TCii Strategic and Management Consultants

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A Guest Article by Shainul Kassam
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How the Bribery Act affects you and your business

You may be thinking that the Bribery Act 2010, which came into force in July 2011, won't affect you or your business.

You've never actually *bribed* anyone. You've never passed an envelope of cash under a table or told a government trade official: "If you scratch my back ..."

You once took the MD of a client company to a one-day international at Lord's, during which he confirmed he would place a large order with you, despite having received a lower price from another supplier. But that's not bribery.

Or is it?

Here are ten things you should know about the Bribery Act 2010.

1. What you can't do

There is an array of widely-drafted offences to be aware of:

- offering, promising or giving a bribe
- requesting, agreeing to receive or accepting a bribe
- bribing a foreign public official to obtain or receive business
- for commercial organisations, failing to prevent bribery by a person associated with them, i.e. a person acting on their behalf in any capacity, including an agent or employee.

2. Definition of bribery

Bribery means promising or giving a financial or other advantage to a person to induce a person to perform improperly a function of a public nature or an activity that is connected to business, performed in the course of employment or on behalf of a body of persons. That person must be expected to perform the activity in good faith, impartially or be in a position of trust by performing it.

3. International scope

Bribing a foreign public official is obviously international in scope, but so too are the other offences:

- A function or activity to be improperly performed in return for the bribe does not need to be connected with or performed in the UK.

- If the bribery takes place in the UK, that is of course an offence, but it is also an offence to bribe someone while abroad if you have a "close connection" with the UK, for example being a British citizen or company.

- Failure to prevent bribery by a commercial organisation is an offence regardless of where the bribery took place and irrespective of the connection with the UK of the person involved.

4. Director liability

If a senior officer or person purporting to be a senior officer of the organisation consents to or connives in the bribery, they are personally liable too. This includes directors, managers, the secretary, and other similar officers.

5. Organisational liability

An organisation's failure to prevent bribery by those acting on its behalf is a strict liability offence, i.e. there is no need to prove negligence, guilt or involvement by the "directing mind and will" of the organisation. If an associated person bribes someone to obtain or retain business for the organisation (or an advantage in the conduct of its business), the organisation will be guilty of the offence, unless it can show that has adequate procedures in place to prevent such conduct.

6. The bottom line: fines and imprisonment

If convicted of a general bribery offence, an individual can be liable to up to 12 months in prison, a fine of up to £5,000, or both. In the Crown Court it's the same, but up to 10 years in prison and an unlimited fine. Organisations, if convicted, are liable to the same fines.

Organisations, if convicted of failing to prevent bribery by an associated person, are liable to unlimited fines.

7. About "adequate procedures"

The Secretary of State has issued guidance on what are "adequate procedures". These are based on the following principles:

- Develop **procedures** that are **clear, practical and proportionate** to the risk your organisation faces – for example, policies and a code of conduct.

- Ensure you have **top level commitment**: issue a statement, design a regime and appoint a compliance officer.

- Conduct a **risk assessment** for your organisation and identify the operations, sectors and countries in which you might be likely to commit an offence.

- **Due diligence**: review current practices for contracting with third parties, giving references and recommendations, and appointing agents.

- **Communicate the regime** effectively: put in place internal reporting procedures and arrange **training** for all relevant employees.

- Make sure you **monitor and review** your procedures and make improvements as necessary.

You can view the guidance here: www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf.

8. Gifts and hospitality

Gifts such as cash, presents, or political or charitable donations, and hospitality such as meals, hotels, or invitations to arts and sporting events, can be regarded as bribes if there is an intention to influence a business decision.

The intention that accompanies the gift is critical and the timing of the gift is important. For example, where another body is about to award a contract, the organisation should be even more careful of giving gifts than it would normally be, but it should also note that a reward paid after the event can still be considered a bribe.

Hospitality or promotional expenditure that is intended to induce a person to perform a function improperly will almost certainly amount to bribery.

The level of an acceptable gift will vary from country to country and may differ for gifts or depending on the type of organisation or hospitality involved. All gifts should be bona fide and reasonable.

9. Purchasing a foreign business

Although a buyer will not be liable for acts of the target company that took place before the acquisition, there are risks for a buyer acquiring a business that has potentially been involved in corrupt practices. These risks range from an impact on the value of the target company or assets to reputational damage.

It is also possible that the proceeds from a contract obtained as a result of bribery could be confiscated as the proceeds of crime.

Where corruption risks are identified during the due diligence process, you may want to do one of the following:

- Ask for a price adjustment.
- Require the seller to resolve identified corrupt practices or risks prior to completion.
- Restructure the transaction to exclude assets obtained by corruption.
- Ask for specific warranties or an indemnity.
- Walk away from the deal.

10. Implementation

The Bribery Act 2010 was implemented on 1 July 2011.

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If you would like more information on any of the points covered in this Guest Article, please contact **TCii** on **020 7099 2621**.