

HOW 'ADEQUATE' ARE YOUR ANTICORRUPTION PROCEDURES?

On 1 July this year, the UK's *Bribery Act* came in to force. Unprepared businesses may find themselves unwittingly falling foul of its provisions.

Most importantly for businesses, the Act introduces a new offence (section 7 [s7]) committed by an organization that fails to prevent bribery by associated persons; a term that the Act defines as including those who provide services on the organization's behalf. There is a rebuttable presumption that this will include employees, but it may also include agents, consultants and other intermediaries.

On the surface, this new offence has particularly wide extra-territorial reach. All that is required to establish jurisdiction is that the organization should "carry on a business, or part of a business, in the UK." Each case will be determined on its own facts, but it is possible that an overseas company, which carries on business in the UK through a local subsidiary or a representative office, is exposed to the risk of prosecution in the UK for a contravention of the s7 offence even where the bribery occurs outside the UK and by an associated person who has no connection with the UK.

This new offence is often described as one of strict liability, but there is one statutory defence — if an organization can show that it had "adequate procedures" in place to prevent

such bribery from occurring. Although the issue of whether or not an organization had "adequate procedures" is ultimately a question for the courts, the Government has now (on 30 March 2011) provided guidance on how to determine whether procedures are adequate (the "Guidance"), which is designed to be of general application and is formulated around six principles:

- **Proportionate procedures:** a commercial organization's procedures to prevent bribery by persons associated with it should be proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organization's activities. They should also be clear, practical, accessible, effectively implemented and enforced.
- **Top-level commitment:** the top-level management of a commercial organization (be it a board of directors, the owners or any other equivalent body or person) should be committed to preventing bribery by persons associated with it. They must foster a culture within the organization in which bribery is never acceptable.
- **Risk assessment:** the commercial organization should assess the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment should be periodic, informed and documented.
- **Due diligence:** the commercial organization should apply due diligence procedures, taking a proportionate and risk-based approach, in respect of persons who perform or will perform services for or on behalf of the organization, to mitigate identified bribery risks.
- **Communication (including training):** the commercial organization must seek to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organization through internal and external communication, including training, that is proportionate to the risks it faces.
- **Monitoring and review:** the commercial organization should monitor and review procedures designed to prevent bribery by persons associated with it and make improvements where necessary.

In essence, these principles boil down to embedding a culture of anti-bribery into a commercial organization with the emphasis falling on the need for a risk-based approach and for procedures that are put in place to be proportionate to the corruption risk faced by an organization. Indeed, the Government deferred the date for final publication, reviewed





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the guidance carefully and has now introduced the need for proportionate procedures as a new first principle.

Senior management should be aware that the emphasis on risk assessment and proportionality cuts both ways. It will be for management to review carefully the potential risks to which their business is exposed (for example, risk profile of their industry sector, location of operations, use of agents and other intermediaries, operational requirements or import/export licences, contracts with overseas Governments) and introduce appropriate measures to counter such risks. In addition, the Government has provided specific guidance on certain other aspects of the Act, which had been of concern to businesses.

Facilitation Payments

These are small bribes paid to facilitate routine Government action and could trigger either the offence under the Act of bribing a foreign public official or, where there is an intention to induce improper conduct, including where the acceptance of such payments is itself improper, the offence of bribing another person and (unlike the US *Foreign Corrupt Practices Act*), therefore, potential liability under s7. As was the case under the old law, the *Bribery Act* does not provide any exemption for such payments.

The Guidance though reveals a slightly softer approach, with the Government recognizing the problems that commercial organizations face in some parts of the world and in certain sectors, but maintains the eradication of facilitation payments as a long-term objective. The Serious Fraud Office and Director of Public Prosecutions joint guidance for prosecutors (published on the same date as the Guidance) sets out factors that might favour prosecution, including large or repeated payments, facilitation payments that are planned for or accepted as part of a standard way of conducting business, indications of an element of active corruption of the official and if internal procedures concerning the avoidance of facilitation payments have been followed incorrectly.¹

Conversely, the guidance for prosecutors indicates it may not be in the public interest to prosecute a single small payment, which might result in only a nominal penalty. The guidance for prosecutors also states that other factors, such as whether the payer was in a vulnerable position arising from the circumstances in which the payment was demanded, will be taken into account.

Corporate Hospitality and Promotional Activity

Another concern raised by commercial organizations was the extent to which corporate hospitality and promotional activity would fall foul of the Act. The Guidance has since made it clear that "...bona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organization, better to present products and services, or establish cordial relations, is recognized as an

established and important part of doing business and it is not the intention of the Act to criminalize such behaviour."

Nevertheless, the Guidance acknowledges that hospitality and other promotional activities can be a bribe. The Guidance envisages that organizations may wish to review policies on corporate hospitality and promotional activities to ensure that they are seen to be acting both "competitively" and "fairly." The Guidance recognizes that different business sectors may apply different standards and leaves it for individual businesses or representative bodies to determine what those standards might be. The point, however, is made that even if the corporate hospitality/promotional activity was in accordance with industry standards, that in itself would be insufficient evidence on its own that bribery had not occurred, particularly if those standards were "extravagant."

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Associated Persons

The finalized Guidance indicates that due diligence should be conducted on all those business counterparties who provide, or might provide, services on behalf of an organization; that is, if they are capable of falling within the statutory definition of an "associated person." This is potentially a highly relevant issue for pharma and life science businesses, but once again, the approach should be tempered by the need to take a risk-based and proportionate approach. In relation to existing relationships, the Guidance recognizes that it may not be possible to take any particular steps, but it does expect all that is practicable, within the framework of proportionality, to be done.

Jurisdiction

In terms of jurisdictional reach, the UK Government had previously been resistant to providing any clarification on what it would mean to "carry on a business or part of a business in the UK." The Guidance still leaves this as a matter for the UK courts to determine on the facts of each

particular case; but, it advocates a common sense approach emphasizing that only those organizations that have a "demonstrable business presence in the UK" would be subject to the s7 offence. It has highlighted that the listing/trading of a company's securities on a UK Exchange or merely having a UK subsidiary would be unlikely on its own to satisfy the business presence test; for example, it is said that the UK subsidiary may conduct business independently of its parent, but whether it does or not is a question of fact.

Conclusion

Ultimately, the Guidance makes clear that though there is no safe harbour, in relation to corporate liability for failing to prevent bribery on its behalf, a link is made between the adoption of bribery prevention procedures and the self-reporting to the appropriate authorities of any bribery concerns that come to light. It seems clear that a commercial organization that has done its best to address its exposure to bribery risk should expect to be dealt with leniently.

Pharma and life science businesses will inevitably have to factor in the accompanying risks of working in countries and markets with significant exposures, given potentially looser monitoring mechanisms and anticorruption legislation. The very nature of these

industries and their frequent direct interaction with public officials and agencies will also be a significant exposure factor. Questions will additionally have to be considered regarding the method and extent to which 'encouraging' intermediaries, such as doctors, to use particular products is appropriate. It is elements such as these that will play a role in considering whether the procedures that are in place can be described as "adequate."

Through the mechanism of a criminal law statute, the Government is seeking to ensure that appropriate standards of good corporate governance are adopted and rigorously applied to combat corruption worldwide. The Serious Fraud Office (the leading UK law enforcement agency with primary responsibility for the investigation and prosecution of cases involving overseas bribery) has indicated that whilst they wish to work with businesses to eradicate corruption, they intend to come down very heavily indeed on those organizations that use corrupt practices to obtain a business advantage. The new s7 offence is likely to make those businesses that have a business presence in the UK a potentially easy target; those businesses that do not have adequate procedures in place to prevent the bribery that has occurred will find that they have no defence to such a prosecution, which could prove to have very costly consequences for the organization concerned. **Pharma**


Reference

1. Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions, 30 March 2011.

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