

## **The Bribery Act 2010**

This memorandum summarises the significant changes in UK anti-corruption law brought about by the Bribery Act 2010 and the urgent need for the Companies to take appropriate action to ensure company-wide awareness of the offences and to protect against incurring liability.

### **Issue**

The Bribery Act 2010 was passed in April 2010. It is currently expected to come into force on the 1<sup>st</sup> July 2011, when it will introduce changes in the law that could significantly impact the conduct of businesses, both in the UK and abroad, in that:

- It extends the crime of bribery to cover all private sector transactions (previously bribery offences were confined to transactions involving public officials and agents).
- It creates a new strict liability offence of failing to prevent bribery. An organisation will only have a defence to this offence if it can show it had "adequate procedures" in place to prevent bribery.
- Its scope is extensive – the offences are very broadly defined and it has significant extra-territorial reach.
- The offences contained in the Bribery Act carry criminal penalties for individuals and organisations. For individuals, a maximum prison sentence of ten years and/or an unlimited fine can be imposed; for companies, an unlimited fine can be imposed.

Companies must review their anti-corruption procedures to ensure they are sufficiently robust to prevent corruption and to mitigate the risk of committing an offence under the Act.

### **Bribery offences**

The Act creates four offences:

- A general offence covering offering, promising or giving a bribe.
- A general offence covering requesting, agreeing to receive or accepting a bribe.
- A distinct offence of bribing a foreign public official to obtain or retain business.
- A new strict liability offence for commercial organisations where they fail to prevent bribery by those acting on their behalf.

The Act will not be retrospective.

### **The new offence of failure to prevent bribery: strict liability and the adequate procedures defence**

A commercial organisation commits an offence if a person associated with it bribes another person for that organisation's benefit.

A person is "associated" with a commercial organisation if it performs services for or on behalf of the organisation, regardless of the capacity in which they do so. This will therefore be construed broadly and could cover our agents, employees, subsidiaries, intermediaries, joint venture partners and suppliers, all of whom could render the Group guilty of this offence.

This is a strict liability offence: there is no need to prove negligence or the involvement and guilt of the 'directing mind and will' of the organisation. This makes the offence easier to prove and will probably lead to more corporate prosecutions and convictions.

### **Adequate procedures defence**

The organisation has a defence if it can prove it had "adequate procedures" in place to prevent bribery. "Adequate procedures" are not defined in the Bribery Act but the Ministry of Justice, on the 30 March 2011, published its guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing.

The guidance sets out six principles that are intended to give all commercial organisations a starting point for planning, implementing, monitoring and reviewing their bribery free business regime:

- Principle 1: Proportionate procedures
- Principle 2: Top level commitment.
- Principle 3: Risk assessment.
- Principle 4: Due diligence.
- Principle 5: Communication.
- Principle 6: Monitoring and review.

The guidance is aimed at giving clarity on how the Bribery Act will operate and is intended to help commercial organisations of all sizes and sectors understand the procedures they can put in place to prevent bribery as mentioned in section 7(1). The guidance strongly advocates a risk based approach to adopting adequate procedures, acknowledging that different procedures will be appropriate depending on the size of the organisation, the sectors and jurisdictions in which it does business, as well as the nature of its business partners and transactions. Procedures should be proportionate to the risks faced by the organisation.

The Serious Fraud Office (SFO), which will enforce the Act, had previously indicated that these procedures should be appropriate to an organisation's sector, size and risks. The SFO is also drawing up joint guidance with the Director of Public Prosecutions to ensure consistency in enforcing the Act between itself, the police and the Crown Prosecution Service.

### **Criminal penalties**

The potential consequences of being convicted of a bribery offence include criminal penalties for both individuals and companies:

- Individuals can be jailed for up to ten years and/or receive an unlimited fine.
- Companies can receive unlimited fines.

Fines for companies are likely to be substantial. No guidance has yet been given, but a recent judgment in the Crown Court against a company that had bribed foreign public officials stated that fines for corruption should be in the tens of millions or more.

"Senior officers" (which is broadly defined, and includes directors) can also be convicted of an offence where they are deemed to have given their consent or connivance to giving or receiving a bribe or bribing a foreign public official. Importantly, it is possible that omitting to act might be regarded as consent or connivance and lead to prosecutions, fines and/or imprisonment.

A director convicted of a bribery offence is also likely to be disqualified from holding a director position for up to 15 years.

## **Particular risks for a company**

Company operations expose it to particular risks of being involved in corruption and can leave a company vulnerable. In particular:

- **Public procurement:** If convicted of "active corruption" the Company will be debarred under EU law from carrying out public contracts. Whether this will include convictions for failure to prevent bribery is, as yet, unclear, but the risk exists and could represent a huge loss of business and reputation damage for the Company
- **Corporate hospitality and gifts:** There is a risk that corporate hospitality, such as customer or supplier entertainment, and the giving or receiving of gifts might be seen as bribery, especially in dealings with foreign public officials. Lavish hospitality or gifts must be avoided, both the giving and receiving.
- **Facilitation payments:** These are payments demanded by officials (or others) simply to secure or expedite the performance of their normal duties (for example, granting a licence, allowing goods to cross a border, and so on). These are commonplace in some jurisdictions, but the making of such payments, regardless of how small, will be an offence under the Act.

## **Need for immediate action**

### **Initial actions**

The following actions, which are consistent with the Ministry of Justice's draft guidance for commercial organisations about preventing bribery, should be carried out:

- Conduct a comprehensive Group-wide risk assessment.
- Conduct an immediate review of anti-corruption policies and procedures, especially taking into consideration corporate hospitality, donations and facilitation payments.
- Conduct due diligence on all "associated persons", especially third parties in high risk jurisdictions or sectors.
- Appoint a compliance officer
- Adopt a robust anti-corruption stance at the highest level, including making statements of the Company's zero tolerance to corruption both internally and externally.
- The Group's anti-corruption statement and policies should be clearly published and accessible, both internally and externally.
- Provide budget to implement the policy (for example, for extensive training and monitoring of staff in key risk areas and establishing disciplinary mechanisms).

For further advice and guidance relating to the Bribery Act please contact Sandra Garlick.

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