

BRIBERY ACT. IF YOU THINK IT WON'T AFFECT YOUR BUSINESS, THINK AGAIN.

After much fanfare, the Bribery Act will come into force in April 2011. The yards of column inches prompted by the Act are deserved. The UK is set to become the global leader in corporate anti-corruption and, like it or not, UK businesses will be the champions of the Act's high ethical standards.

Key implications

The Act makes two fundamental changes that will particularly affect UK firms with international businesses:

- The Act will apply UK standards to what does and does not constitute bribery to any business activity *in any part of the world*. For example, if a UK business engages in or tolerates practices in foreign markets, which in the UK would be considered bribery, then it will have committed a criminal offence and can be prosecuted for it in the UK. It makes no difference if the local practice and customs are often tolerated or accepted in the relevant foreign country.
- The Act introduces a new offence of *failure to prevent bribery*. Any company or partnership which does business in the UK will be itself liable for any bribery carried out in its name (whether by an employee, agent, introducer, joint venture partner or other representative).....*anywhere in the world*. This means, for example, that a UK business could be prosecuted under the Act if one of its local agents on the other side of the world offers somebody a bribe in the hope of furthering its interests. It makes no difference if management in the UK had no knowledge of the bribe. The only defence will be for the business to demonstrate that it has adequate anti-bribery procedures in place. And what are adequate anti-bribery procedures? That all depends, says the government. But business will have to do a lot more than just point to a zero-tolerance policy on corruption on websites or in their employee handbooks. Prosecutors and courts will want to see robust procedures thoroughly implemented at all levels of the business (see *Are my procedures adequate?* below).

"For SMEs...the message is clear: do your utmost to ensure you do not engage in or tolerate bribery.....and be able to prove it."

A worldwide web

The Act casts a wide net that will catch bribery in any part of the world if it is carried out by a British subject, a UK resident or a British-based business.

The breadth of the Act is not limited to its extra-territorial reach. Unlike the US Foreign Corrupt Practices Act (which limits its application to bribery of public officials), the Act covers all commercial activity, whether with public officials or with commercial organisations.

The penalties

The stakes are high. A person who makes or takes a bribe could face up to ten years in prison. Senior officers of a company can also be personally liable and face fines and imprisonment if they are found to have connived in or consented to acts of bribery. A business which fails to prevent bribery, wherever it takes place, could be subject to an unlimited fine. The Serious Fraud Office has already indicated its intention to use its new powers vigorously.

CONTEXT

The impetus behind the Bribery Act is the UK's support for international anti-corruption initiatives, such as the OECD's Convention on Combating Bribery and the UN's Convention Against Corruption.

The idea of having a single set of global anti-corruption standards is laudable. But the conversion of these conventions into domestic law across the world is patchy. The UK, so often criticised for its half-hearted efforts to stamp out corrupt practices by its companies in international markets, has now committed itself to taking the lead in applying global anti-corruption standards.

The UK does so ahead of its competitor nations. Some company bosses are concerned that unless all the world's big economies move forward in lockstep in combating corruption, the UK might end up handing an advantage to competitor nations which take a more laissez-faire approach to bribery.

The implications go beyond hefty fines. Businesses convicted of bribery or a failure to prevent bribery will not only have their public image tarnished, but might also be excluded from future opportunities to bid for valuable projects and contracts. Even businesses which have not been fined could miss out on pitches and tenders if they cannot show that they have adequate anti-bribery procedures.

Next steps

Large multi-national organisations are likely to have internal anti-corruption policies and procedures already in place. They will have to review and revise these in the light of the Act. Smaller businesses which are trying to grow their international markets, particularly in emerging countries, are less likely to have such policies and procedures. If so, they will need to do something about it quickly (see *Are my procedures adequate?* below). For SMEs operating in parts of the world and in markets where bribery is a more common problem, the message is clear: do your utmost to ensure you do not engage in or tolerate bribery...and be able to prove it.

ARE MY PROCEDURES ADEQUATE?

A business' liability for its failure to prevent bribery is strict. If someone representing your organisation offers a bribe in order to further your business then your organisation could face prosecution for a failure to prevent that bribe. The only defence is to prove that your organisation had adequate anti-bribery procedures in place.

The government will establish its final guidance on what amounts to adequate procedures in early 2011. Its draft guidance stresses that commercial organisations must decide for themselves what procedures are adequate in the context of their business. Understandably, the standards expected of large multi-national corporations will be higher than those demanded of smaller businesses. But all businesses, big and small, are encouraged to review their anti-bribery procedures. The government's guidance is short on specifics but it sets out six principles around which anti-bribery procedures should be based:

| Six principles for bribery prevention | Practical points |
|---|---|
| Risk assessment | <ul style="list-style-type: none"> Consider if your geographical markets and/or industry sectors put you at greater risk Improve controls over third party representatives (agents and introducers) |
| Top level commitment | <ul style="list-style-type: none"> Communicate a clear message to all employees and business partners that bribery is not tolerated |
| Due diligence | <ul style="list-style-type: none"> Run checks on third parties you have engaged to represent your business and on wider business partners (e.g. joint venture partners) |
| Clear, practical, accessible policies and procedures | <ul style="list-style-type: none"> Develop and publicise a clear policy on gifts, corporate hospitality, political and charitable donations Implement internal whistle-blowing procedures to alert central management |
| Effective implementation | <ul style="list-style-type: none"> Training for employees and representatives on (i) bribery awareness and prevention, (ii) your anti-bribery procedures Add anti-bribery covenants into contractor agreements. Translate your policies and procedures for employees and representatives who do not speak English. |
| Monitoring and review | <ul style="list-style-type: none"> Make sure your audit and financial controls will pick up unusual or unexplained expenses or transactions Monitor your procedures, their effectiveness and training Consider buying in external help to test your procedures |

Speak to your usual contact at Boodle Hatfield if you would like advice on putting together anti-bribery policies and procedures.

THE BRIBERY OFFENCES

The Bribery Act consolidates existing offences into a single statute. But it goes further by introducing extra-territorial reach and a strict liability offence of failing to prevent bribery. The bribery offences are:

- Offering bribes
- Receiving bribes
- Bribing foreign public officials
- Failing to prevent bribery

Offering and receiving bribes.

The Act introduces two general offences: broadly, these are offering a bribe and receiving a bribe. The obvious example is a cash payment, but other things can amount to bribes, such as gifts, extravagant hospitality, offers of employment, donations to particular causes, promises of future contracts. The possibilities are seemingly endless and the Act is framed to catch them all. Companies, partnerships, sole traders and trustees will all need to consider if any of their business development practices could potentially be considered bribery.

Whether a bribe is being offered or received, the intention must be for the recipient to carry out a *relevant function* improperly. A *relevant function* could relate to an official process (e.g. the granting of an official permit) or a commercial decision (e.g. the award of a contract). The key is that the person receiving the bribe performs the function improperly.

What is improper performance? The Act describes this as performance in breach of a relevant expectation. Whose expectation? Well, if a reasonable person in the United Kingdom. If a reasonable person in the UK would expect a function or activity to be performed in good faith or impartially (or considers the person performing it to be in a position of trust), and the performance doesn't meet this expectation, then the performance has been improper. It doesn't matter where the improper performance takes place and local customs and practices (which are not themselves part of local law) are irrelevant in assessing this expectation.

Bribing a foreign public official (FPO)

This offence speaks for itself but there must be an intention to influence the FPO and to gain some sort of business advantage. FPOs are not just foreign government officials but also representatives of international organisations.

Failure to prevent bribery

Failure to prevent bribery (also called the corporate offence) is the most controversial aspect of the Act. It does not matter where in the world the bribery takes place. If it is carried out by a person who is associated with a commercial organisation which has a business presence in the UK, then that commercial organisation will be liable for failing to prevent the bribery. The only defence is for the organisation to show that it had adequate anti-bribery procedures in place (see *Are my procedures adequate?* above).

The person who engages in the bribery must be *associated* with the company. This captures not just employees but also agents, distributors, introducers, joint venture partners and other representatives.

The corporate offence applies equally to (i) UK companies/partnerships and (ii) non-UK commercial organisation which have a business presence in the UK. The meaning of *business presence* is not clear. It might mean having a trading business in the UK, or it might mean having a lesser presence, such as a non-trading representative office. What is clear is that a company with very little connection to the UK could find itself prosecuted here for a failure to prevent a bribe somewhere else in the world.

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CORPORATE CONTACT

This document is intended to provide a first point of reference for current developments in aspects of corporate law. It should not be relied on as a substitute for professional advice. If advice on a particular circumstance is required please contact your Boodle Hatfield lawyer or the partner listed below:

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