Corporate & Commercial

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BRIBERY ACT 2010

The Bribery Act 2010 will enter into force on 1 July 2011. As well as codifying existing UK laws, the Act also creates a new, high profile offence of failing to prevent other people from paying bribes on a company's behalf (discussed in more detail below).

Interpretation of the Act will, of course, be a matter for the Courts and there are a number of areas (highlighted below) where the position is uncertain (even with the benefit of the guidance from the Ministry of Justice and others). What is clear, particularly in light of the long lead time into the Act coming in to force, is that ignorance of its provisions and scope will not be a defence.

This briefing considers the old and the new offences under the Act, as well as the position on facilitation payments and corporate hospitality, two topics which have recently grabbed the headlines, and offers some practical suggestions for steps which companies can take to minimise their exposure.

HFW recommendations:

- Conduct a detailed risk assessment, including a review of business practices where non-UK corporates have a UK listing, subsidiary or branch.
- Carry out thorough due diligence on all counterparties, agents, other intermediaries, joint venture partners and employees.
- Have in place robust procedures for preventing bribery including, in particular, procedures on facilitation payments, hospitality and dealing with foreign public officials.
- Communicate those procedures internally (ie to all employees) and externally (ie to all counterparties, agents, other intermediaries, and joint venture partners).
- Train staff thoroughly and monitor and review the programme.
- Obtain appropriate local law advice in advance.
- Review insurance cover, including Directors & Officers cover.

Codification of existing offences

The Act consolidates existing laws outlawing bribery into three offences, namely (i) bribing another person (including an individual or company who operates in the private sector); (ii) being bribed; and (iii) bribing a foreign public official. In each case, there is no requirement that a bribe has actually been paid - it is enough if a bribe is offered, promised or given.

The offences are committed if any act or omission takes place in the UK, but they may also be committed where no act or omission takes place in the UK, if the act or omission is that of a person with *"a close connection"* with the UK. This will include British citizens, those resident in the UK, and companies incorporated in the UK.

The penalties for the offences include unlimited fines and/or confiscation of assets and up to 10 years' imprisonment; a company's directors and senior officers may be personally liable if the offence is committed with their consent or connivance. We recommend that companies which may be affected by the Act should review carefully their Directors & Officers insurance to ensure that there is adequate cover in place, including for the costs of investigating and defending any allegations of bribery or corruption.

The offence of bribing a foreign public official is widely drafted (it is sufficient if the person offering the bribe intends to influence the public official, even if it cannot be shown that he intended to induce the foreign public official improperly to perform a relevant function or activity). We recommend that any company which deals with foreign public officials should have in place robust procedures to ensure that bribes are not offered, promised or given to foreign public officials.

In addition, because a party which is alleged to have paid a bribe in Country X can only rely, by way of defence, on the written laws of Country X (and not on any unwritten local custom or practice), we recommend that any company which seeks to rely on local rules should obtain local legal advice to ensure that the relevant rules fall within the Act's definition of written law.

Creation of new offence

The Act also creates a new offence where "a relevant commercial organisation" fails to prevent a "person associated with" it from paying bribes on its behalf. For brevity, this offence is referred to as "the section 7 offence".

The section 7 offence has a wider territorial scope than the three offences discussed above, because of the way that a "relevant commercial organisation" is defined. A relevant commercial organisation includes not only UK companies and UK partnerships, but also any company (wherever incorporated) or any partnership (wherever formed) *"which carries on a business, or part of a business, in any part of the UK".*

It will be for the Courts to interpret this provision depending on the facts of each case, but there has already been speculation about whether this language is wide enough to include a non-UK company which is listed in the UK. The recent Ministry of Justice guidance includes the following comments on Government policy: *"The Government would not expect, for example, the mere fact that a company's securities have been ... admitted to trading on the London Stock Exchange, in itself, to qualify that company as carrying on a business or part of a business in the UK"* (emphasis added).

Similarly, the Guidance indicates that *"having a UK subsidiary will not, in itself, mean that a parent company is carrying on a business in the UK, since a subsidiary may act independently of its parent or other group companies."*

It should be kept in mind that the Act refers to companies carrying on *"a business"*, not merely carrying on business, in the UK, and we recommend that all companies with a UK listing, branch or subsidiary should carefully review their business practices to determine whether they have any other connection with the UK, and whether they could be said to be carrying on a business, or part of a business, in any part of the UK.

It is a defence to the section 7 offence for the commercial organisation to show that it had in place "adequate procedures designed to prevent" other people from paying bribes on its behalf. The Guidance comments on, amongst other things, the extent of those adequate procedures. We recommend that those companies which consider that they may potentially fall within the definition of "relevant commercial organisation" should carefully consider their risk management and compliance procedures to ensure that they are adequate.

The penalty for the section 7 offence includes an unlimited fine.

Adequate procedures

The level of procedures which are needed will vary from company to company, depending on the countries and sectors where the company operates, as well as the types of transactions and counterparties involved.

We recommend that a detailed risk assessment is carried out, to establish the nature and the extent of a company's exposure. Due diligence should be carried out on counterparties, intermediaries (such as agents), joint venture partners, and potentially employees, and the transaction itself should be carefully reviewed, to see whether it presents any particular risks. Proportionate procedures can then be put in place and communicated to employees, backed by a top-level commitment to preventing bribery. Employees, agents and others should be educated and trained, and the procedures should be monitored and kept under review.

Facilitation payments

The law in this area is essentially unchanged by the Act, in that facilitation payments (small bribes paid to facilitate routine Government action, often called "grease" payments) are still illegal under the Act, as they were under the law prior to the Act.

There has been speculation about whether the UK authorities will necessarily seek to prosecute in every single case, and we will be monitoring the situation carefully.

Major factors in deciding whether there is a public interest in proceeding with a prosecution are likely to be the size of the payment, whether it is a regularised payment, the vulnerability of the payer and whether the organisation has taken any steps to address the problem.

The key change in respect of facilitation payments arises because of the creation of the new section 7 offence discussed above. In particular, where Company X (which is a non-UK company carrying on a business or part of a business in the UK) uses an agent, and that agent makes a facilitation payment in order to secure a benefit for Company X, then Company X will commit the section 7 offence unless Company X can show that it had in place "adequate procedures designed to prevent" the agent (and others) from paying bribes on its behalf.

We recommend that those companies which are subject to the jurisdiction of the section 7 offence discussed above should ensure that their risk management and compliance procedures clearly address the issue of facilitation payments, and that their position on facilitation payments is communicated to their counterparties, intermediaries (such as agents), joint venture partners and employees.

Hospitality

Despite all of the press attention, the law in this area is essentially unchanged by the Act.

The Guidance sets out Government policy as follows: *"the Government does not intend to prohibit reasonable and proportionate hospitality and promotional or other similar business expenditure intended ... to improve the image of a commercial organisation, better to present products and services, or establish cordial relations".*

By the same token, hospitality which goes beyond reasonable and proportionate hospitality may potentially be a bribe, and we recommend that companies which are subject to the Act should ensure that their risk management and compliance procedures clearly address the issue of hospitality and promotional expenditure.

HFW seminar

In advance of the Bribery Act entering into force, HFW recently hosted an afternoon seminar on the Bribery Act.

This included an informative presentation from Roderick Macauley of the Ministry of Justice, who summarised the key provisions of the Act and the Ministry of Justice guidance, and offered some useful insights into the Government's thinking.

In particular, Mr Macauley said that *"The Government has no intention of using the Act to drag well-run companies through the Courts because of an isolated incident of bribery".* He also said, in the context of the adequate procedures defence that this had been formulated *"in the recognition that no bribery prevention regime can guarantee exemplary behaviour"* and that this explained the use of the term 'adequate' procedures rather than 'effective' or some such other adjective.

Leading criminal barrister Jim Sturman QC outlined the powers

available to the Serious Fraud Office (and others) to investigate and prosecute suspected offences under the Bribery Act.

HFW's Anthony Woolich and Daniel Martin presented a detailed case study which brought to life a number of the issues which are raised by the Act, with a particular focus on the risks which our clients face, in the context of international commerce, including facilitation payments and corporate hospitality. If you are concerned about any of the issues raised in this briefing, we would be happy to present a case study tailored to your particular business, at your office.

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