Bribery Act 2010 — are you running out of time to implement compliance policies and procedures?

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CATEGORY:
ARTICLE

The Bribery Act 2010 (the '**Act**') comes into force on 1 July 2011 and simplifies and expands the range of bribery-related offences for which individuals and organisations can be prosecuted.

All UK businesses and overseas businesses carrying on activities in the UK need to be aware of the provisions of both the Act and the guidance. For a link to the Ministry of justice's guidance on the Act click here.

Why has the Act been introduced and what action do businesses need to take?

The Act reforms the existing bribery laws and provides for a consolidated scheme of criminal offences. It covers bribery both in the UK and abroad, and in both the private and public sectors. The Act also introduces a new 'corporate' offence of failing to prevent bribery.

We recommend that all businesses analyse their current activities to establish whether there are any particular risk areas, and to assess the strength of the measures in place to prevent bribery. It takes only one act of corruption to bring a business and its staff into disrepute and bring exposure to prosecution. Having the right policies and procedures in place will help to mitigate this risk. Please note that these policies need to be in place by 1 July 2011.

Organisations also need to have trained staff and updated staff handbooks and compliance procedures by 1 July 2011. See 'What precautionary measures should be taken to prevent bribery?' below.

A summary of the finalised Ministry of Justice guidance is set out in the Appendix to this note.

What constitutes an offence?

- Giving bribes ('active offence'): It will be an offence to promise, offer or give a bribe (whether directly or through a third party).
- Receiving bribes ('passive offence'): It will be an offence to request, receive or agree to receive a bribe.
- Bribery of a foreign public official ('public offence'): It will be an offence to bribe a foreign public official. The definition of a foreign public official covers both foreign government officials and individuals working for international organisations.
- Failure of commercial organisations to prevent bribery ('corporate offence'): A commercial organisation may be guilty of an offence if someone acting on its behalf commits an active offence or a public offence.
- Liability of senior officers: A senior officer of a corporate body will be personally guilty of an offence if he consents to or connives in an active, passive or public offence by the company.

The concept of a 'bribe' is broad. It covers the offer, promise or giving of any financial or other advantage which is intended to induce or reward the improper performance of a public function or business activity (or is done in the knowledge or belief that acceptance of the advantage itself constitutes the improper performance of a public function or business activity).

'Improper performance' covers any act or omission that breaches an expectation of good faith or impartiality, or an expectation arising from a position of trust. This is an objective test based on what a reasonable person in the UK would expect in relation to the performance of the relevant activity.

What about corporate hospitality?

The Ministry of Justice's position on corporate hospitality as explained in the revised guidance is that '*Bona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations, is recognised as an established and important part of doing business and it is not the intention of the Act to criminalise such behaviour*'. This statement is included in the section of the guidance on the offence of bribing a foreign public official.

Hospitality is also referred to in the section of the guidance on the offences of bribing another person. This explains that a successful prosecution based on corporate hospitality would depend on the prosecution being able to show that '*the hospitality was intended to induce conduct that* *amounted to a breach of an expectation that the person would act in good faith, impartially or in accordance with a position of trust'*. It cites as an example of an activity that would not meet that test an invitation to foreign clients to attend a Six Nations match at Twickenham as part of a public relations exercise designed to cement good relations.

Plainly the timing of such hospitality could be critical and offering it just before a decision was due on a major public services contract could take an organisation over the line into potential criminal conduct.

The new corporate offence: failure of commercial organisations to prevent bribery

The Act introduces a new corporate offence of 'failing to prevent bribery'. The new corporate offence can be committed by 'relevant commercial organisations', a broad definition which includes:

- any body which is incorporated under, or a partnership which is formed under, any UK law (wherever it carries on business); and
- any body corporate or partnership (wherever incorporated or formed) which carries on business in the UK.

The corporate offence will be committed if:

- the bribery is committed by a person associated with the relevant commercial organisation;
- the person intends to secure a business advantage for the organisation; and
- the bribery is either an active offence (giving bribes) or a public offence (bribing a foreign public official). The individual committing the bribery does not need to be prosecuted successfully for the corporate offence to apply. The corporate offence does not apply where the individual commits a passive offence (ie requests or receives a bribe).

'Associated' has a broad meaning and will cover not only employees, agents and subsidiaries of the organisation, but also third parties who perform services for it or on its behalf (regardless of their capacity)

It is irrelevant where the bribery is committed, which means a foreign corporate entity can be prosecuted in the UK in respect of a foreign bribe merely by virtue of having a business presence in the UK (even if the bribe is unrelated to the UK business).

It is, however, a **defence** for the organisation to demonstrate that it had in place **adequate procedures** designed to prevent persons associated with it from bribing others on its behalf. The Secretary of State is required by law to publish guidance about such procedures. As mentioned above, the Ministry of Justice has now published finalised guidance, which is summarised below.

The new offence of failing to prevent bribery means that a corporate entity can be prosecuted in respect of bribery even if senior management were entirely unaware that the bribery had taken place, and even if the bribery was committed by a third party (acting on its behalf). The Liability can be avoided if the organisation has in place adequate procedures to prevent bribery. Nevertheless this is a marked change from the existing law and distinguishes this particular offence from the others under the new Act.

To whom do the other offences apply?

A person or entity can be prosecuted in the UK for giving or receiving bribes or bribing foreign public officials (the active, passive and public offences) if:

- any part of the offence takes place in the UK; or
- the offence takes place abroad but the person or entity is: a British citizen; or an individual ordinarily resident in the UK (whether or not a British citizen); or a body which is incorporated under any UK law.

Overseas corporate bodies will not therefore be liable to prosecution in the UK for active, passive and public offences committed abroad although they may be caught by offences committed in the UK and, as mentioned above, they may face prosecution for failing to prevent bribery.

Senior officers of an organisation can also be held personally liable under the Act for bribery offences committed by the organisation (ie active, passive or public offences). 'Senior officers' is widely defined in the Act to include directors, managers, company secretaries and other similar officers, as well as those purporting to act in such a capacity. The provision will therefore catch a wider group than statutory office holders such as directors and company secretaries. However, it only extends to British citizens and those ordinarily resident in the UK.

For senior officers to be found liable, they must have 'consented to' or 'connived in' the offence committed by the organisation. This may include failing to act. In practice, it will be difficult to establish corporate liability without evidence of active participation, consent or connivance by senior officers. This is different from the position in respect of the corporate offence of failing to prevent bribery, where the organisation may face prosecution regardless of whether any senior employee is liable to individual prosecution.

What are the penalties?

The Act provides for significant penalties on conviction for any of the bribery offences: up to 10 years' imprisonment and/or an unlimited fine for an individual; or an unlimited fine for a company. Directors convicted of bribery offences are likely to be disqualified from acting as directors for substantial periods.

What precautionary measures should be taken to prevent bribery?

The steps to be taken to prevent bribery will vary from organisation to organisation. Relevant factors will include the organisation's particular business circumstances and culture, size, business sector, nature of business and locations of operation. The finalised guidance emphasises a proportionate approach, bearing in mind the size of the organisation, the complexity of its operations and the extent of its bribery related risk.

An organisation might consider the following steps:

Risk assessment and due diligence

Undertake a review of all the organisation's activities in order to identify where a risk of bribery may arise. Consider whether any relationships with third parties, including joint ventures, need to be reviewed whether the organisation's anti-bribery policies should be notified to the third parties.

When entering into new relationships, consideration should also be given to what contractual protections should be included in any written agreement. These might include, where the arrangements are perceived to carry a degree of risk, a requirement for the counterparty to certify annually that it has complied with agreed form undertakings regarding compliance with anti-bribery policies. The contract would then provide that a breach of the ongoing anti-bribery undertakings would constitute a material breach of the contract and an indemnity for any loss would be included. Even in low risk situations, it may be prudent to include anti-bribery undertakings in contracts as a matter of course even if the counterparty is not required to produce a compliance certificate each year.

Senior / responsible officers

The new law should be emphasised to senior officers and the board of directors should take responsibility for implementing effective anti-bribery measures. The finalised Guidance states '*Those at the top of an organisation are in the best position to foster a culture of integrity where bribery is unacceptable*'. Consider forming an internal committee of relevant senior people or appointing a compliance manager to oversee and monitor compliance with the anti-bribery measures (and ensure it has the resources to carry out its responsibilities).

Anti-bribery policy and employment contracts

Put in place an anti-bribery policy (or update any existing policy), which covers bribery generally as well as concerns specific to the organisation (including rules on gifts, entertainment, expenses, sponsorship and charitable donations) and monitor compliance with the policy. Emphasise that compliance is mandatory and set out actions that are prohibited, but also address the question of what to do if an individual comes across bribery within the business.

Ensure the anti-bribery policy is communicated and readily available to all employees at all levels (eg by e-mail, in the appropriate section of a staff handbook and/or on an intranet) and that it is endorsed and promoted from the highest levels in the organisation.

Ensure employees are aware that breach of the policy may give rise to disciplinary action (including possibly summary dismissal). The policy must also be communicated to all other persons who perform services for or on behalf of the organisation, including consultants, contractors and agency staff.

Whistleblowing procedure

Ensure there is an adequate whistleblowing procedure in place (and readily available), so that staff feel confident that they can report bribery or suspected bribery safely and confidentially. It is important that staff members are encouraged not just to avoid participating in bribery but to report bribery by others. Contracts with staff, contractors and consultants should, if possible, impose a general obligation to report wrongdoing.

Implementation, induction and training

The anti bribery policy should be an integral part of any induction process and training. Training, appropriate to the organisation's size and the extent of bribery risk, should be given to all staff where appropriate, not just new joiners.

Monitoring procedures

Ensure that relevant financial (and other) procedures contain adequate safeguards to identify irregular activity.

Ensure that acts in breach of the anti-bribery policy are dealt with appropriately (eg in accordance with any disciplinary procedure for employees) and are not condoned or overlooked.

Business dealings in certain countries

For organisations doing business in countries which have a low rating in **Transparency International's Annual Corruption Perceptions index** , review areas such as dealings with state enterprises and dealings through agents. Any subsidiaries or other controlled organisations should adopt the same anti-bribery measures.

How will FSA authorised businesses be affected?

FSA authorised businesses are more likely to be put under the spotlight by the relevant enforcement agency. The FSA has a regulatory objective to reduce financial crime. In January 2009, Aon was fined £5.25 million for failings in its anti-bribery and corruption systems and controls.

Appendix:

'Guidance about procedures which relevant commercial organisations can put in place to prevent persons associated with them from bribing'

The Government has adopted principles-based guidance, which will allow a commercial organisation to tailor its policies and procedures so that they are appropriate to its size and resources. The principles have been revised since the consultation paper earlier this year and are now as follows:

- Proportionate procedures: A commercial organisation's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities. They are clear, practical, accessible, effectively implemented and enforced.
- Top level commitment: The top level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable.
- Risk assessment: The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. This assessment is periodic, informed and documented.
- Due diligence: The commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services before or on behalf of the organisation, in order to mitigate identified bribery risks.
- Communication (including training): The commercial organisation seeks to ensure that its bribery prevention polices and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks it faces.
- Monitoring and review: The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.

The guidance goes on to explain and illustrate each of the principles in turn, with recommended action in each category.

The guidance then sets out a series of case studies, to illustrate how the principles are engaged in different types of situation such as:

- Facilitation payments
- Proportionate procedures
- Joint ventures
- Hospitality and promotional expenditure
- Due diligence of agents
- Communicating and training
- Community benefits and charitable donations
- Top level commitment