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Client Alert

Corporate Practice Group

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The UK Bribery Act: Be Prepared

The long-awaited UK Bribery Act 2010 (the "**Act**") is now in force. The Act drastically changes the anti-corruption regime for organisations and for directors. It creates a simplified regime to tackle anti-corruption that applies to all organisations based in the UK and overseas entities that carry out business in the UK. The penalties for non-compliance are serious. The UK government has published guidance on "adequate procedures" to prevent bribery occurring in the organisation. In this note, we discuss the main provisions of the Act and the steps organisations should take so that they are ready for the new anti-corruption regime.

Background

The previous UK anti-corruption legislation is a mixture of common and statutory law, some of which dates back to 1889. It has been criticised as being confusing and complex, with increasingly little relevance to global corruption problems. The government has also been criticised for being out of step with the international community in contrast to, for example, the US government, which brought the Foreign Corrupt Practices Act (the "**FCPA**") into force in 1977. The Act aims to rationalise the existing legislation and also target overseas corruption by organisations with a connection to the UK. Although the Act does not have quite the territorial reach of the FCPA, it applies to international organisations and UK individuals and also covers private transactions, where the current UK regime does not.

A key aspect of liability is that unlawful acts by third parties (agents, consultants and other business partners) render that organisation liable under the Act. Therefore, people who perform services for or on behalf of the organisation, regardless of their capacity and whether they are a third party or an employee of the organisation can render the organisation liable for bribery.

Four offences under the Act

The Act creates the following offences:

A. ***"Offering, promising or giving a bribe to another person" and "requesting, agreeing to receive or accepting a bribe from another person"***

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The Act sets out two general offences of bribing and being bribed which are committed when someone:

- offers, promises or gives another person a bribe;
- requests, agrees to receive or accepts a bribe; or
- gives a financial or other advantage in connection with a person performing a function "improperly."

These offences are not new but are restated more clearly than under the previous regime. The improper performance of a function is one which breaches an expectation that the function will be performed in good faith, impartially or as a result of a position of trust. This contrasts with previous legislation which required an element of corruption. The change in approach should make it easier for bribery offences to be prosecuted, since there is no longer any need to show a corrupt intent on the part of the giver or recipient of the advantage. The government responded to criticism that the drafting of these offences could be interpreted too widely and cover transactions not commonly thought of as "corrupt", particularly in private transactions. The government, however, preferred that the Act remained broadly drafted and to rely on the discretion of the prosecutor of overseas corruption, the Serious Fraud Office ("**SFO**")), as to which offences were prosecuted. As organisations are liable for the bribery activities of third parties acting on their behalf or for their benefit, it is vital that they deal with trusted third parties who abide by anti-corruption ethics.

B. "Bribing a foreign public official"

Bribing a foreign official is an offence regardless of where the bribe is committed, if performed by a UK national or resident.

This offence is committed when a person bribes a foreign public official or offers an advantage to such an official:

- with the intention of influencing the foreign public official in his capacity as such an official;
- to obtain or retain business or an advantage in the conduct of business; and
- when the official is not permitted or required by local law to be influenced by this business or advantage.

This offence implements the intentions of the Organisation for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1998 and emphasises the need for organisations to exercise caution in their dealings with foreign public officials. Unlike the offences of bribing or being bribed, there is no need for the official to perform his function "improperly" as a result of the bribe. Where local advice has been properly sought and the payment made in accordance with that advice, it is anticipated that prosecutors and juries will take that into account.

Facilitation payments remain illegal under the Act, even if they are expected by local custom. In contrast, the FCPA permits organisations to make payments for the purpose of expediting the performance of routine governmental actions, such as clearing goods through customs, although it does not extend to payments made for the purpose of obtaining a substantive decision from a governmental agency. Concern had been raised that this will mean UK organisations will be

at a disadvantage compared to US organisations. The UK government is, however, keen to show that bribery will not be tolerated in any form and intends that the playing field will be levelled in the future for UK organisations. US organisations should be aware of this point when considering the impact of the Act on their businesses.

C. Corporate offence of "failing to prevent bribery"

This is a new offence and the one which has, so far, provoked the greatest reaction from businesses. An organisation will be liable if:

- a person associated with it bribes another person intending to obtain or retain business or an advantage in the conduct of business for the organisation; and

- there are no "adequate procedures" in place designed to prevent bribery.

It is subject to an adequate procedures defence and reflects the government's emphasis on corporate culture and the need for everyone within the organisation to be committed to preventing bribery.

Organisations subject to this provision in the Act include UK companies, UK partnerships and non-UK companies and partnerships that do business in the UK. The Act, therefore, covers companies with only a limited connection with the UK. Third parties who could potentially trigger a liability for the organisation under the Act ("associated persons") include any person who performs services for or on behalf of the organisation. It may include, for example, the company's employee, agent, subsidiary, consultant or joint venture partner.

Adequate procedures

It is a defence to the corporate offence of failing to prevent bribery that the organisation had "adequate procedures" in place designed to prevent persons "associated" with the organisation from committing bribery offences. "Adequate procedures" are not defined in the Act. The government has published its guidance to organisations on how the defence can be established. The guidance is not prescriptive and it is not binding. The guidance focuses on six key principles:

(i) Proportionate procedures

Organisations with comprehensive, practical and accessible policies and procedures dealing with acceptable levels of gifts and hospitality, prohibiting bribery and dealing with reporting any requests for bribes to a senior manager are likely to be in a better position to establish the defence than those without any procedures at all. The policies and procedures should be proportionate to the bribery risks faced by the business. They should contain a clear prohibition of all forms of bribery and a strategy for incorporating this prohibition into the decision-making process of the business. The procedures should also deal with enforcement and making confidential reports about suspected bribery. Guidance on making political or charitable contributions, gifts, hospitality or promotional expenses to ensure that the purposes of such expenditure are ethically sound and transparent is also likely to be helpful.

(ii) Top-level commitment

As it is believed that board members are best placed to foster a culture of integrity, where bribery is unacceptable within the organisation, anti-corruption should be led by a board director. Effective demonstrations of this top-level commitment are likely to include the following:

- a statement of commitment to counter bribery in all parts of the organisation and to adopt a zero-tolerance policy towards bribery and set out the consequences of breaching the Act for employees; and
- the personal involvement of a board director in developing a code of conduct and the policies and procedures.

(iii) Risk assessment

What constitutes an adequate risk assessment will depend on the size of the organisation, its activities, its customers and the markets in which it operates. As organisations evolve, they should give adequate resources to the ongoing assessment and mitigation of bribery risks. A business with greater knowledge of its bribery risks is likely to have more effective procedures and conduct greater efforts to prevent bribery. Due diligence, dealt with below, is one aspect of risk assessment. Other aspects include management oversight of the risk assessment, appropriate resourcing and support and information on the risks.

(iv) Due diligence

Organisations need to know with whom they are doing business if their risk assessment and mitigation procedures are to be effective. Specific enquiries may be required depending on the jurisdiction, the nature of the business opportunity and the third party involved. Diligence should be proportionate to the risk assessment.

(v) Communication and training

Internal and external communication of bribery prevention policies and procedures is likely to help prevent bribery, especially where the penalty for breaching the policies and procedures (e.g., disciplinary action, including possible dismissal) is communicated to all employees. Training on these procedures is likely to ensure awareness and understanding of them.

(vi) Monitoring and review

Organisations should consider what internal checks and balances are needed to monitor and review anti-bribery policies. In smaller organisations, this might include effective financial and auditing controls that pick up potential and actual irregularities, combined, perhaps, with a means by which the comments of employees and key business partners are incorporated into the continuing improvement of anti-bribery policies. In larger organisations, this may include periodically reporting the result of such reviews to the audit committee or the board of directors.

Companies using third party suppliers are expected to consider requiring sub-contractors to have in place similar bribery prevention procedures as apply to the organisation subject to the Act. In practice, this is likely to be difficulty to impose on small businesses overseas with limited rights of audit.

Penalties

The penalties for breaching the provisions of the Act are far more severe than under the previous regime, with conviction carrying unlimited fines for businesses and up to ten years' imprisonment (currently seven years) and/or an unlimited fine. The potential damage to an organisation's reputation, however, cannot be quantified. Businesses also risk being excluded from bidding on public or utilities contracts if they have been considered of a bribery offence (under mandatory exclusion rules in Europe), and they are also likely to incur negative publicity and damage to their reputations.

Additional liability of "senior officers"

If any of the offences of bribing another person, being bribed or bribing a foreign public official are committed by an organisation, any "senior officer" is guilty of the same offence if he or she has "consented" to or "connived" in the commission of the offence provided that, if the offence is committed outside the UK, he or she has a close connection to the UK. This provision places an obligation on senior officers to ensure that they are not deemed to have consented (explicitly or implicitly) to bribery committed by others. The provision reiterates the need for an organisation's anti-corruption culture to be led from the top (as envisaged in the government's draft guidance).

"Senior officer" is widely defined to include a director, manager, secretary or similar officer. A close connection will be established if the officer is a British citizen, British national (overseas) or an individual ordinarily resident in the UK.

Contrasting the FCPA with the Act

Many US companies and businesses are already familiar with the requirements of the FCPA and used to ensuring that their policies and practices meet those requirements. Compliance with US law will not, however, necessarily ensure compliance with the Act.

The Act is broader than the FCPA in the following respects:

- not only does the Act apply to bribery of public officials but also bribery of private citizens, unlike the FCPA (individual commercial bribery is generally covered by state law in the US);
- there is no defence for facilitation payments in the Act, unlike under the FCPA;
- the FCPA does not contain an equivalent to the corporate offence for failing to prevent bribery, although it does include provisions relating to the keeping of books and records that accurately reflect business transactions and to the maintenance of effective internal controls, similar to corporate requirements in the UK; and
- there is no need to prove "corrupt" intention under the Act, as there is under the FCPA.

It will, therefore, be necessary to ensure that any organisations with a connection to the UK comply with the Act, in addition to applicable US requirements. Given that a connection will be established simply by having a place of

business in the UK, even if the organisation's main activities are carried on elsewhere, the ambit of organisations subject to the Act is wide.

The SFO

The SFO, the current UK prosecutor of crimes under the Act, has actively promoted a policy of encouraging companies to self-report, in line with the practice of US companies to the US Securities and Exchange Commission or US Department of Justice. The SFO's approach has been that it would usually seek to agree civil remedies rather than criminal sanctions, if companies co-operated with it regarding possible corruption issues. This approach was successful in, for example, the recent *Mabey & Johnson* case, where the court adopted the civil penalties negotiated between the SFO and the company for corruption charges in 2009. Recently, however, the SFO's role in negotiating settlements has been criticised by the UK courts. The recent decisions in *Innospec* and *Dougall* have created uncertainty for companies about the benefits of self-reporting and co-operating with the prosecutor regarding possible corruption activities. Innospec Limited pleaded guilty to conspiracy to corrupt in relation to activities in Indonesia and Iraq. They co-operated with the SFO in the investigation and reached a joint agreement between the US and UK authorities (the first on record). Although the court ultimately agreed with the total penalty imposed on Innospec Limited, the judge made clear that he considered the UK penalty to be inadequate and that the UK courts were not bound to accept a criminal sanction negotiated between the company and the prosecutor. Similarly, the suspended sentence negotiated for Robert Dougall, an executive of DePuy International Limited, who co-operated with the SFO in its investigation of activities in Greece, was initially rejected by the court (it sentenced Dougall to twelve months' imprisonment, rather than give him a suspended sentence) and it criticised the approach of the SFO in advocating the suspended sentence for Dougall. The decision was later overturned by the appeal court (issuing Dougall with a suspended sentence), but again the court made clear that it is for judges to determine criminal penalties, not the SFO or individual defendants.

It is clear, following these decisions, that it is for the courts to determine if substantial criminal penalties are appropriate for serious criminal offences. The SFO cannot definitively agree penalties with defendants. It is also clear that prosecutors cannot advocate certain sentences on behalf of defendants. The courts were particularly critical of the SFO for advocating reduced sentences for the defendants in return for their co-operation. The courts have said they will also determine fines comparable to those imposed in corruption cases in the US and it is not always appropriate that these fines are reduced in return for co-operation in the UK. In return for the co-operation, companies will generally aim to seek a global negotiated settlement. These are, however, difficult to enforce, and these recent cases highlight the difficulties of achieving a global settlement as regards UK bribery activities.

Companies co-operating with the SFO must, therefore, accept that courts may disregard the SFO's recommendations as to appropriate penalties. There is, in addition, a mandatory obligation to self-report corruption to the Serious and Organised Crime Agency, in connection with handling with proceeds of crime and anti-money-laundering offences. Organisations should consider very carefully the strategic advantages and disadvantages of self-reporting and co-operating. It is important to bear in mind that an offence under the Act can lead to an unlimited fine. When the bribery settlement with BAE Systems is put before the courts for approval in the near future, this will hopefully provide some additional clarity about the SFO's role (possibly within the Economic Crime Agency from 2011), particularly with respect to negotiating settlements of offences under the Act.

Risk areas

The provision of corporate hospitality and gifts to third parties, public officials, politicians, clients or suppliers is often viewed as normal business practice. Under the Act, such practices should be scrutinised. They will be viewed as bribes if they are given or received with the intention of improperly influencing a business outcome. Organisations should have clear and enforced policies on gifts and hospitality, setting levels above which such gifts should not be accepted and lower levels at which such gifts need approval from a senior manager, and requiring all such gifts (whether or not accepted) to be reported (including the dates). Gifts and hospitality to politicians and public officials should be prohibited.

Facilitation payments are not allowed under the Act, unlike under the FCPA. US organisations should be aware that business practices may need to change if they currently allow such payments and there is a UK connection to the business. Employees should be made aware of this and the potential penalties.

Transparency International has published a corruption perception survey, indicating countries in which to do business, noting that Russia, Pakistan, Kenya, Iran and Venezuela rank amongst the highest-perceived corrupt countries in the world. Organisations should pay particular attention and conduct more detailed diligence and vetting of businesses and potential business partners or acquisitions in high-risk countries.

Be prepared now

Companies should consider taking the following steps:

- put in place a clear ethics code or anti-corruption statement, applicable to all organisations operating in the UK (if not globally), issued by the managing director or chief executive officer of the organisation;
- develop a gifts and hospitality policy, requiring employees to seek approval for gifts or hospitality above a specified threshold, and monitor the reports submitted by employees for approval; all approvals should be given or refused in a consistent manner;
- require all employees to abide by a code of ethics, forbidding bribery in all jurisdictions and in any form, and make any breach of the policy an act of gross misconduct; consider comprehensive pre-employment screening before employees are hired; introduce contractual obligations on employees to abide by the ethics code or anti-corruption statement;
- set up a compliance function, possibly within the legal function, with a senior officer or board director responsible for compliance and anti-corruption responsibilities; the officer should be authorised to implement anti-corruption steps and monitor suspected bribery activities;
- allow employees to blow the whistle on bribery offenders in a confidential and protected manner (whether or not via a formal hotline, bearing in mind there are data protection rules to comply with when implementing hotlines in Europe);

- investigate all allegations of bribery quickly and consistently; any disciplinary action taken against employees suspected of bribery should be carried out promptly, after investigation, and consistently applied sanctions should be issued;

- undertake diligence on agents, consultants, distributors and new business partners (including joint venture companies and new company acquisitions); include anti-corruption obligations, immediate termination rights for breach of these provisions as well as indemnities against liabilities incurred by the business in all contracts with third parties;

- put in place adequate audits of financial transactions and internal financial controls to highlight suspicious transactions; and

- train all employees on anti-corruption policies on a regular basis and keep a record of all employees who received training and when it occurred.