

# How will the UK Bribery Act 2010 impact your company?

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The Bribery Act 2010, which comes into effect in July 2011, is considered to be the beginning of an aggressive new stance by the UK on business misconduct. The Act casts a wide net and captures acts of bribery committed outside the country.

The new anti-bribery regime will have potentially alarming consequences for corporates with a presence in the UK because of the uncertainty surrounding its scope and application to international businesses. The Act has generated a lot of (often misleading) discussion and, while government has recently issued some high-level guidance on its application, this has in many ways added to the confusion by simply advocating a 'common sense' interpretation and leaving considerable discretion to the courts. This means that all businesses ought to be fully prepared for the increased risks and responsibilities that they will face under the new regime.

One of the greatest areas of risk for businesses is the new 'corporate offence'. Under the Act, UK corporates and those *carrying on business in the UK* will be guilty if they fail to prevent bribery committed by persons performing services for or on their behalf, *anywhere in the world*. This offence may, in some circumstances, apply to joint venture relationships, which are, of course, commonplace in the oil and gas industry.

It was expected that the government guidance would clarify the boundaries of the 'corporate offence' and, particularly, its application to non-UK businesses. Unfortunately, the guidance is rather vague in this respect and only provides that whether a company is carrying on a business in the UK will be decided by applying a 'common sense' approach.

The government has indicated that applying this approach will mean that organisations which do not have a 'demonstrable business presence' in the UK will not be subject to the Act. For example, it is anticipated that a company's listing on the London Stock Exchange will not, in itself, mean that a company is deemed to be carrying on business in the UK. This does not sit comfortably with the Serious Fraud Office's recent comments that it intends to take a broad view of what constitutes 'carrying on business' and that companies should not rely on technical arguments to fall outside the scope of the Act.

A defence to the 'corporate offence' will only exist where the corporate in question has '*adequate procedures*' in place to prevent bribery. The government's guidance has set out high-level principles for bribery prevention, which are once again based on vague concepts such as a common-sense and risk-based approach. This leaves it to companies to determine how to implement their own policies and procedures in line with the Act.

## Facilitation payments

Another aspect of the new anti-bribery regime, which has generated a lot of discussion, is the treatment of 'facilitation payments', ie the practice of paying small sums of money to officials in order to speed up processes. In contrast to the position under the US FCPA anti-corruption regime, all facilitation payments are illegal under the Act. However, recognising the prevalence of such payments, the government's guidance sets out a number of public interest factors which will tend against prosecution and refers to the eradication of facilitation payments as a 'long-term objective'.

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Nevertheless, the government has considerable discretion to prosecute company employees for facilitation payments in situations where it considers that to do so would be in the public interest. Exactly when this would be the case remains unclear and will raise particular issues for companies which are subject to both the FCPA and UK Bribery Act regime.

### **Gifts and hospitality policies**

Given the broad nature of certain offences in the Act, there has been a lot of concern raised by the business community regarding the application of the antibribery regime to corporate hospitality. The guidance from the government has clarified that *genuine* hospitality and promotional expenditure is an established and important part of doing business. Importantly, the guidance recognises that paying the travel and accommodation costs of foreign public officials is not prohibited. The recognition of the legitimacy of reasonable and proportionate corporate hospitality is a welcome development, especially given the recent confusing and misleading press commentary concerning this aspect of the Act.

### **Where does business stand?**

The lack of clarity surrounding the 'corporate offence' and the government's decision to leave it up to the courts to interpret the scope of the new anti-bribery regime is not what businesses were hoping for. The sweeping reforms mean that companies need greater clarity to comply with the new Act.

Where does all this leave businesses? We will have to wait and see over the coming years before we can be certain of the true scope of the Act. In the meantime, both UK and non-UK companies (including in the oil and gas sector) should act now to ensure they have rigorous diligence processes and appropriate policies in place.