasonable person in the UK would expect. Where the function is not subject to UK law, local written law will apply, although local customs or practice which are not written law are to be disregarded.

Corporate hospitality

There have been fears that the Act would bar corporate hospitality, e.g. giving clients tickets to events, paying for their travel and accommodation, etc. However, the Guidance indicates that the Act is not intended to criminalise bone fide, proportionate and reasonable hospitality, marketing and other similar business expenditure. The prosecution would have to show: (a) that the company's largesse was intended to cause the official's improper performance; and (b) that a real advantage was given to the official (or a third person at his request).

The Guidance recognises that different sectors have different hospitality norms and practices, although merely following the industry norm would not by itself demonstrate that no offence was committed. Generally speaking, the more extravagant the hospitality, the more likely that it is intended to influence the official.

Foreign public officials

Under section 6, a person is guilty of an offence if he intends to influence someone in the latter's capacity as a foreign public official. Note that section 6 has a lower evidential standard than section 1, i.e. the prosecution only has to prove intent.

"Foreign public official" includes, *inter alios*, elected and non-elected officials holding a legislative, administrative or judicial position in any country or territory outside the UK. It also includes officials at public agencies, public enterprises and international organisations (e.g. the World Bank).

Section 6 does not apply if the foreign official is permitted or required by the applicable local written law to be influenced in performing his function by the advantage given. For instance, if local law requires a contracting party to make side investments in the local economy, this is very unlikely to be deemed a section 6 offence. However, where side investments go beyond the writ of local law in benefiting the foreign official himself, UK prosecutors will consider the public interest in prosecuting.

Criminal liability of commercial organisations

Under section 7, a commercial organisation is guilty of an offence if it fails to prevent bribery anywhere in the world by a person associated with it with the intention of obtaining or retaining business or a business advantage.

A person is "associated" with a commercial organisation if he or it performs services for or on behalf of that organisation. Therefore, employees, agents, consultants and overseas group entities are all included. Contractors and suppliers who perform services (as distinct from those merely selling goods to the company) could also be caught by the definition. A joint venture entity is at risk of passing liability to its members where the bribe is paid with the intention of benefiting them. If the JV is a contractual arrangement, whether a party to the arrangement is liable for a bribe paid by an employee or agent working for one of the other parties to the JV will depend on the extent of control it has over that employee or agent.

It is a defence for the commercial organisation to prove that it had "adequate procedures" in place to prevent those associated with it from undertaking offending conduct. Whether procedures are "adequate" will depend on the nature, size and risk of bribery in the particular business. Please see below for more on procedures.

Because of the risk that a company and its directors could be liable for offences committed down the length of the supply chain, by persons who may be unknown to the company, the Guidance suggests that companies should establish anti-bribery procedures (e.g. risk-based due diligence, the use of anti-bribery terms and conditions, etc.) with the contractual counterparty and require it to do the same with the next party in the chain, and so on.

In any event, an offence will not be committed if it cannot be proved that the associated person *intended* to obtain or retain a business advantage for the company. This is so even if the company benefits indirectly from the bribe. However, if intent can be proved, then section 7 will come into play.

Facilitation payments

Small bribes to facilitate routine government action can constitute a section 6 offence or, if the requisite intention to induce improper conduct is present, a section 1 offence, and therefore liability for the commercial organisation under section 7. The Guidance states that there will be no exemptions for facilitation payments. However, it says that the common law defence of duress may be available if the payment is made to avoid injury, imprisonment or death and there is no alternative. For similar reasons, there may also not be a public interest in prosecuting.

Anti-bribery procedures

Given that “adequate procedures” is the only defence to the corporate offence in section 7, it is imperative that companies develop and implement a robust set of anti-bribery procedures. The Guidance sets out six key principles for businesses to consider as they formulate and enforce their anti-bribery strategy:

- Procedures should be **proportionate** to the bribery risks that an organisation faces. For instance, a small company may face lower bribery risks than a multinational operating across multiple jurisdictions. However, this will not excuse a small company from putting comprehensive and effective procedures into place. The Guidance illustrates this with a case study of an SME which contracts with a new customer in a foreign country where facilitation payments are commonplace; it suggests enlisting UK diplomatic support to pressure the foreign government to take action to stop demands for such payments.
- There should be **top-level management commitment** at the organisation in developing, implementing and communicating anti-bribery policies internally and externally.
- The organisation should undertake informed, periodic, written **assessments** of its bribery risks. External risks should be assessed at the level of country, sector, transaction, business partner and business opportunity (as appropriate). Internal risks include inadequate training of employees; a bonus culture that rewards excessive risk taking; vagueness in the policies relating to hospitality, political or charity expenditure; a lack of financial controls; and an ambiguous or half-hearted anti-bribery message from senior executives.
- **Due diligence** should be undertaken, on a proportionate basis, to identify and manage bribery risks.
- The organisation should ensure that its anti-bribery policies and procedures are understood throughout the organisation through proper **internal and external communication**, including training, codes of conduct and feedback/reporting mechanisms.
- **Ongoing monitoring and review of the procedures.** Financial controls are particularly important here. Organisations should also consider obtaining external review of policies and procedures.

Prosecutorial guidance

The UK’s director of public prosecutions and the Serious Fraud Office have jointly issued a separate guidance note on what factors they will take into account when deciding whether to prosecute offences under the Act, e.g. self-reporting, post-investigation improvement and monitoring. This note also mentions that facilitation payments are more likely to trigger prosecution if premeditated.

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