

# The long arm of the Bribery Act



THE BRIBERY ACT DOESN'T JUST AFFECT UK BUSINESSES – IT COVERS THE ACTIVITIES OF EVERY BUSINESS THAT OPERATES IN THE UK AND THE FOREIGN OPERATIONS OF EVERY UK BUSINESS. **RICHARD SALLYBANKS** AND **SHAUL BRAZIL** EXPLAIN HOW TO STAY THE RIGHT SIDE OF THE LAW.

Much has been written about the Bribery Act, which came into force on 1 July 2011, in particular the new criminal offence for commercial organisations of “failing to prevent bribery”. This article does not explain the new law in detail but considers the types of procedures that companies can put in place to prevent bribery by associated persons and the factors that companies should have in mind if they find that bribery has occurred within their organisation.

**A SHORT SUMMARY OF THE LAW** The Bribery Act creates two general offences – of bribing another person and being bribed – and a discrete offence of bribery of a foreign public official. In addition, section 7 introduces an offence whereby a “relevant commercial organisation” (ie. one incorporated/formed in the UK or which does business in the UK) is guilty of an offence if a person “associated” with it (such as an employee, agent or joint venture partner) offers, promises or gives a bribe with the intention to obtain or retain business or an advantage in the conduct of business for that organisation.

This last offence is commonly characterised as “failing to prevent bribery” and can only be committed by a company, not an individual. It is also an offence of strict liability – if bribery is committed on behalf of a company by a person associated with it, the company may incur criminal liability (with the risk of an unlimited fine, debarment from public procurement contracts, and reputational damage) even if the directors were unaware of it. However, the company will have a complete defence if it can prove that it had in place “adequate procedures designed to prevent persons associated with [it] from undertaking such conduct” (ie. offering, promising or giving a bribe).

There remains the larger ambiguity of what constitutes a bribe. Bribery may come in different forms including large corrupt payments made to obtain or retain business, lavish hospitality intended to influence a public official, and small unofficial “facilitation” payments to expedite the performance of a routine or necessary action such as the granting of a visa.

All are illegal under the new law and although the government has

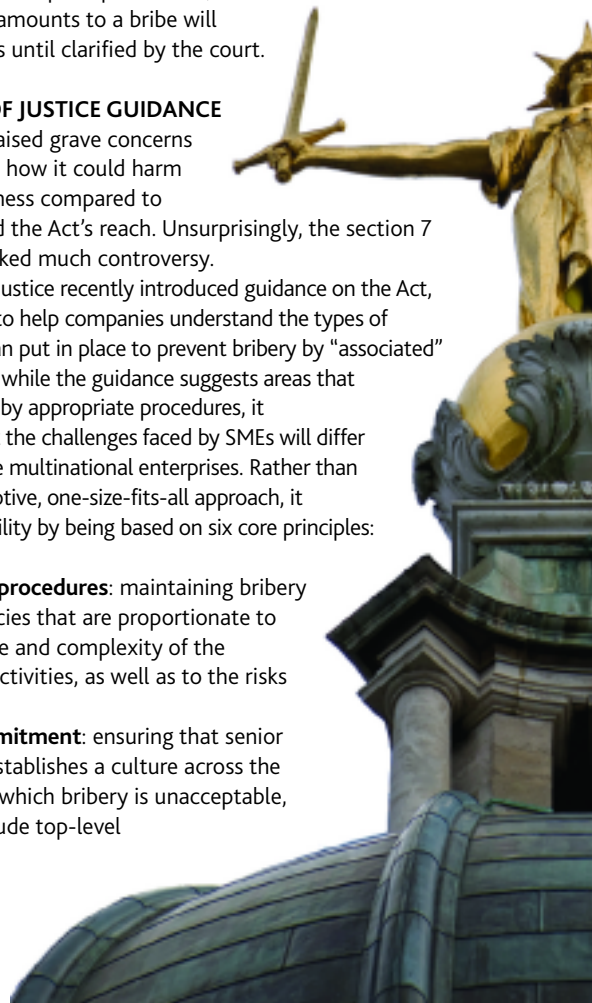
sought to reassure business that the Act “is not intended to prohibit reasonable and proportionate hospitality and promotional or other similar business expenditure intended for these purposes”, it has nevertheless emphasised “that hospitality and promotional or other similar business expenditure can be employed as bribes”. The Act therefore employs the concept of what an ordinary person would think, but, as with adequate procedures, the question of what amounts to a bribe will remain ambiguous until clarified by the court.

## THE MINISTRY OF JUSTICE GUIDANCE

UK business has raised grave concerns about the Act and how it could harm their competitiveness compared to businesses beyond the Act's reach. Unsurprisingly, the section 7 offence has provoked much controversy.

The Ministry of Justice recently introduced guidance on the Act, which is intended to help companies understand the types of procedures they can put in place to prevent bribery by “associated” persons. However, while the guidance suggests areas that should be covered by appropriate procedures, it acknowledges that the challenges faced by SMEs will differ from those of large multinational enterprises. Rather than adopting a prescriptive, one-size-fits-all approach, it incorporates flexibility by being based on six core principles:

- **Proportionate procedures:** maintaining bribery prevention policies that are proportionate to the nature, scale and complexity of the organisation's activities, as well as to the risks that it faces.
- **Top-level commitment:** ensuring that senior management establishes a culture across the organisation in which bribery is unacceptable, which may include top-level



communication of the organisation's anti-bribery stance and being involved in the development of bribery prevention policies.

- **Risk assessment:** conducting periodic, informed and documented assessments of the internal and external risks of bribery in the relevant business sector and market.
- **Due diligence:** applying due diligence procedures that are proportionate to the risks faced by the organisation. Since an organisation's employees are "associated" persons, appropriate due diligence may become part of recruitment and HR procedures.
- **Communication and training:** ensuring that bribery prevention policies are understood and embedded throughout the organisation through education and awareness.
- **Monitoring and review:** putting in place auditing and financial controls that are sensitive to bribery, including consideration of obtaining external verification of the effectiveness of an organisation's anti-bribery procedures.

The guidance includes a number of illustrative case studies, and businesses would be well advised to review these and the guidance closely. Ultimately, however, the question of whether an organisation has adequate procedures will turn on the particular facts of the case; ambiguities surrounding "adequate procedures" will gradually be resolved by the courts, as the authorities prosecute organisations that fall foul of the legislation.

#### SELF-REPORTING AND THE RISK OF CRIMINAL PROSECUTION

There will always be the potential for bribery to take place in relation to a company's business regardless of the procedures put in place to prevent it. If bribery is identified, what does the company do? Should it report the matter to the authorities and, if so, how can it mitigate the risk that a prosecution will follow?

Joint guidance issued by the Serious Fraud Office (SFO) and the Director of Public Prosecutions (DPP) acknowledges that the Act "is not intended to penalise ethically run companies that encounter a risk of bribery" and that "a single

instance of bribery does not necessarily mean that a company's procedures are inadequate". The SFO and DPP have also made it clear that the public interest factors in favour of or against a criminal prosecution of a company include whether there has been a history (or lack of history) of similar conduct.

A company that has genuinely and appropriately tried to prevent bribery but failed may therefore avoid prosecution if it can show that the conduct was an isolated incident.

However, the more prevalent bribery is within the organisation, the greater the risk of prosecution.

So what does a company do if it identifies bribery within its organisation which has been ongoing or is part of an established business practice?

Perhaps counterintuitively, the company's best interests may still lie in reporting the matter to the authorities.

Companies should note that if they do not self-report and bribery within their organisation is reported to the SFO by a third party (such as a

disgruntled competitor), this will be viewed as a significant aggravating factor tending in favour of prosecution. Conversely, self-reporting (when allied with a genuinely proactive approach from senior management, including a comprehensive internal investigation, remedial action and a commitment to effective corporate compliance going forward) can result in the possible resolution of the matter by civil, as opposed to criminal, proceedings. The availability of a civil remedy – namely, proceedings to recover monies obtained in connection with the corrupt conduct – is a factor tending against prosecution but this will only be on offer if the company self-reports in the way described above.

In any event, a company may have little choice but to self-report as the Bribery Act provisions cannot be considered in isolation. There is a real risk that monies obtained by a company in connection with a corruptly obtained contract would be considered criminal property under the Proceeds of Crime Act 2002. The company (and its directors, once they had been informed of the suspicion that the contract had been won through corruption) would be at risk of committing money laundering offences unless it disclosed that fact to SOCA as soon as practicable. And as SOCA will probably pass the information to the SFO, the company has little choice but to report the underlying conduct to the SFO simultaneously.

**CONCLUSION** By way of practical example, companies which have engaged the services of intermediaries or introducers to assist in winning new business will need to ensure that any payments to them can be fully justified and are accurately and transparently reported in the company's records. Depending on the relationship between the introducer and the ultimate client, it may well be that the acceptance of the payment by the introducer (if hidden from the client) would be regarded as improper and the payment to the introducer treated as a bribe.

Further, a subcontractor, depending on the services it performs, may be regarded as a person "associated with" the main contractor, leaving the main contractor with a potential criminal liability if the subcontractor pays a bribe in connection with the main contractor's business. The main contractor will therefore need to have procedures in place to satisfy itself, so far as possible, that the subcontractor will not engage in such conduct.

With an anti-corruption programme in place, a company is better placed to deal with the fall-out if it discovers bribery; if it self-reports, it will substantially mitigate the risk of prosecution. However, companies cannot make a decision on whether to self-report bribery without regard to the Proceeds of Crime legislation and the possible need to make a disclosure to SOCA. Any company that decides against a disclosure to SOCA because it wants to keep the bribery under wraps runs the risk of exposing its directors and the company itself to criminal investigations for both bribery and money laundering.

Richard Sallybanks is a partner at BCL Burton Copeland.  
[rsallybanks@bcl.com](mailto:rsallybanks@bcl.com)

Shaul Brazil is a barrister at BCL Burton Copeland.  
[sbrazil@bcl.com](mailto:sbrazil@bcl.com)  
[www.bcl.com](http://www.bcl.com)

See *Straying from the Path*, page 38