



THE UK BRIBERY ACT 2010: IMPLICATIONS FOR PROFESSIONALS WORKING IN THE UAE

UAE BRIEFING PAPER



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1 INTRODUCTION

This paper has been produced from the discussions that took place at events hosted by ICAEW in Dubai and Abu Dhabi on 5 October, 2011, entitled 'The UK Bribery Act 2010 – Do you have procedures in place?'

The panel discussion was chaired by Amanda Line, ICAEW Regional Director, Middle East and included the panelists:

- Felicity Banks, Head of Business Law, ICAEW,
- Rebecca Kelly, Partner, Clyde and Co LLP, and
- Charles Robson FCA, Director, KPMG (Forensic) Lower Gulf.

The purpose of this paper is to highlight the implications of the UK Bribery Act 2010 (the Act) on professionals working in the UAE and offer practical steps to mitigate the risk of falling foul of the law.

Legal terms, from the Act, referred to in the text are placed in inverted commas and are defined elsewhere within the paper.

2 CORRUPT BUSINESS PRACTICE AND ITS IMPLICATIONS FOR THE ECONOMY

It has long been understood that bribery has a detrimental effect on business and the economy. Corruption is particularly damaging when it involves public officials but is also harmful when being performed outside of the public sector. The wider casualties of bribery are equity, the principles of free and fair competition and meritocracy. Bribes, even small payments, are socially damaging as they promote a cultural acceptance of bribery in a way that tends to lead to the spread of corruption, undermining legitimate governance and the rule of law.

Nefarious business practices not only stifle a country's internal national economic development but also significantly curtail sustainable and beneficial foreign direct investment opportunities. Countries that lack transparency and clarity of regulations pertaining to business are generally less attractive for legitimate foreign investors.

In some cases the blame of perpetuating and intensifying corrupt business practices in emerging and developing economies has been apportioned to international companies from developed economies. There is a perception by some that these companies have increased and embedded bribery in some jurisdictions by being in a position to pay the highest bribes to secure lucrative contracts. This has been one factor that has led the UK to legislate extraterritorially on the issue of bribery and to hold both their own citizens and their international companies accountable for both national and overseas business practices.

3 AN OVERVIEW OF THE UK ACT AND UAE LEGISLATION

Implications of the UK legislation on bribery

The existing UK legislation had dealt with bribery and corruption within the UK, but up until the enactment of the UK Bribery Act 2010 (the Act) UK citizens and companies were not held accountable to these similar high standards when conducting themselves abroad due in part, to the difficulties faced by the regulators in securing a conviction.

The Act is purposely broad in scope with the main implication being that now UK citizen's and UK companies are caught within this law even while conducting themselves outside of the UK. For UK citizens the Act covers both their behaviour in the corporate sphere and also their private non-corporate behaviour. Importantly, UK and some international companies (where they carry out some business in the UK) are responsible for the actions taken by those that are acting on their behalf including, but not limited to, employees, agents or subsidiaries. As a result, non-UK citizens who are 'associated persons' of UK companies operating outside of the UK are also caught by the Act.

Penalties for persons found guilty of the offence of bribery include imprisonment and substantial fines. Where a 'commercial organisation' is in breach of the law both the company and its directors could be subject to criminal penalties and substantial fines. The UAE and UK have signed a Judicial Cooperation Treaty and an Extradition Treaty which are routinely used when individuals are charged with offences and require repatriation to be tried under their national law.

The main defense against the failure of a 'commercial organisation' to prevent bribery is that there are 'adequate procedures' in place to minimize the risk of bribery. The UK Ministry of Justice (MoJ) has provided guidance on what these procedures might be (see below). Particular risk areas, in the UAE context, are agency arrangements and facilitation payments.

Implications of the UAE legislation on bribery and corruption

The UAE has a national Penal Code and various regulations which deal with bribery and corruption both in the public and private sector. These regulations set a high standard of business practice. The penalties for non-compliance include prison sentences and fines for both private sector and public sector employees and companies. Arguably the 'adequate procedures' stipulated in the UK MoJ guidance would be a useful tool in ensuring that the existing UAE legislation on bribery and corruption are also met.

4 WHAT IS THE UK BRIBERY ACT 2010?

The UK Bribery Act 2010 came into force on 1 July 2011. It has been a long deliberated piece of legislation which incorporates the requirements of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, but in some areas goes beyond those requirements.

The Act covers three broad offence categories.

1 Offences of bribing another person

This core offence is widely defined and covers all bribes, those given or received in a personal capacity as well as those made in a corporate setting for a business advantage.

The core offences relate to the giving or receipt of bribes to 'improperly perform' a function which is expected to be carried out:

- in good faith,
- impartially, or
- where the person involved is in a position of trust.

'Improperly perform' is defined in terms of the expectations of persons performing those functions if they were in the UK, even if the functions are carried out abroad. As a result UK citizens will be held to UK standards of behaviour, wherever they are located, unless local 'written law' provides for different standards.

The Act refers to local written law to allow for variations in what is accepted practice in different jurisdictions. This is inline with the principles of transparency that the Act is upholding as it ensures clarity and a level playing field for all.

The law applies whenever:

- Any part of the offence (including but not limited to the improper performance) takes place in the UK; or
- All parts of the offence take place outside the UK, but the offender is:
 - A UK citizen, or overseas citizen,
 - Ordinarily resident in the UK,
 - A UK incorporated body.

These offences go beyond OECD convention requirements in that:

- There is no exemption for small 'facilitation payments', defined as a small bribe paid to facilitate routine Government action.
- Bribe receivers are covered as well as bribe payers. Action can also be taken against foreign nationals being paid bribes in the UK.
- All bribes are included, not just bribes to obtain or retain business or a business advantage.
- Bribes to private persons are covered and not just public officials.

2 Bribery of a foreign official

This specific offence covers any financial advantage paid, offered or promised where the intention is to:

- influence foreign officials, in performance of their 'functions', or
- obtain or retain business or a business advantage.

No actual improper performance is required for the offence to have been committed.

'Functions' is defined in terms of what would be expected of that function if it were being performed in the UK, unless the applicable local written law differs. This again allows for legitimate and legal local variations to take place.

3 Failure of commercial organisations to prevent bribery

'Commercial organisations' commit an offence if they themselves or any person associated with them bribes another person intending to obtain or retain business or a business advantage for them. Senior officials that are found to be consenting or conniving to any of the bribery offences will be acting illegally.

This offence can be committed not just by UK companies, but by any non UK commercial organisation which carries on a business, or part of a business, in any part of the UK. This would certainly cover any internationally active UAE companies conducting some part of their business in the UK.

'Commercial organisations' are widely defined to include any body or partnership incorporated or formed in the UK or any body or partnership which carries on a business in the UK irrespective of the place of incorporation or formation.

In addition, of particular relevance to the UAE context, the law extends to the offence being committed by any 'associated persons' of a UK company even if the 'associated person' is operating outside of the UK.

'Associated persons' include anyone who performs services on behalf of the organisation which may specifically include employees, agents or subsidiaries, but may also extend to contractors, suppliers, joint ventures.

5 PROTECTING YOURSELF IN A CORPORATE SETTING

– ADEQUATE PROCEDURES

The Act creates a new offence which can be committed by commercial organisations which fail to prevent persons associated with them from committing bribery on their behalf. However there is a full defence for an organisation if it can prove that despite a particular case of bribery it nevertheless had ‘adequate procedures’ in place to prevent persons associated with it from bribing.

Guidance in the form of six principles has been issued by the UK Ministry of Justice (MoJ), which provide a common sense risk based approach to managing bribery risk.

1 Proportionate Procedures

The application of the guidance is not intended to be overly burdensome and therefore procedures should be proportionate to the risk of bribery within the organization, taking into account for example the; size, business sector, geography, nature and complexity of the organisation. Often it will be simple and practical procedures that require effective implementation and enforcement for bribery risk to be mitigated.

Steps to take:

- Develop a corporate anti-bribery and corruption policy.
- Prepare ancillary policies and procedures to cover particular risk areas e.g. corporate gifts and entertainment, charitable giving.
- Establish bribery incident management procedures so that there is a process of investigation and escalation in the event of a suspected incident of bribery.

2 Top-Level Commitment

This requires that there is a demonstrable commitment to anti-bribery procedures by the Board and senior management, and that there is promotion of a culture within the organisation in which bribery is never acceptable.

Steps to take:

- Develop a clear statement of your organisation’s anti-bribery position.
- Involve senior management in anti-bribery procedures (steering committees, decision making and monitoring).
- Demonstrate the anti-bribery message in internal and external communication.

3 Risk Assessment

Periodic bribery risk assessments should be undertaken that are clearly documented and take into account the nature of the organisation’s bribery risk profile. This will depend for example on the geographical location of the organisation, the sector or markets in which it operates and its business model. The risk assessment must consider not only employees but all ‘associated persons’.

Steps to take:

- Document bribery risk assessment and procedures.
- Introduce specific procedures to prevent and detect bribery in high risk areas.

4 Due Diligence

Due diligence reviews, applying a proportionate risk-based approach, should be undertaken periodically. In particular there should be a focus on 'associated persons' for example those business partners who perform or will perform services on behalf of the organisation, including agents, distributors and high risk vendors. This is especially important as an organisation may be liable if those acting on the organisation's behalf commit acts of bribery. Interestingly, there has been an increased focus on the actions of those acting on behalf of organisations by the US regulators enforcing the US Foreign and Corrupt Practices Act ("FCPA") in recent years and this is reflected in the guidance for the UK Bribery Act. In addition it is appropriate to consider the practices of JV partners and M&A targets, since entrenched organisational practices are very often difficult to change.

Steps to take:

- Assess who are your business partners.
- Determine the adequacy of and documentation of due diligence of business partners.
- Ensure that the organisation's business partners are aware of the importance of complying with the Bribery Act.
- Incorporate contractual clauses in contracts with business partners requiring adherence to anti-bribery practices.

5 Communication (including training)

Periodic communication and training ensures that anti-bribery policies and procedures are properly communicated and embedded throughout the organisation. This can be promoted by internal and external communications (with 'associated persons') and training focused on high risk areas or functions of the business.

Steps to take:

- Develop whistleblower channels and helpdesks.
- Offer risk-based management and staff training.
- Maintain communications with 'associated persons' on anti-bribery policies.

6 Monitoring & Review

There should be due regard for the governance framework, monitoring, reporting and review of anti-bribery procedures.

Steps to take:

- Ensure there is demonstrable senior management oversight.
- Link reporting mechanisms and KPIs to anti-bribery procedures.
- Incorporate anti-bribery processes into the independent review processes of Internal Audit/Risk Management.

6 PARTICULAR BRIBERY RISK AREAS WHEN OPERATING IN THE UAE

Impact on Agency in the UAE

The corporate offence of failing to prevent bribery can be committed by the company itself or a person associated with the company. 'Associated persons' defined in the Act include agency arrangements which are standard practice in the UAE and the Middle East generally. Within the UAE it is routine practice to appoint registered or non-registered agents for various matters relating to obtaining trade licenses, office premises and employee work visas. These agents may be individuals or companies who offer these and related services.

There is clearly nothing illegal about using agents and often their involvement are a legal requirement of conducting business within the UAE. However, companies caught by the Act need to be careful that both their dealings with the agents and the activities of the agents comply with the act.

Practical measures

- Meet your agent, preferably visit him in his office and understand his business.
- Enter into a written formal agreement to detail the arrangement.
- Make clear reference to the laws that you subscribe to in your formal agreement and ensure the agent understands and agrees to them.
- Share your own corporate training on anti-corruption and bribery with your agents.

These measures will help to provide a stronger defence that 'adequate procedures' were in place in the event that an offence is subsequently committed by the agent.

Facilitation Payments

'Facilitation payments' are described in the guidance to the Act as a small bribe paid to facilitate routine Government action. These are illegal and could trigger an offence. The Act provides no exemption on the amount of the facilitation payment. However any payment made that is required or permitted and underwritten in local law is outside these provisions and does not count as a bribe.

Within the UAE, as in the UK, payments are made when accessing various services at Government departments. Where these fees are codified in the UAE law they are legal payments under the UK Act and would not be classified as facilitation payments.

Practical measures

- Review the relevant government department guidance on whether a payment is legal. If a fee is not codified in law avoid making the payment.
- Seek legal advice on fees to differentiate between properly payable fees and disguised requests for facilitation payments.
- Where it is not clear that payments are legally mandated, measures should be taken to ensure transparency. Matters should be escalated within the organisation and to local regulatory bodies active in the UAE.

7 GENERAL BRIBERY RISK AREAS

Other general bribery risk areas are listed below.

Geography

- Certain jurisdictions are more vulnerable to bribery. Consulting the Transparency International Corruption Perceptions Index (bribe payers and bribe givers indices) or other equivalent indices to focus anti-bribery procedures to the higher risk jurisdictions.
- In certain jurisdictions there may be a need to make a payment to protect life, limb or liberty. The Act accepts this case of duress as a legitimate defence for making payment. Where such payment is made the organisation should consider subsequently reporting the matter to the British embassy or other relevant local regulatory authorities. This defence does not extend to making payments to ensure the protection of goods or business.

Also:

- Transactions involving tax havens or opaque jurisdictions can signal increased risk.
- Unusual differences between; a company's country of domicile or origin and the transit or destination for goods can also indicate increased risk.

The use of intermediaries

Factors that may highlight increased risk of bribery include:

- Intermediaries are recommended or required by the end customer when none is strictly necessary.
- A written contract is absent or informal
- The place of business cannot be easily corroborated
- The client is operating through a new company or one that has been previously dormant
- The nature and size of the intermediary is inconsistent with the services to be rendered
- Lack of background checks or supporting documentation
- Intermediary interaction is sporadic or for a single purpose
- There are multiple distributors with related parties
- There is evidence of unusual success in securing public bids or services

Treasury and Accounts payable

Risk areas include cash payments generally, and in particular; unsubstantiated expense reimbursements, irregular payment procedures, out-of-country payments, payments to tax havens or opaque jurisdictions, one off payments and payments in unusual or round amounts.

Also:

- Invoices with vague descriptions or sequentially numbered invoices received.
- No VAT number where one might be expected.
- A vendor being found immediately prior to finalising the business agreement.

Sales and pricing

Various outliers can signal bribery risk:

- Outliers in relation to pricing and discounts relative to similar products or similar sales within the same geographical location.
- Outliers in net margins or net profitability (free goods, returns, write-offs, and commission rates).

Also:

- Periodic or one-time transaction with a sales intermediary.
- Red flags in the bidding process (e.g. related party bidders, late winning bids, unusual bidders present or usual bidders missing, unusual bid criteria).
- Risks are increased when there is a long and expensive sales process (e.g. large and expensive projects).
- Commission payments netted against sales.

High risk transactions

- Hospitality and promotional expenditure are recognised aspects of doing business. However the expenditure must be proportionate. A review of corporate policies would be needed to prevent such expenditure being used as a cover for bribery.
- Other payments to be wary of include; charitable contributions, travel expenses and payments to travel agents, conferences and seminars, contributions to political groups or lobbies, payments related to customer education, reimbursements of (third party) expenses.

Also:

- Payments in relation to the transportation of goods, freight forwarding and customs clearance.

8 FURTHER READING

Ministry of Justice publications; The Bribery Act 2010, Quick start guide and The Bribery Act 2010, Guidance.




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