

The Bribery Act

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Background

1. The Bribery Act is now coming in to force on 1st July 2011 after the Government issued guidance on its implementation on March 20th.
2. There are still questions over whether it applies to companies listed on stock exchanges but not operating in the UK.
3. The Bribery Act 2010 sets out four key offences:
 - Offences of bribing another person.
 - Offences relating to being bribed.
 - Bribery of foreign public officials.
 - Failure of commercial organisations to prevent bribery.
4. Bribery Act 2010 sets out one defence relating to the corporate offence:
 - *Failure of commercial organisations to prevent bribery*

It is a defence for a commercial organisation to prove that it had in place 'adequate procedures' designed to prevent associated persons from undertaking such conduct.

Penalties

5. An individual guilty of bribing another person, receiving a bribe or found to be bribing a foreign official faces a maximum prison sentence of 10 years and/or an unlimited fine.
6. A company found guilty of failing to prevent bribery will be subject to an unlimited fine.
7. Directors and senior executives may also be personally liable if it is found that they were directly associated with an offence committed by their company.
8. Companies may also find themselves debarred from EU and US procurement lists (Although the Government is currently considering how the Bribery Act impacts the 2004 EU Procurement Directives and these may be amended lessening the threat of EU debarment).

Challenges facing companies

9. *Broad definitions:*

- 'Associated person' is defined as 'a person who performs services for or on behalf of' a company - the capacity in which a person performs such services 'does not matter'.
- Examples of 'associated persons' given in the Act include employees, agents or subsidiaries.

10. *Extraterritorial reach:*

- The new corporate offence is also applicable across the globe to any UK

registered company or equivalent foreign company that has significant business operations within the UK.

Vague text within the guidance (but not the Act) refers to:

“... that organisations that do not have a demonstrable business presence in the United Kingdom would not be caught. The Government would not expect, for example, the mere fact that a company’s securities have been admitted to the UK Listing Authority’s Official List and therefore 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... Likewise, 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.”

In reality, any large foreign company with a global brand and business reputation to protect is unlikely to take this text as an excuse for non-compliance with the Bribery Act 2010 and risk an investigation by the SFO under the UK Act and potentially, and more alarmingly, their US equivalent the Department of Justice (DoJ) under the US Foreign Corrupt Practices Act were bribery and corruption suspected within their business.

11. The long arm of the US Foreign Corrupt Practices Act

Perennial threat that should the SFO start a corruption investigation it is likely the US DoJ will also get involved due to the extraterritoriality of the FCPA. There have been many examples of joint SFO/DoJ enforcement already and the DoJ fines are always significantly higher.

12. Facilitation payments – no level playing field

The Bribery Act 2010 makes all facilitation payments illegal (with the exception of payments made under duress or by Government intelligence agencies). The FCPA allows for some facilitation payments to be made.

Although, the intentions of the Bribery Act in eradicating facilitation payments (and therefore their impact on global poverty) are well meant, can UK companies really compete fairly against companies which will not need to comply with UK legislation?

13. What are meant by ‘adequate procedures’?

Different guidance with different levels of detail:

- Ministry of Justice (MOJ) guidance published.
- Transparency International guidance also published.
- British Bankers’ Association guidance for the financial services sector due in the next few weeks.