

The Bribery Act 2010: practical guidance for Jersey companies

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The Bribery Act 2010 (the “Act”) came into force on 1 July 2011. Whilst the Act is UK legislation which is not directly applicable to Jersey, its far reaching provisions mean that it does impact on Jersey based companies and individuals with connections to the UK. It is therefore important that Jersey based companies and their officers are aware of the impact of the Act, the offences under the Act and how to protect themselves.

This briefing is designed to answer some key questions that may be asked.

Q: What are the offences under the Act?

A: There are four main offences under the Bribery Act which are:

- Bribing another person. Accepting a bribe.
- Bribery of a foreign official.
- Failure of commercial organisations to prevent bribery.

For further detail on each of the main offences under the Act, please refer to our briefing: [The Bribery Act 2010 and its implications for Jersey](#).

Please also be aware that Jersey has its own Corruption (Jersey) Law 2006 which came into force in March 2007. This law is similar to the Act in many ways and creates offences in relation to corruption concerning public bodies, public officials and corrupt transactions with agents.

Q: I am a director of a Jersey company. Can I be personally liable under the Act for acts of

bribery committed by my company?

A: Liability of Senior Officers (including directors) under the Act is restricted to offences where the company has committed active or passive bribery, or where it has bribed a foreign public official, and where the Senior Officer has consented to or connived in the bribery.

If the offence (or a part of it) took place in the UK, a Senior Officer of a Jersey company could be prosecuted under the Act.

If the offence did not take place in the UK then the senior Officer could not be prosecuted under the Act as Jersey

companies do not commit UK offences of active bribery, passive bribery or bribery of a foreign public official if the bribery occurs outside the UK.

(Senior Officer liability does not extend to the "failure to prevent bribery" offence, which is the corporate offence most likely to be committed by a Jersey company).

Q: We are a Jersey company, or have a subsidiary which is a Jersey company. Could the Act apply to us?

A: The Act makes it an offence for relevant commercial organisations to fail to prevent bribery. This offence under the Act applies to any "relevant commercial organisation" which fails to have "adequate procedures" in place to prevent "associated persons" from committing bribery. A person is "associated" with a commercial organisation if that person performs services for or on behalf of the commercial organisation. Such a person could be an employee, a subsidiary, a contractor, sub-contractor, supplier or even a joint venture partner.

The provisions of the Act do not automatically apply to Jersey commercial organisations. However, Jersey companies carrying on their business or a part of it in the UK will be caught by the Act under the definition of "relevant commercial organisation" which includes any body corporate, partnership or limited partnership, wherever incorporated or formed, that "carries on a business, or part of a business, in any part of the United Kingdom".

The Act does not define the term "carries on a business, or part of a business, in any part of the United Kingdom". However, the guidance published by the Ministry of Justice in England on 30 March 2011 provides some assistance with this point. They have confirmed that a company listed on the Official List of the LSE or AIM or a parent company with a UK subsidiary would not necessarily be caught by the Act by virtue of the listing alone and refer to businesses with a "demonstrable business presence in the UK", but the Ministry of Justice defers to the courts as the final arbiter on such issues. As such there is no absolute assurance that Jersey companies with UK subsidiaries or Jersey companies with UK listings would not fall within the scope of the Act.

Subsequent to the Guidance published by the Ministry of Justice, Richard Alderman, Director of the

Serious Fraud Office has stated that:

"We have to look at the simple text in the Bribery Act and ask whether or not that foreign corporation is carrying on business [in the UK]. If it is, then corruption that it commits anywhere in the world is within our jurisdiction". Mr Alderman did not rule out the possibility that a UK listing might suffice.

The implications of this provision are far reaching: a Jersey company, partnership or limited partnership which carries on even part of its business in the UK could commit an offence under the Act in respect of bribery carried out outside the UK by a person who has no connection with the UK and who is performing services for that Jersey company, partnership or limited partnership outside the UK.

Q: Our Company has a UK subsidiary which provides certain services to us. Could we be guilty of an offence under the Act vis a vis this relationship?

A: In the absence of current guidance or ruling, it is reasonable to conclude that the presence of the UK subsidiary would not necessarily mean that the Jersey parent itself was carrying on business in the UK. Nonetheless, it could be a factor amongst others which may be relevant to the question. Therefore if your company carries on at least part of its business in the UK and comes within the scope of the "failure to prevent bribery" offence, it is possible that your company could be guilty of that offence if the UK company commits a bribe intending it to benefit your company.

Q: What happens if our company does nothing to prevent bribery?

A: In addition to any regulatory issues flowing from a failure to mitigate risk, any Jersey company carrying on business or part of a business in the UK can be prosecuted by the UK criminal courts for its failure to prevent bribery under the Act. A company will be considered to have failed to prevent bribery if it does not have adequate procedures in place which are designed to prevent persons associated with it from engaging in bribery.

Q: What can we do to prevent our company from committing a bribery offence?

A: In order to minimise the risk of prosecution under the Act, it is advisable for Jersey companies who might be said to carry out part of their business in the UK to put in place anti

bribery procedures. Implementation of such procedures should also help companies to invoke the Act's "adequate procedures" defence to the offence of failing to prevent bribery.

The Ministry of Justice Guidance highlighted six key principles as being indicative of adequate procedures. These are:

- Proportionate procedures:

The company'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 company's activity. They should also be clear, practical, accessible, effectively implemented and enforced. A summary indication of what an anti corruption policy might include is contained within the Guidance.

- Top level commitment:

The top level management of a commercial organisation (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 should foster a culture within the company in which bribery is never acceptable. Risk Assessment:

The company should assess the nature and extent of its exposure to the 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 company should apply due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for and on behalf of the organisation, in order to mitigate identified bribery risks.

- Communication (including training):

The company should seek to ensure that its bribery prevention policies are embedded and understood throughout the company through internal and external communications, including training that is proportionate to the risks the company faces.

- Monitoring and review:

The company should monitor and review procedures designed to prevent bribery by persons associated with it and should make improvements where necessary.

Q: We are about to enter negotiations for a new acquisition / transaction. Should we be carrying out any additional due diligence? Is there anything we need to be mindful of from a bribery perspective?

A: On 1 July 2011, Transparency International UK published a draft consultation on anti-bribery guidance for transactions. The guidance is intended to provide a practical tool for companies wishing to undertake anti-bribery due diligence in the course of mergers, acquisitions and investments.

The guidance notes state that while it is likely that much anti-bribery due diligence will be driven by legal obligations, it is important to recognise that taking a best practice approach is the surest

way to avoid both legal liabilities and the potential financial and reputational damage that may come from investing in, purchasing or even just contracting with a company associated with bribery. The guidance notes state that anti-bribery due diligence is most effective when the purchaser itself has in place an anti-bribery programme and that care should be taken that bribery does not take place during the investment or acquisition process.

As regards anti-bribery due diligence, the guidance notes set out the following as being good practice principles:

- It should be conducted for all but the smallest investments.
- It should be conducted with sufficient depth and resources to ensure that it is undertaken effectively.
- It should be conducted sufficiently early in the due diligence process.
- The partners or board should provide oversight to the due diligence reviews. Bribery detected through due diligence should be reported to the authorities.
- Information gained through due diligence should be passed on efficiently and effectively to the company's management prior to the investment being made.

When conducting anti-bribery due diligence, the following questions should be asked: Has bribery taken place historically?

- Is it possible or likely that bribery is currently taking place?
- If so, how widespread is it likely to be?
- Does the target have in place an adequate anti-bribery programme to prevent bribery?
- What would the likely impact be if bribery, historical or current, were discovered after the transaction had completed?

Q: We have a non-UK subsidiary operating in another country. The subsidiary carries out a bribe in that country. Are we, the Jersey company, guilty of an offence under the Act?

A: Potentially. The "failure to prevent bribery" provisions of the Act will only apply to a Jersey company where the company carries on a part of its business in the UK. So if your company carries on any business in the UK and your foreign subsidiary company carries out a bribe in another country then that act of bribery will fall within the jurisdiction of the Act.

The subsidiary is likely to be an "associated person". If you do not have "adequate procedures" in place and if the bribe is intended to benefit your company the actions of your subsidiary may result in liability for the parent company.

Q: Will the directors of the Jersey Company be personally liable for the bribe committed by a

subsidiary company in another part of the world?

A: Statutory liability of Senior Officers who consent or connive in an act of bribery applies to passive bribery, active bribery and bribery of foreign public official offences, not to the "failure to prevent bribery" offence and therefore there would be no statutory liability in this example.

Q: Are facilitation payments allowed?

A: No.

Q: What do we do about facilitation payments if they are an inescapable part of doing business in the jurisdiction my business operates in?

A: While facilitation payments remain illegal, the Serious Fraud Office will apply the usual test on whether to prosecute a company or not (i.e. both a realistic prospect of conviction and prosecution in the public interest) and be guided by the Joint Guidance published in 2011 by the Director of the SFO and the Director of Public Prosecutions. The Joint Guidance lists a number of factors tending against prosecution for making facilitation payments, including:

- A single small payment likely to result in only a nominal penalty;
- The payment(s) came to light as a result of a genuinely proactive approach involving self-reporting and remedial action;
- Where a commercial organisation has a clear and appropriate policy setting out procedures an individual should follow if facilitation payments are requested and these have been correctly following; and.
- The payer was in a vulnerable position arising from the circumstances in which the payment was demanded.

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