UK Bribery Act 2010: Putting in Place Adequate Anti-Bribery Procedures

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This article is part of the National Compliance Debate 2011 organized by Houthoff Buruma

Introduction

The UK Bribery Act 2010 comes into force on 1 July 2011 (the **Act**). It is, arguably, the most stringent anti-bribery legislation in the world. Unlike the US Foreign Corrupt Practices Act (FCPA), the Act applies to bribery in both the private and public sectors. It also has extraterritorial effect and applies to non-UK companies carrying on business in the UK regardless of where in the world the actual bribery takes place.

The stated aim of the Act is to make life difficult for the minority of organisations responsible for corruption. It is not intended to burden the vast majority of law-abiding businesses. However, in order to ensure that unethical businesses are caught, the Act has been broadly drafted. This has caused concern among the business community and, in order to address these concerns, further guidance on the Act has been published by the UK Government (the **Guidance**).[1]

In this article we look at the Act and the Guidance, focussing on three particular questions:

- What is bribery?
- Why is the Bribery Act relevant to overseas companies?
- What do overseas companies need to do about it?

The Bribery Act at a glance

The Act introduces four categories of offence:

- offering, promising or giving a bribe to another person (section 1);
- requesting, agreeing to receive or accepting a bribe from another person (section 2);
- bribing a foreign public official (FPO) (section 6); and
- failing to prevent bribery (the corporate offence) (section 7).

The Act applies only to bribery offences committed from 1 July 2011. The penalties if convicted of an offence include:

- up to ten years' imprisonment; and
- an unlimited fine.

What is bribery?

[1] *The Bribery Act 2010: Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)*, published by the Ministry of Justice on 30 March 2011.

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The definition in the Act is deliberately broad and refers to the giving or receiving of a financial or other advantage. This captures a wide range of things including payments of cash, the awarding of contracts and political and charitable donations.

Both the offences of giving or receiving a bribe incorporate the notion of "improper performance", or a "wrongfulness element". In other words, has the recipient of the bribe breached an expectation of "good faith", "impartiality" or "trust"? The key to whether an offence has been committed is the connection between the bribe and this "wrongfulness element". Without the connection, no offence is committed.

How does this apply to corporate hospitality?

The broad definition of a bribe also covers corporate hospitality and promotional expenditure. This raised questions over the line to be drawn between legitimate business expenditure and bribery. The Guidance addresses these concerns, clarifying that the Act is not intended to stop companies from engaging in reasonable and proportionate corporate hospitality. It emphasises that, for corporate hospitality to be an offence, there has to be a direct link between the corporate hospitality and an intention for that hospitality to induce improper conduct.

What is reasonable and proportionate will depend on factors such as:

- the standards or norms applying in a particular sector,
- whether or not the hospitality or expenditure is clearly connected with the legitimate business activity or whether it was concealed, and
- how lavish the hospitality is - the more lavish the hospitality or expenditure the greater the inference that it is intended to encourage or reward improper performance.

As an example, the Guidance confirms that it is legitimate for a company to pay the travel and accommodation expenses of foreign government officials invited to visit the company's mining operations, where the purpose of the visit is to satisfy those officials of the high standard and safety of the company’s installations and operating systems.

Facilitation payments

Facilitation or "grease" payments are bribes paid to secure routine, non-discretionary acts from public officials. While the FCPA contains an express carve-out of such "routine government action", the UK Government decided not to follow suit. As a result, the payment of facilitation payments is an offence under the Act.

Jurisdictional reach

Any individual or corporate can be prosecuted for acts of bribery committed in the UK.

For acts of bribery committed overseas, only individuals or corporates with a close connection to the UK can be prosecuted. This includes British citizens, individuals resident in the UK and UK incorporated companies.

The section 7 corporate offence applies to acts of bribery, wherever committed, carried out on behalf of a UK company or an overseas company that carries on business in the UK.

Why is the Bribery Act relevant to overseas companies?

Overseas companies will be caught by the Act if they commit acts of bribery within the UK. However, the real extra-jurisdictional reach of the Act lies in the new section 7 offence: the failure of a company to prevent bribery committed on its behalf. Under section 7 a company could be

prosecuted if an associated person commits a bribery offence with the intention of benefiting the company. It does not matter where the bribery took place or that the company had no knowledge of it.

What is an associated person?

The corporate offence was drafted broadly to cover the whole range of individuals and corporate entities connected to a company who might be capable of committing bribery on the company's behalf. It covers any person who performs services for or on behalf of the company. Whether a person is "associated" is a question of fact, taking into account all the circumstances and not just the legal relationship between the company and that person. It could include employees, subsidiaries, sub-contractors, suppliers, agents and joint ventures.

However, for a section 7 offence to be committed, the associated person has to bribe another person with the intention of benefiting the company. The Guidance clarifies that indirect benefit through simple ownership of or investment in a company will not be sufficient. The Guidance recognises that subsidiaries and joint ventures can act independently of their parent companies and shareholders. Unless an intention to directly benefit the shareholder or particular member can be shown, liability under section 7 will not arise.

Overseas companies will fall within section 7 if they "carry on a business or part of a business in the UK". What is meant by carrying on business in the UK will be established over time by the English courts. However, the UK Government expects a "common sense" approach to be applied so that companies that do not have a "demonstrable business presence in the United Kingdom" are not caught. Applying that test, the Government would not expect the fact that a company's securities are traded on the London Stock Exchange to qualify that company as carrying on business in the UK. Something else would be required. Equally, having a UK subsidiary will not automatically mean that a parent company is carrying on business in the UK, since a subsidiary may act independently of its parent or other group companies.

The prosecutors have indicated that they will take a broad view as to whether an overseas company satisfies the test. Representatives of the Serious Fraud Office have publicly stated that they will use section 7 to protect ethical UK companies from overseas companies that are paying bribes in order to gain business. In view of this uncertainty, any overseas company with a business presence in the UK should assume that it is caught.

What do overseas companies need to do about it?

A company will have a complete defence to a section 7 offence if it can show that "adequate" procedures to prevent bribery were in place. All overseas companies that are caught by the Act therefore need to review their anti-bribery policies and procedures to ensure that they are adequate. What is "adequate" is not defined in the Act but is covered by the Guidance.

The Guidance adopts a principle-based approach to help companies work out what procedures they need to have in place to prevent bribery. It sets out six guiding principles that apply across all sectors and all types of business. As the principles make clear, companies are expected to adopt a risk-based approach to managing bribery risks, and procedures should be proportionate to the risks faced by a company. Based on the Guidance, the following are the practical steps that companies should be taking.

The six principles

- Proportionate procedures
- Top-level commitment

- Risk assessment
- Due diligence
- Communication and training
- Monitoring and review

Conduct a risk assessment

What will be adequate in terms of a company's procedures will depend on the bribery risks the company faces. Therefore, the first step any company has to take is to look at what bribery risks it faces. There are several ways of assessing risk and how a company carries out its risk analysis will depend on the level of perceived risk and size of organisation. An internal risk assessment may be appropriate or external expertise may be required. Different approaches include the use of workshops, questionnaires or roundtable meetings. Whichever method is chosen, the risk analysis needs to documented.

In identifying areas of risk, the Guidance distinguishes between external and internal risk.

Assessment of external risks includes looking at:

- Country risk: certain countries have a reputation for corruption and companies with business operations in those countries will need to ensure that their procedures are adequate to deal with the additional risk. A useful resource is Transparency International's "Corruption Perceptions Index."[2]
- Sector risk: certain sectors are higher risk than others, e.g. oil and gas and construction.
- Transaction risk: certain types of transactions tend to be higher risk, e.g. charitable or political contributions, licences and permits, and transactions relating to public procurement.
- Business opportunity risk: risks may arise in, for example, high value projects or projects involving several contractors or intermediaries.
- Business partnership risk: certain relationships may involve higher risk, e.g. consortia or joint venture partners.

Internal structures or procedures may also add to a company's risk, for example:

- a bonus culture that rewards excessive risk-taking;
- frequent use of lavish corporate hospitality;
- deficiencies in employee training, skills and knowledge;
- lack of clarity in the company's anti-bribery policies;
- lack of clear financial controls; and
- lack of a clear anti-bribery message from top-level management.

[2] Transparency international is one of the leading international organisations with the primary aim of monitoring countries and providing information and resources to assist the reduction of global bribery and corruption. It produces a number of surveys and indices highlighting areas of corruption risk. See their website for more detail: http://www.transparency.org/.

Top Level Commitment

Leadership on anti-corruption has to come from the top. Senior management (i.e. board members and owners) should be at the forefront of creating a culture in which bribery is never acceptable. Without that top-level commitment there is a risk that any company's procedures will be perceived as "inadequate". This is the case whatever the level of bribery risk.

In practice, senior management will be expected to:

- communicate the organisation's anti-bribery stance internally and, if appropriate, externally;
- endorse all anti-bribery procedures and publications;
- be involved in critical decision-making relating to anti-bribery, for example, sanctions for serious breaches of the procedures; and
- become involved in developing bribery prevention policies and procedures;

Most of all, senior management will be expected to practise what it preaches.

Adequate procedures – what should they look like?

Having undertaken a risk assessment, a company should be in a position to revise or draft its policies and procedures. First, management will need to decide who will be responsible for implementation. Ideally, this should be someone from senior management. The anti-bribery policies and procedures can be stand-alone or incorporated into existing policies and procedures but will need to be clear, practical and applicable throughout the company regardless of location. They should set out the standards of behaviour expected of all employees and, if appropriate, third parties associated with the company.

Generally, the issues anti-bribery policies would cover include:

- a zero-tolerance ethics statement from senior management;
- gifts and corporate hospitality;
- promotional expenditure, travel, accommodation and per diem allowances;
- facilitation payments;
- charitable and political contributions; and
- penalties for breaches of agreed policies and procedures.

Companies should also consider whether they need to put in place policies on due diligence in relation to employees or other associated persons such as contractors, agents, and joint venture partners. The level of due diligence required will depend on the perceived risk but methods might include:

- carrying out background checks on individuals;
- asking to see the relevant company's anti-bribery policies;
- asking for business references and financial statements, to ensure the third party has suitable experience and a good reputation;
- checking the information received against other sources, e.g. via business contacts, local chambers of commerce or on the internet; and

- general research, e.g. official records, registration documents and court records.

Companies may also need to put in place procedures that provide for transparency and accurate recording. Existing procedures can be used for bribery prevention purposes, for example, financial and auditing controls. Examples of issues procedures will need to cover include:

- reporting incidents of bribery;
- recording corporate hospitality and promotional expenditure payments;
- recording any exceptional facilitation payments;
- recording payments to third parties, particularly intermediaries; and
- effective management of all incidents of bribery, including arrangements for internal investigation, reporting the outcomes to senior executives and/or the Board, and the disclosure of material findings to the relevant external authorities and interested parties, e.g. shareholders and business partners.

Monitoring and review

A company's bribery risk will change over time. Companies therefore need to put in place systems that monitor and review the effectiveness of their anti-bribery procedures so that the procedures remain adequate.

Companies who are involved in joint ventures, regularly appoint intermediaries or agents, or operate in jurisdictions where the payment of facilitation payments is commonplace are at greater risk. The Guidance offers practical advice on minimising those risks.

Joint ventures

When entering into a new joint venture, companies might consider:

- having representation on the board of the joint venture company;
- ensuring the joint venture itself has adequate anti-bribery procedures in place;
- establishing an audit committee for the joint venture; and
- including a contractual term in the joint venture agreement prohibiting any partner from breaching applicable anti-bribery laws.

Agency agreements/intermediaries

These can involve risks since it may be difficult for the company to monitor what the agent or intermediary is doing. The following might mitigate the risks:

- establish at the outset a clear statement of the precise nature of the agent/intermediary's services, costs and commission (or other remuneration);
- due diligence;
- communicate the company's anti-bribery procedures to the agent/intermediary, and give training where appropriate;
- ask the agent/intermediary about their own anti-bribery strategies;
- review contracts with agents/intermediaries annually, and include terms requiring the agent/intermediary not to offer bribes; allowing the company to audit activities and

expenditure; requiring the agent/intermediary to report any requests for bribes by officials; and giving the right to terminate if the agent/intermediary's actions are suspicious.

Facilitation payments

These are illegal under the Act and companies that are regularly faced with requests for them should adopt strategies to deal with this, including:

- training staff on how to respond to a request for a payment, such as questioning the legitimacy of the demand, or requesting paperwork (e.g. the official's ID, or receipts);
- clarifying in written policies that facilitation payments are not permitted;
- seeking local law advice relating to facilitation payments, in the particular country; and
- using diplomatic channels, or participating in local non-governmental organisations to apply pressure on authorities in the particular country.

Communication and training

Companies should ensure that the zero-tolerance approach to bribery is clearly communicated both internally and externally. Internal communications should convey the "tone from the top" and should focus on the company's policies and procedures. Training is a useful way to communicate the message.

The level of external communication will depend on the kind of industry an organisation is involved in and the level of risk. Many global organisations make their zero-tolerance approach to bribery clear on their website via ethics statements or codes of conduct. Organisations in high-risk industries communicate that message to third parties they contract with and insert appropriate warranties into their contractual arrangements.

The level of bribery risk and the size of the company will also determine the requirement for training and whether training will be required for individuals associated with the company.

Conclusion

What is clear is the need for any overseas company with a business presence in the UK to undertake risk assessments and due diligence exercises on their current business partners and arrangements. They also need to take stock of their current policies and procedures and consider how they may need to revise them in light of the Guidance. This should not be too onerous for those companies that already have sound ethical policies and procedures in place. However, those companies that have no policies or procedures in place need to act fast before the Act comes into force on 1 July 2011.