

Update on the UK's tough new bribery laws. Are you prepared?

The Act

The Bribery Act received Royal Assent in April this year although it was uncertain when the offences, including the radical new corporate offence, would become effective.

This key question has now been answered by Ken Clarke, the Justice Secretary and anti-corruption champion, who has announced that the offences will come into force from April 2011. This gives companies only a few months to prepare for the Act.

In the meantime the Government has published draft guidance on what constitutes Adequate Procedures, the only defence to the corporate offence, to assist companies in preparing for their responsibilities under the Act. Ken Clarke has announced that:

"It is essential that any guidance the Government publishes is informed by the wealth of knowledge, experience and expertise to be found outside Government"

As a result the Ministry of Justice is undertaking a consultation exercise, the results of which are expected by January 2011, which may well lead to a further review of the guidance issued by the Government on Adequate Procedures.

The Offences

The new Bribery Act offences include:

- Offering, promising or giving of a bribe;
- Requesting, agreeing to receive, or accepting a bribe, either in the UK or abroad, in both the public and private sectors;
- Bribery of a foreign public official in order to obtain or retain business; and
- Corporate liability in relation to "commercial organisations" which fail to prevent a bribe being paid by those who perform services for or on behalf of the organisation (capturing 3rd parties).

A "Senior Officer" may also face personal criminal liability if found to have consented to, or connived with, any of the first three offences.

You may now be exposed to potential criminal liability where bribes are paid by overseas agents and subsidiaries, even if the relevant conduct has no connection with the UK.

The Penalties

If found guilty the penalties for companies, Senior Officers, employees,

or associated parties, are severe: with up to 10 years imprisonment for individuals and unlimited fines for companies.

Adequate Procedures

The new corporate offence is a strict liability offence. Companies are automatically guilty if it can be proved that those associated with it have committed one of the other offences under the Act. The only defence available to the company is to show that it has "Adequate Procedures" in place to prevent bribery. The draft guidance sets out six guiding principles:

- 1 There must be a corruption risk assessment carried out.
- 2 Top level commitment, an organisation must make a clear and unambiguous commitment to establishing a culture in which bribery is unacceptable.
- 3 Good due diligence - you must be able to demonstrate that you know who you do business with.
- 4 Clear practical and accessible policies and procedures.
- 5 Policies and procedures must be effectively implemented.
- 6 There must be monitoring and review of the effectiveness of anti-bribery controls with consideration of the need for external audit.

The Right Response

Grant Thornton UK LLP has recently undertaken a survey of 166 large corporates to ascertain their views on the Bribery Act. There were a number of interesting findings and the key ones are set out below:

- A sense of unfairness. The Act places too high a burden on companies.
- Competitive advantage is put at risk with worries that UK businesses might lose out to foreign competition.
- A general lack of preparation for the Act.
- A sense of complacency with many respondents believing that the Act was not relevant to them despite 90% doing business overseas.

Several key recommendations emerge:

- Organisations should act *now* to prepare for the Act.
- Each organisation should urgently produce a corruption risk assessment of its business to ensure that it understands its risk and that it considers its procedures adequate.
- Clients must review their existing policies and procedures and align these to address corruption risk. Enhanced management training on corruption risk is also likely to be necessary.

How can we help you?

- 1 Guidance on Adequate Procedures
- 2 Facilitating corruption risk assessment workshops
- 3 Providing bespoke management and staff training
- 4 Help assessing the effectiveness of existing training programmes
- 5 Enhanced due diligence on third parties.

Key concerns for clients

The House of Lords Committee Stage debate on the Bribery Bill demonstrated that there remain divergent views on certain issues and companies need to apply very careful thought to them, including:

- Hospitality/gifts to foreign public officials, and facilitation payments - both are prohibited under the new Act;
- Having an FCPA (the equivalent US legislation) compliant policy is not sufficient - the Bribery Act goes further than the FCPA in respect of facilitation payments and business to business corruption;
- An additional concern will relate to M&A activity - there are risks associated with the take on of "successor liability" for any corrupt activity which may have previously occurred in the acquired entity - due diligence is therefore critical.

These are just some of the complex issues associated with the new Act and how it sits alongside existing international legislation, which also cannot be overlooked.

Companies will inevitably be faced with difficult choices. For example, while it is easy to prohibit facilitation payments, the reality may be on the ground that this is simply not possible.

Can your Board answer these questions?

- **Have you performed a Corruption Risk Assessment (CRA)?**
- **You have a bribery strategy but are policies and procedures bespoke or aligned to the CRA?**
- **Do your policies and procedures fully address facilitation payments, gifts, entertainment, corporate hospitality, or political donations on a global basis?**
- **Do you have an over-reliance on agents or other intermediaries, particularly overseas, to assist in winning business?**
- **Do you rely on tiered due diligence for the appointment of agents, and/or during M&A activities to address "successor liability"?**
- **Do you have an escalating review process for payments to agents?**
- **Is there an anti-corruption training programme for the Board, all managers and staff?**
- **How do you assess how effective your training programme is?**
- **Is staff training conducted face-to-face to allow them to ask questions?**

- **Do you have a mechanism such as an independent whistle-blowing or helpline for staff to report their concerns or seek advice?**
- **Are reports of corruption investigated and appropriate sanctions employed?**
- **Do you have an effective compliance monitoring programme which provides the requisite assurance?**

Poor systems and controls in a business allow bribery to occur and red flags to go unnoticed by staff. If you cannot answer these questions with confidence then there is a need to take action now.

What are our credentials?

1. We have a wealth of experience of helping companies mitigate corruption and fraud risk through effective internal control regimes, (especially financial controls), performing proactive reviews and advising companies on anti-corruption programmes.
2. We have in depth experience of undertaking corruption investigations on an international basis including FCPA cases.
3. We are at the forefront of the debate on this topic and our working relationships with prosecution and regulatory agencies are extensive.
4. As part of our broader thought leadership on this subject, we are also working alongside the World Bank Institute to help companies find a different way to do business and mitigate corruption risk*.

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