

This note summarises the significant changes in UK anti-corruption law brought about by the Bribery Act 2010 and the urgent need for businesses to take appropriate action to ensure awareness throughout their organisation of the offences and to protect against incurring liability, to the extent such actions have not already been taken.

Issue

The Bribery Act 2010 came into force on 1 July 2011. It introduced changes in the law that could significantly impact the conduct of a Company's business, both in the UK and abroad, in that:

- It extends the crime of bribery to cover all private sector transactions (previously bribery offences were confined to transactions involving public officials and agents).
- It contains a new strict liability offence of failing to prevent bribery. An organisation will only have a defence to this offence if it can show it had "adequate procedures" in place to prevent bribery.
- Its scope is extensive – the offences are very broadly defined and it has significant extra-territorial reach.
- The offences contained in the Bribery Act carry criminal penalties for individuals and organisations. For individuals, a maximum prison sentence of ten years and/or an unlimited fine can be imposed; for companies, an unlimited fine can be imposed.

Companies are advised to review their anti-corruption procedures to ensure they are sufficiently robust to prevent corruption and to mitigate the risk of committing an offence under the Act.

Bribery offences

The Act contains four offences:

- A general offence covering offering, promising or giving a bribe.
- A general offence covering requesting, agreeing to receive or accepting a bribe.
- A distinct offence of bribing a foreign public official to obtain or retain business.
- A new strict liability offence for commercial organisations where they fail to prevent bribery by those acting on their behalf.

The Act is not retrospective.

The offence of failing to prevent bribery: strict liability and the adequate procedures defence

A commercial organisation commits an offence if a person associated with it bribes another person for that organisation's benefit.

A person is "associated" with a commercial organisation if it performs services for or on behalf of the organisation, regardless of the capacity in which they do so. This can be construed broadly and could cover the Company's agents, employees, intermediaries, joint venture partners, distributors and suppliers, all of whom could render the Company guilty of this offence.

This is a strict liability offence: there is no need to prove negligence or the involvement and guilt of the 'directing mind and will' of the organisation. This makes the offence easier to prove and will probably lead to more corporate prosecutions and convictions.

Adequate procedures defence

The organisation has a defence if it can prove it had "adequate procedures" in place to prevent bribery. "Adequate procedures" are not defined in the Bribery Act but the Ministry of Justice has published guidance on what adequate procedures might involve.

The guidance sets out the following six principles for companies to follow:

- Proportionate procedures.
- Top level commitment.
- Risk assessment.
- Due diligence.
- Communication.
- Monitoring and review.

Companies are advised to continue to review the guidance, conduct regular risk assessments, and ensure that the Company has adequate procedures to prevent bribery in place.

Criminal penalties

The potential consequences of being convicted of a bribery offence include criminal penalties for both individuals and companies:

- Individuals can be jailed for up to ten years and/or receive an unlimited fine.
- Companies can receive unlimited fines.

Fines for companies are likely to be substantial. No guidance has yet been given, but a judgment in the Crown Court in 2010 against a company that had bribed foreign public officials stated that fines for corruption should be in the tens of millions or more.

"Senior officers" (which is broadly defined, and includes but is not limited to directors) can also be convicted of an offence where they are deemed to have given their consent or to have connived in giving or receiving a bribe or bribing a foreign public official. Importantly, it is possible that omitting to act might be regarded as consent or connivance and lead to prosecutions, fines and/or imprisonment.

A director convicted of a bribery offence is also likely to be disqualified from holding a director position for up to 15 years.

Particular risks for the Company

Certain of a Company's activities and operations may expose it to particular risks of being involved in corruption and leave it vulnerable. In particular:

- **Public procurement:** If convicted of "active corruption" a Company might face mandatory exclusion under EU law from carrying out public contracts in the EU. If convicted of the offence for failing to prevent bribery, public authorities would have discretion to exclude it from public contracts.
- **Corporate hospitality and gifts:** There is a risk that corporate hospitality, such as customer or supplier entertainment and the giving or receiving of gifts, might be seen as bribery, especially in dealings with foreign public officials. Lavish hospitality or gifts must be avoided, both the giving and receiving.
- **Facilitation payments:** These are payments demanded by officials (or others) simply to secure or expedite the performance of their normal duties (for example, granting a licence, allowing goods to cross a border, and so on). These are commonplace in some jurisdictions, but the making of such payments, regardless of how small, is an offence under the Act. (Note: the equivalent US legislation (Foreign Corrupt Practices Act 1977) currently specifically exempts such payments provided they are not unlawful in the relevant jurisdiction, but the Bribery Act does not.)

Action points

If you have business customers who operate in high risk industry sectors, the public sector or overseas – or if they conduct business through others such as agents, representatives, distributors, joint ventures or any other kind of 'associated person' then you should consider bringing the risks highlighted above to their attention.

KBL will gladly meet with you and/or your customer for an initial meeting to explain the implications of this new legislation and explore the risks to which they may be exposed – and are able to provide further advice on;

- Anti-corruption and Bribery Policies;
- Adoption of an appropriate 'ethics statement'
- Self-evaluation for the assessment of risks;
- Due diligence on associated persons;
- Adoption of provisions in contracts to provide additional protection;
- Employee awareness programmes;
- Whistleblowing policies

If you require any additional information or would like to arrange a meeting with any of your customers – in the first instance, please contact **Jonathan Shorrocks**