TRAVERS SMITH

The Bribery Act 2010

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The Bribery Act 2010 received Royal Assent on 8 April 2010. When it comes into force some time later this year (possibly October) it will introduce a new set of criminal offences of bribery which are considerably wider than those under existing UK law and the US Foreign Corrupt Practices Act. The sanctions include prison sentences of up to 10 years for individuals and unlimited fines and the possibility of a public procurement ban for businesses.

The Ministry of Justice is due to publish guidance on the procedures companies should implement to prevent bribery in their organisations. In the meantime, companies should familiarise themselves with the new offences and consider what, if any, changes are needed to their existing business practices and governance procedures to avoid the risk of prosecution under the Act.

"Core" bribery offences

The Act contains the following "core" bribery offences which may be committed by an individual or by a company:

- an offence of bribing another person, with the intention, knowledge or belief that the bribe will induce the other person to do something improper;
- offences of being bribed (e.g. accepting financial or other advantages) – it should be noted that a number of these offences can be committed even if the person receiving the bribe does not know or believe that what he is doing is improper;
- an offence of bribing a foreign public official (such as a politician, judge or other similarly highly-placed individual) intending to influence the official and obtain or retain a business advantage. While there must be an intention to influence the relevant official to be caught, that intention need not be dishonest or improper.

Corporate offence of failing to prevent bribery

Recognising that it is often difficult to show that the "directing mind" of a company had the requisite intention, knowledge or belief necessary for the "core" bribery offences outlined above, the Act contains a further offence of failing to prevent bribery, which is directed at commercial organisations (as opposed to individuals). A body corporate or partnership - whether formed in the UK or carrying on business here – commits an offence if any one of its employees, subsidiaries, agents or service providers ("associated persons") bribes another person intending to obtain or retain business or a business advantage. Of particular note are the following points:

- *this is a strict liability offence* – the prosecution will not have to prove that the body corporate or partnership knew anything about the bribery - just that it had failed to prevent it;

A taste of things to come?

The following are examples of enforcement action taken under existing UK law (pre-Bribery Act):

£8.3 million

Fine imposed on Innospec for involvement in bribing Indonesian officials (2010)

£4.5 million

Fine imposed on Mabey & Johnson for involvement in bribing Jamaican and Ghanaian officials and breaking UN sanctions in Iraq (2009)

£2.25 million

Civil Recovery Order imposed on Balfour Beatty over accounting irregularities relating to Egyptian construction project (2008)

- *the associated person may or may not have been prosecuted in relation to the bribery* – it is sufficient that such person *would be* guilty of a "core" offence of bribing another person or a foreign public official if prosecuted;
- *the bribery by the associated person may be undertaken anywhere in the world* – so, if the body corporate or partnership is formed in the UK *or carries on business here*, it will on the face of it be guilty even if the bribery takes place overseas.

There is only one defence to the strict liability offence outlined above: the body corporate or partnership will not be guilty if it can *prove* that it had in place "adequate procedures to prevent the relevant associated person from undertaking the bribery". For more on this see below.

What type of conduct is caught?

The Act does not identify particular types of conduct or activity which will constitute an offence and the offences are deliberately widely drafted to capture a range of possible scenarios and give the CPS and SFO considerable latitude in their decision as to whether to prosecute. The Law Commission summarised the various offences in the following terms: "*Do not make payments to someone (or favour them in any other way) if you know that this will involve someone in misuse of their position; do not misuse your position in connection with payments (or other favours) for yourself or others*".

Examples of activities which could be caught by the Act include facilitation payments, offset arrangements, political donations and payments to lobbyists and in some circumstances, gifts and corporate hospitality. Although these arrangements are in many cases standard business practice, each of the core offences (other than the offence of bribing a foreign public official) hinges on the concept of "improper performance", i.e. a financial or other advantage is given in order to induce someone to act improperly or reward them for doing so. The improper performance test is designed to be the 'line in the sand' which differentiates bribes from legitimate business payments. So for example, the Joint Parliamentary Committee on the Bribery Bill acknowledged that corporate hospitality is a "legitimate part of doing business at home and abroad, provided that it remains within appropriate limits" and that "most routine and inexpensive corporate hospitality would be unlikely to lead to a reasonable expectation of improper conduct".

Overseas operations

As regards overseas business operations, the previous Government acknowledged that cultural differences come into play, but stated that it should not be possible to escape prosecution simply because otherwise criminal conduct amounts to a tolerated practice in an overseas jurisdiction. Essentially, under the Act, local practice and custom will only be taken into account to the extent that it is enshrined in local law, and the previous Government indicated that it is up to companies doing business overseas to take advice on the legitimacy of payments to foreign officials and others.

The previous Government also recognised that many UK companies struggle with petty corruption in emerging markets and face regular demands for facilitation payments in circumstances which often amount to extortion, but its answer was that such practices should be outlawed, and in the UK prosecutorial discretion will determine whether it is in the public interest to prosecute. The prosecutor may consider, for example, the size of the payment, the options facing the payer, whether it was a single or repeated incident and whether the payment was solicited in circumstances which were tantamount to extortion. As such there is no explicit defence in the Act for small facilitation payments as there is in the US Foreign Corrupt Practices Act. However the zero-tolerance approach under UK law may in some situations be helpful to companies in justifying a refusal to pay a bribe.

"The improper performance test is the 'line in the sand' which differentiates bribes from legitimate business payments..."

"It will be a defence….if the organisation can prove it had in place 'adequate procedures' to prevent bribery..."

The "adequate procedures" defence

As noted above, it will be a defence in a prosecution against a commercial organisation for failing to prevent bribery by its employees or other associated persons if the organisation can prove it had in place "adequate procedures" designed to prevent bribery. There will be Government guidance on what is meant by "adequate procedures" (although the guidance will not be a safe harbour from prosecution). The Conservatives, when in opposition, were very much in favour of clear guidance being made available. The GC100 (the body representing the general counsel of FTSE 100 companies) has already produced some useful guidance for companies in assessing whether adequate procedures are in place for combating bribery and corruption (see link).

The GC100's recommendations include:

- board responsibility for the design of an anti-bribery and corruption programme and instilling a culture in which corruption is eradicated
- the appointment of a senior officer for the oversight of the programme
- a clear and unambiguous code of conduct which is publicised both internally and externally
- risk management - having procedures in place to assess the risks of bribery and corruption arising in the organisation
- procedures for vetting and training employees and ensuring the existence of adequate disciplinary procedures for breach of anti-bribery and corruption obligations
- a clear and workable policy on gifts and corporate hospitality which is effectively monitored
- due diligence procedures in relation to potential business partners and service providers to identify bribery and corruption risks and the existence of and compliance with any code of conduct applicable to them
- financial controls to minimise the risk of the bribery occurring and
- whistle-blowing procedures for reporting suspected bribery and corruption offences and adequate mechanisms for investigating and dealing with allegations.

Whether or not an organisation's procedures are deemed to be adequate will not be a box-ticking exercise and will ultimately be a decision for the court in any prosecution. The Ministry of Justice has stressed that an organisation's procedures must be appropriate to its own circumstances and business sector, taking account of its size and the particular risks to which it may be exposed. However, the guidance is expected to set out the relevant principles, backed up by illustrative good practice examples. In addition to the GC100 guidance referred to above the MoJ has also highlighted other sources to which it will have reference in preparing its official guidance which you may wish to consider in advance of its publication:

(i) OECD good practice guidance on internal ethics and controls: see link;

(ii) Transparency International Business Procedures for Countering Bribery: see link; and

(iii) Global Infrastructure Anti-Corruption Centre Anti-Corruption Programme for Companies: see link.

When will the Bribery Act come into force?

The new Act is likely to come into force some time later this year, although the precise date has not been confirmed. The Ministry of Justice has previously indicated that commencement in October 2010 would be likely, although this may change as a result of the change of Government. In opposition, the Conservatives were largely supportive of the aims of the Act, although they did express concern that there was not enough time allowed for a proper analysis of the practical implications of the Act, as it was rushed through in the dying moments of the last Parliament. It remains to be seen whether the new Government will make any amendments to it.

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"There is no 'one-size-fits-all' solution …"

Practical implications

In principle, all businesses are at risk under the new legislation and the Serious Fraud Office will be looking to use the Act to 'ramp up' its enforcement activity in the field of bribery and corruption. However, in practice, the level of risk is likely to vary considerably across different sectors and from business to business. It follows that there is no 'one-size-fits-all' solution to the question of how to comply with the Act. In our view, a tailored approach is far more likely to be effective in ensuring that the focus is on those areas where the business is most at risk and that relevant staff fully understand the implications for their day-to-day activities.

We recommend that companies should take the opportunity to scrutinise their business practices and governance procedures in the light of the Act and the guidance materials already available (as referred to above) in readiness for the Act coming into force. Companies should also identify a person within the organisation who will take responsibility for compliance going forward. Any existing anti-bribery and corruption programme may need to be reviewed once the Ministry of Justice guidance is published.

If you would like further advice on preparing for the Act please get in touch with your usual contact at the firm or email mailto:corporate@traverssmith.com. We are always happy to talk informally about the options and to act as a 'sounding board', even before being formally instructed.

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