

UK Bribery Act and D&O Insurance: New Legal Risks for Multinationals

May 2010: The new UK Bribery Act will significantly increase the legal and compliance risks faced by multinationals and may require a re-examination of existing D&O policies

The UK government passed the Bribery Act in April 2010, bringing the UK into line with other leading international efforts to deal with corruption. The new anti-bribery legislation criminalises acts of corruption and improper payments by commercial organisations, wherever incorporated, that carry on a business or a part of a business in the UK. This has implications not only for corporate entities with any UK operations but also has far reaching consequences for any Directors and “senior officers” who may themselves be liable to civil and criminal charges for breaches of the proposed offences.

The Act is considered by many to be significantly more thorough in its scrutiny and potential penalties than the US Foreign Corrupt Practices Act (FCPA). It is designed to encourage a climate of “zero toleration” towards bribery and corruption. The Serious Fraud Office anticipates a marked change in the number of additional prosecutions following enactment, reflecting an increased appetite for corporate criminal liability as a means of policing business activity. It is therefore prudent for businesses to adjust procedures to reflect the new guidance and avoid becoming an “example” conviction.

International Trend towards Anti Bribery Legislation

In recent years US enforcement agencies have demonstrated renewed commitment to their long established anti-bribery regime, notably through criminal and civil prosecutions against individuals and corporations under the FCPA.

Under the FCPA it is illegal to offer or provide anything of value to foreign public officials with the intention of obtaining or retaining business. It also places strict requirements on accounting controls to minimise corrupt payments. Lanny Breuer, Assistant US Attorney General, described 2009 as “the most dynamic single year” in the statute’s history. He stated that 2009 was the “year of the FCPA trial”, with, for the fourth year running, more prosecutions than in the previous five years.

Legal commentators have also observed the growing attention enforcement agencies have given to Directors and senior management. Breuer noted in November 2009 that “prosecution of individuals is a cornerstone of our enforcement strategy”. The potential impact on Directors and Officers is becoming increasingly important in light of the new UK legislation.

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Offences under the UK Act

The Act replaces current statutory and common law and introduces four offences:

- *Bribing Someone* - Offering or giving a bribe in the private or public sector (Section 1)
- *Taking a Bribe* - Accepting or agreeing to accept a bribe in the private or public sector (Section 2)
- *Bribing Foreign Public Officials* - A separate offence of bribing a foreign public official (Section 6)
- *Failing to Stop Bribery Occurring within an Organisation* - Strict corporate liability relating to the ability to demonstrate “adequate procedures” to prevent bribery (Section 7)

These offences apply to any entity that conducts any part of their business in the UK regardless of where it is incorporated and regardless of where the bribe takes place. The offences also apply to UK residents and UK citizens even if the alleged bribery takes place outside the UK. Non-UK nationals and companies will be liable if part of an offence takes place in the UK. The legislation introduces personal criminal liability for senior management who are liable to up to ten years in prison, or a fine, or both.

The legislation introduces a new “strict liability” offence for corporates and partnerships which fail to prevent bribery. This is a significant and important departure from the current legislation in so far as there is no need to prove negligence on the part of one individual.

The only provision for defence is “adequate procedures”. The government has requested that this provision is interpreted by the courts on a case by case basis, taking into account a firm’s level of risk, size and resources. For example, it may be considered whether the company regularly uses intermediaries or whether it regularly operates in jurisdictions that score poorly on international corruption rankings.

What are “Adequate Procedures”?

A defence based on “adequate procedures” suggests that the courts may take a nuanced approach, balancing the severity and prevalence of violations against the existing compliance programme that the company has in place. A robust compliance programme based on risk-focused due diligence can help identify exposure to Bribery Act regulations and also demonstrates that a company has undertaken a concerted effort to identify and put a stop to improper payments.

A critical means of achieving this is ensuring that subsidiaries, joint venture partners, third party agents and consultants are vetted as part of a comprehensive due diligence programme that examines their background and *modus operandi*. Such a programme should address the following questions:

- The reputation of the party or agent among local sources in a specific industry
- The identity of the final beneficial owners and senior management
- The extent to which the entity is or has been the subject of local media or enforcement scrutiny
- The perceived integrity of the jurisdiction for public corruption
- Designation of the entity or any of its directors or shareholders on any international or government sanctions or watch lists
- The perceived integrity and suitability of the party for the project in question
- Political and business connections enjoyed by the directors and shareholders of a subject company
- Previous litigation or regulatory issues whether rumoured or actual

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There may be situations whereby a company is not able to exercise much influence over a service provider, for example if it holds a minority stake in a joint venture. The notion of adequate procedures may suggest that an enterprise would be well placed to include in contracts an appropriate mechanism for termination should suspicions of bribery arise.

The Ministry of Justice is expected to publish guidance on the critical issue of on what constitutes adequate procedures under the Act in August. The issuing of this guidance has been delayed by the UK General Election at the beginning of May and the British political convention of *puddah*, which restrict the activities of UK Civil Servants during this period. It remains to be seen what effect the recent appointment of a pro-business Minister of Justice in the form of Ken Clarke, a former Chancellor and Director of British American Tobacco, may have on this.

Impact on D&O Policy

The procurement of D&O insurance is also likely to be critical in mitigating the risks posed by the new UK legislation and the increased enforcement by the authorities. Fines paid in connection with corruption probes are unlikely to be covered under many D&O policies but defence costs may well be covered by a suitable policy. Violations or anti-bribery laws are likely to give rise to significant follow-on litigation through a securities fraud or a derivatives suit. Furthermore, a failure to maintain “adequate procedures” may open Directors and Officers up to litigation claiming a breach of fiduciary duty.

The value of D&O insurance is illustrated by the recent Siemens AG case brought in the US under the FCPA. Siemens faced a USD 800 million settlement with the Department of Justice following a protracted investigation into a corruption scandal involving multiple jurisdictions. Two Siemens Executives were accused of paying nearly EUR 6 million in bribes to facilitate a USD 609 million contract with Italian energy company Enel. Siemens subsequently received a USD 148.5 million payout from a group of D&O insurers led by Allianz Global Corporate and Specialty AG.

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