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Described as “the toughest bribery legislation in the world” by the Serious Fraud Office, the long awaited Bribery Act 2010 is now due to come into force on 1 July 2011 and places a greater burden on businesses than the current law on bribery.

The Act is fairly short but its far reaching scope should not be underestimated.

### **Current Law**

The existing law on bribery is contained in a combination of statutes going as far back as the nineteenth century and of common law. The existing law is considered to be both antiquated and inadequate to deal with corruption in an increasingly global market.

The Act will repeal the existing legislation and abolish the common law offence. However, the Act will not have retrospective effect - the existing law will still be around for many years and apply to any activities occurring before the coming into force of the Act.

### **The New Legislation**

The Act creates four offences as follows:

- (a) giving, offering or promising a bribe (active bribery)
- (b) requesting, accepting or receiving a bribe (passive bribery)
- (c) bribing a foreign public official
- (d) failure by a commercial organisation to prevent bribery by its “associates”

### ***Active Bribery and Passive Bribery***

These general offences prohibit the following:

(i) the offer, promise or provision of a financial or other advantage to another person with the intention of inducing that person to perform improperly a relevant function or activity or reward that person for doing so; and

(ii) a request, agreement to receive or acceptance of a financial or other advantage with the intention that, as a consequence, a relevant function or activity should be performed improperly by the person receiving the bribe or by any other person.

The term “relevant function” includes any function of a public nature or any activity connected with a business or performed in the course of a person’s employment or by or on behalf of a body of persons (whether corporate or unincorporated), where the person performing the function or activity is expected to perform it in good faith, impartially or is in a position of trust.

“Improper performance” is defined by reference to a failure to perform a relevant function or activity in breach of a relevant expectation, namely good faith, impartiality or a position of trust. When determining the level of expectation, the test is what a reasonable person in the UK would expect in relation to the performance of the function or activity. It is worth noting that the function or activity need not have any connection to the UK.

Also, for passive bribery it is not necessary for a person to have requested, agreed, received or accepted the advantage directly or through a third party and, in some cases, it does not

even matter whether the person knows or believes that the performance of the function or activity will be improper. For example, this will be the case where:

- (a) a person requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance of a relevant function or activity, regardless of whom the improper performance is carried out by; and
- (b) in anticipation or in consequence of a person (“A”) requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly by A, or another person at A’s request or with A’s assent or acquiescence.

#### ***Bribing a foreign public official***

This offence is committed if the person giving the bribe intends to influence a foreign public official and intends to retain or obtain business or an advantage in the course of business, where the foreign public official is neither permitted or required by the written law applicable to the foreign public official to be influenced as such.

For the purpose of determining what is required or permitted by local laws to which a foreign public official is subject to, reference is to be made to the written law of that jurisdiction. Customs and practices of a jurisdiction that do not form part of the written law will not be taken into account.

#### ***Failure to prevent bribery***

The offence of failure of commercial organisations to prevent bribery by associated persons is a new offence and has important implications for all organisations with a base in the UK. The offence is one of strict liability and is committed if an “associated person” is guilty of either (a) active or passive bribery; or (b) bribing of a foreign public official. A commercial organisation will be vicariously liable even where the organisation was unaware of the activities by the associated person. The only defence for commercial organisations is to demonstrate that they had adequate procedures in place.

“Commercial organisation” will include any corporate or partnership incorporated under UK law which carries on a business or any other corporate or partnership, wherever incorporated, which carries on business in the UK.

The definition of “associated person” is broad and means any person who performs services for and on behalf of the commercial organisation. The Act states that the capacity in which the associated person performs its services does not matter and that an associated person will include employees, agents and subsidiaries. Importantly, the associated person does not need to have a connection to the UK for commercial organisations to be found guilty under the Act.

#### **Adequate Procedures**

It will be an absolute defence for a business charged under the new offence of failing to prevent bribery if it can demonstrate that it has “adequate procedures” in place. The meaning of “adequate procedure” has not been defined in the Act, although the government has recently published its long awaited guidance on the procedures businesses should have in place.

The guidance sets out six general principles that businesses should consider in their approach to preventing bribery. These are:

- (i) *Proportionate procedures*

Commercial organisations should have procedures to prevent bribery that are proportionate to the bribery risks they face. The level of risk an organisation faces will vary depending on the size and type of organisation. Some procedures may be relevant to a certain set of employees and perhaps not as much to other employees.

*(ii) Top-level commitment*

Senior staff members (whether directors or managers) should be committed to establishing a zero-tolerance culture towards bribery across the organisation.

*(iii) Risk assessment*

Commercial organisations must assess and understand the bribery risks they face and maintain documentation to this effect.

*(iv) Due diligence*

Due diligence procedures should be proportionate to the risk identified. The extent of due diligence will vary for each organisation. The guidance indicates that in lower risk situations, commercial organisations may determine that there is no need to conduct much in the way of due diligence, while in higher risk situations, due diligence can include conducting direct interrogative enquiries, indirect investigations or general research on associated persons.

*(v) Communication (including training)*

Commercial organisations should ensure that anti-bribery policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training. Such communication and training should cover areas such as decision making, financial control, hospitality and promotional expenditure, charitable and political donations and penalties for breach of the rules.

*(vi) Monitoring and review*

The bribery risks an organisation faces can change over time. Commercial organisations must therefore institute monitoring and review mechanisms to ensure compliance with the policies and procedures and identify any issues as they arise.

As well as the above six principles, there are numerous other actions organisations can legitimately take to prevent or mitigate the risk of bribery, such as:

- inserting provisions into employment contracts and terms and conditions dealing with bribery
- having controlled bookkeeping, auditing and approval of expenditure
- procedures for disclosure of information on all transactions
- sanctions for breaching the organisation's bribery rules
- whistle blowing procedures

As the guidance points out, it is not a case of one size fits all. Businesses are encouraged to carry out their due diligence now and ensure they have adequate procedures in place to deter bribery. Given the wide definition of "associated person" (which can include contractors and suppliers if performing services on behalf of a commercial organisation), it is important that any due diligence carried out and procedures implemented are effective and proportionate to the risks identified.

## **Corporate Hospitality**

Before the publication of the guidance there was much speculation about whether corporate

hospitality may fall within the remit of the Act. Much to the relief of many organisations, the Ministry of Justice has recently confirmed that hospitality is not prohibited by the Act.

As well as clarifying that the offering of tickets to sporting events to cement good relations or enhance knowledge in the organisation's field is not an offence (so long as it is reasonable or proportionate), the guidance explains that in deciding whether or not to prosecute, the Director of Public Prosecutions or the Director of the Serious Fraud Office must consider whether a prosecution is in the public interest.

Indeed in the run up to the London 2012 Olympics Games and with tickets costing as much as £2,000, the guidance brings some relief to those who have been lucky in the draw for tickets at the Olympics, especially amongst the many businesses who consider such sporting events as part and parcel of their marketing and public relations agenda.

Businesses should still, however, err on the side of caution when deciding whether to give away tickets for the Olympics or any other prestigious event. This is on the basis that the government does acknowledge that such expenditure can amount to bribery, if there is an intention to gain a financial or other advantage.

### **Facilitation Payments**

Unlike the US Foreign Corrupt Practices Act, which makes an exception for small bribes (known as "facilitation payments") to be paid to officials to speed up government processes, the Act makes no such exception and any payments for that purpose, no matter how big or small or whether accepted under local custom, will be an offence.

Thus, businesses and their associated persons should be aware that the fact that an action may be permissible in another jurisdiction does not act as a defence to the prohibitions under UK law, especially in light of the wide territorial scope of the Act (see below).

### **Penalties**

The consequences of being found guilty under the Act are potentially severe. The maximum term of imprisonment has been increased from seven years (under the current law) to ten years and both businesses and individuals can face an unlimited fine.

### **Territory**

The Act's territorial application is wide. Unlike the existing law, its scope is not restricted to public officials but extends to private organisations as well as individuals. Senior officers and managers can be held liable for a company's involvement in bribery if they consented to or connived in the offence.

Non-UK businesses are also caught under the Act if they have any business activity in the UK. The Act goes as far as applying to any person with a "close connection" to the UK.

In addition, the Act is not limited to offences committed in the UK but extends to bribery activities committed anywhere in the world by UK businesses or individuals if that activity would amount to an offence in the UK.

### **Conclusion**

The Act's adoption of a zero-tolerance approach, its wide territorial scope and the absence of any exceptions to the offences only serve to highlight that businesses cannot turn a blind eye to this new piece of legislation.

A conviction under the Act may have a devastating effect for a business, particularly for those relying on public sector contracts. For example, under Article 45 of the EU Public Sector Directive anyone found guilty of corruption may be prevented from participating in such public sector contracts. All should also remain aware of the possibility of unlimited financial penalties.

Businesses need to assess their approach to anti-corruption activities and adopt adequate procedures to ensure they do not fall foul of the provisions of the Act.

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This article only covers some of the provisions affecting businesses and is not intended to constitute specific legal advice.