

The Bribery Act and your Business

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The Bribery Act finally came into force last Friday 1 July. In addition to consolidating the antiquated English bribery laws in one place, it also created two new offences, bribery of foreign public officials (Section 6) and failure of commercial organisations to prevent bribery (Section 7). It is the second of those offences that is causing much concern in the business community, particularly in organisations that act internationally.

The Section 7 offence can be committed by a commercial organisation that carries on business in whole or in part in the United Kingdom if it fails to prevent a person associated with it from bribing another person on its behalf either in the UK or abroad.

An associated person is defined by Section 8 of the Act as a person who provides services for or on behalf of the commercial organisation and includes employees, agents or subsidiaries.

The only defence to the Section 7 offence is that the commercial organisation had adequate procedures in place designed to prevent persons associated with it from bribing another. This will have to be proved by the defendant organisation on the balance of probabilities.

Hence, a commercial organisation could face an unlimited fine for acts for bribery carried on abroad, and without its knowledge or intention (although the person or subsidiary doing the bribing must intend to obtain or retain business or an advantage in the conduct of business for the commercial organisation), unless it has adequate procedures in place to prevent bribery.

Importantly, facilitation payments are not exempt from the legislation (unlike in the US) and although the joint Serious Fraud Office/Director of Public Prosecutions' prosecution guidance indicates that it is not targeting one-off payments by otherwise reputable firms, repeated facilitation payments will also lead to prosecution if the company has inadequate procedures in place.

The Ministry of Justice's guidance about procedures, which relevant commercial organisations can put into place to prevent persons associated with them from bribing, identifies six principles to assist those organisations to determine the level and type of procedures which might be considered adequate. They are:

- proportionality
- top level commitment
- risk assessment
- due diligence
- communication
- monitoring and review

There is no detailed further guidance from either the MoJ or the SFO/DPP as to exactly what specific procedures should be in an organisation's policy, but a reading of the documents (which can be found at [Bribery Act guidance document](#) and www.sfo.gov.uk) makes clear that the procedures will need to be robust if breached, if prosecution is to be avoided under Section 7.

The SFO/DPP guidance confirms that prosecution is to be considered the norm. In addition there will be no settling in period and the Bribery Act will be applied from the moment it came into force last Friday.

Commercial organisations that have not already done so should therefore give priority to ensuring that they have adequate procedures in place and those procedures will need to be bespoke and tailored to the particular organisation and its way of doing business, rather than off the shelf.

Organisations will need to carry out a comprehensive risk assessment (or have someone do it on their behalf) before preparing a policy, and it is important to get it right, as the consequences of a successful prosecution are rather more than just an unlimited fine, including:

- reputational damage
- exclusion from tendering for certain contracts
- a potential Confiscation Order to recover the criminal benefit of any monies obtained as a consequence of corruption or bribery.

The Bribery Act is the most stringent anti-corruption legislation in the world and will be enforced by the SFO. A quick Google search highlights that the Director of the SFO, Richard Alderman, is not adverse to the publicity that a successful prosecution brings. Indeed, the SFO sends press releases to email subscribers trumpeting its successes. It should therefore be assumed that this legislation is intended to be used.

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