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The Bribery Act 2010

The Bribery Act was passed on 8 April 2010 and is expected to come into force in October. It made significant changes to existing laws, and represents the UK's zero tolerance approach to bribery and corruption. The Act emerged following immense pressure on the UK from the international community, particularly the Organisation for Economic Co-operation and Development, to take a tougher stance on bribery and corruption, and enables the prosecutors and courts to respond more effectively to criminal conduct both at home and abroad. It has far-reaching compliance consequences for many public and private organisations including those with minimal presence in the UK.

The offences

Active and passive bribery

There are two new general offences:

- **Active bribery** – Offering, promising or giving a bribe; and
- **Passive bribery** – Requesting, agreeing to receive or accepting a bribe.

A bribe may be thought of as a payment or receipt of money or benefits intended to induce or reward improper performance.

The breadth of the Act's provisions means that a victim of bribery and corruption could commit an offence - such as an employee of a multi-national company who needs to lawfully cross a border but is prevented from doing so by a border guard who insists on receiving a payment before allowing the employee to pass through. The employee in these circumstances will face a difficult choice in deciding whether to pay the bribe. In some countries this sort of conduct is common practice.

Bribing a foreign official and the corporate offence of failing to prevent bribery

The Act also creates two new discrete offences of bribery of a foreign public official in respect of the active offence, and the new corporate offence of failure of a commercial organisation to prevent bribery.

The corporate offence represents a significant change to the UK law and will be committed when a person who performs services for or on behalf of a relevant commercial organisation (an "associated person") commits bribery where the bribe was intended to obtain or retain business or an advantage in the conduct of business for the commercial organisation.

The corporate offence is a strict liability offence. This means that once it is proven that a bribe for the benefit of the organisation was made, the only defence the organisation will have is to show that it had "adequate procedures" in place to prevent bribery. The government will publish guidance to commercial organisations on this issue later in the year and organisations should attempt to follow them as closely as possible.

Increased exposure for senior managers

Directors and senior managers face a direct increase in exposure under the Act – where active bribery, passive bribery or the bribery of a foreign public official is found to be committed by a corporate body, a senior officer or a person purporting to act in such a capacity who has "consented or connived" to the bribery will also be guilty of the offence. For example, a director or senior officer could be guilty of this offence if he or she knew that acts of bribery were happening but took no action to prevent them.

Who will be affected?

The Act applies to actions of UK organisations, UK nationals and UK residents in the UK and abroad.

Any corporate entity or partnership will be guilty of the corporate offence if it does business in the UK even if the act of bribery itself was committed outside the UK – therefore, this offence could apply to actions committed outside the UK by non-UK corporates.

What are the implications for business of the new corporate offence?

Organisations will be criminally liable if anyone "associated" with it makes a bribe in order to win business, regardless of whether the bribe is made in the UK or another country. This will catch the actions of employees, agents and intermediaries performing services for or on behalf of the business. This could extend to franchisors, distributors and others in a similar commercial relationship with the business. The Act requires the courts to have regard to "all relevant circumstances" when assessing this and not just the nature of the relationship between the parties. Therefore, there will be a real risk that UK companies may fall foul of the Act where an act of bribery has been committed by joint venture or consortia partners, or by agents of any sort who have no connection with the UK, unless the defence of "adequate procedures" applies.

Facilitation payments and corporate hospitality

As a bribe covers reward and inducements including a "financial or other advantage", facilitation payments (certain types of payments to foreign officials to secure business opportunities or the performance of governmental functions) are illegal under the Act. The Act does not distinguish these from bribes, unlike the Act's US equivalent, the Foreign Corrupt Practice Act 1977, which accepts some facilitation payments from criminal liability where they are intended to expedite the performance of routine governmental action, rather than influence the outcome of the official's action in the first place. If interpreted broadly by the authorities, even providing corporate hospitality in some circumstances could constitute a bribe.

In some overseas territories facilitations are lawful and an accepted part of doing business. UK companies and individuals will need to be careful to ensure that where doing business overseas they don't fall foul of the new law. Whether an organisation will ultimately be prosecuted for making facilitation payments, will be at the discretion of the authorities and is expected to be a question of proportionality. Statements made in parliament suggest that it will remain unlikely that small one-off facilitation payments made abroad will be prosecuted. However, companies are best not to run the risk of prosecution and adopt a zero tolerance approach.

In relation to corporate hospitality, the Government has made it clear that this will not be exempted from the new Act. However, whilst the Act offers no guidance on this issue, there is likely to be a distinction drawn between "routine and inexpensive hospitality" and "lavish or extraordinary hospitality". For example, a company golf day for a UK organisation could amount to bribery if it takes place overseas, coupled with 5 star accommodation and accompanying lavish restaurant bills instead of the local UK golf course. However, again, this will be a question of proportionality, and any consequent prosecution will be left up to the discretion of the authorities.

Penalties

A corporate body found guilty of a bribery offence could face an unlimited fine and individuals found guilty of a bribery offence could face a maximum sentence of ten years imprisonment or an unlimited fine or both.

A director convicted of a bribery offence may also be disqualified from acting as director for up to 15 years.

What should your organisation do?

In light of the new laws, organisations should put in place and continually monitor a robust internal anti-corruption regime which may include some or all of the following:

- Publishing a clear code of conduct publicised internally and on the organisation's website
- Implementing a comprehensive training programme for all employees and agents of the organisation
- Carefully scrutinising third party agents and others employed to work on behalf of the company - foreign agents could be a company's biggest risk area
- Implementing robust internal audit, investigation and disciplinary procedures to enforce the anti-corruption policies and procedures – such as encouraging whistle-blowing in the organisation where criminal conduct is suspected
- Obtaining board-level commitment

Whilst organisations may be able to show they have the appropriate rules in place, they will also need to establish clearly their continual review and enforcement of them – this is likely to be what the authorities will be keen to see. Organisations should also ensure that they have rules in place to prevent any behaviour which could be misinterpreted as against the law, such as in the areas of corporate hospitality and facilitation payments made in connection with overseas contracts.

Smaller organisations could be more at risk than their larger counterparts as they are unlikely to have the legal, compliance and human resources back-up that is available to the larger organisations.

If a breach of the rules does occur, and an organisation suspects corrupt conduct, it should take legal advice on whether or not to report the issue to the Serious Fraud Office ("SFO"). The SFO has said that it encourages self-reporting and that if organisations do so, ultimately the penalties could be significantly reduced, along with the potential for the matter to be treated as a civil one rather than criminal. Investigations typically could go on for years and be extremely costly for an organisation, not to mention the adverse reputational impact.

Implications on insurance

Professional indemnity insurance

Although the Act may not have any direct impact on cover because such a policy is only triggered once a third party who has suffered a loss makes a claim against an organisation, there could be an indirect impact if that third party loss arises out of bribery and corruption. Organisations should check that the fraud and/or criminal conduct exclusion on their policies only applies to the acts of the organisation itself, rather than its employees, and that the exclusion only triggers on a "final adjudication" basis. That is, once the corrupt conduct is proven by a court or tribunal. Any "deliberate corporate acts" exclusion should also be on a final adjudication basis. Further, the policy should be clear in this context as to what constitutes the "mind" of the company for the purposes of the corporate acts – usually this should be limited to the company's most senior officers such as the Chief Executive Officer and Chief Financial Officer.

Directors' and officers' liability insurance

As well as being exposed to individual liability under the general provisions of the Act, senior managers will be guilty of an offence involving the corporate body where they "consented or connived" to the bribery.

A directors' and officers' liability policy will fund the costs of defending any action against a director or manager under the Act unless the director is convicted of the offence by a court.

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Cover under the policy may also be compromised if a director makes an admission of liabillity in an internal investigation by the company into suspicious conduct, or where a director is interviewed "under caution". A condition of cover under standard policies is that insureds do not admit liability for their conduct.

Advice should be sought by directors under these circumstances as to the steps that they should take to protect their position and their insurance cover.

In order to provide maximum protection to a director faced with allegations of bribery and corruption the policy should:

- Cover all directors and senior managers of the UK holding company and its local and international subsidiaries
- Contain a broad definition of "claim" to include criminal prosecutions; and
- Provide that the fraud or criminal conduct exclusion only applies on a "final adjudication" basis and that it is severable - so that the criminal acts of one director will not invalidate the policy for all others.

This will ensure that any director faced with allegations of bribery and corruption receives legal costs of mounting a defence right up until the point when a decision is made by a court. This is particularly important where a director no longer has his company standing behind him to fund his defence because of a conflict of interest between the parties. If found guilty, the insurer is likely to require the costs advanced to be repaid.

Cover for the costs of defending concurrent actions against a director for disqualification and for costs in hiring public relations consultants to mitigate any reputational injury should also be negotiated with insurers.

Currently standard directors' and officers' liability policies in the UK marketplace would not cover any legal costs incurred by a director in responding to a regulator or any internal investigation conducted by the company following a self-report by the organisation, unless and until a "formal or official investigation" is launched – often such inquiries fall short of the "formal or official" trigger but could also be costly for an individual particularly where the company does not indemnify him for the costs because of legal prohibition or insolvency. As well as trying to negotiate some cover for these costs with insurers in these circumstances, clarity should be sought on how insurers view self-reporting and whether this would also be considered as an admission of liability under the policy, hence invalidating any cover for a related claim.

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