

The Bribery Act 2010 and “Adequate Procedures”

IBLF Roundtable

Paul Melling, Partner (paul.melling@bakermckenzie.com)

Tel: +44 (0) 20 7919 1827

Sunny Mann, Partner (sunny.mann@bakermckenzie.com)

Tel: +44 (0) 20 7919 1397

Introduction

- Background to the Act
- Reforms the UK law; repeals current Acts and common law offence of bribery
- Public and private sector bribery
- Main offences under the Bribery Act
 - Offences of bribing and being bribed
 - Offence of bribing foreign public officials
 - New corporate offence
- Will come into force in April 2011
- Intended to facilitate greater enforcement against corporations
- How it affects business in Russia

New Corporate Offence

New Corporate Offence (1)

- Strict liability offence of failure to prevent bribery.
- Offence can be committed by a *relevant commercial organisation* where a *person associated* with the relevant commercial organisation (RCO) bribes another person intending:
 - To obtain or retain business for the RCO; or
 - To obtain or retain a business advantage in the conduct of business for the RCO.
- Defence for the RCO to prove that it had *adequate procedures* designed to prevent *associated persons* from engaging in bribery.
- No requirement that the person who makes the bribe is either prosecuted or subject to the Bribery Act.

New Corporate Offence (2)

- *Relevant commercial organisation* includes UK corporates AND any other corporate carrying on *business or part of business* in the UK.
- Potentially very broad application; business conducted in UK does not need to be connected to act of bribery:
 - Prosecutorial discretion
- *Associated person* is someone who performs services for or on behalf of RCO:
 - Capacity in which *associated person* performs services on behalf of the RCO is irrelevant (but, legal presumption re employees)
 - Whether agents, subsidiaries, JVs, distributors, consultants etc. are an *associated person* is determined by reference to all relevant circumstances not merely by label of relationship
 - Breadth of individuals and entities that may be considered an *associated person* must be reflected in *adequate procedures*

Adequate Procedures

Draft Government Guidance

- Six principles for bribery prevention
 - Risk assessment
 - Top level commitment
 - Due diligence
 - Clear, practical and accessible policies and procedures
 - Effective implementation
 - Monitoring and review

Risk Assessment

- Key external risk factors
 - *Country risk*: Perceived level of corruption
 - TI Corruption Perceptions Index
 - *Transaction risk*: Political contributions, public procurement, high value projects
 - *Partnership risk*: Government relationships, distributors, JVs
- Internal risk factors include deficiencies in knowledge and procedures, as well as remuneration structures
- Assessment must be undertaken by appropriate personnel

Top Level Commitment

- Top level management commitment to prevention of bribery → “Culture of Compliance”
- Internal and external communication of commitment
 - Public statement of anti-bribery commitment
 - Code of Conduct
 - Compliance Manual/Compliance Policies
 - Employment contracts
 - Agreements with third parties
 - Training
- Senior management oversight of anti-bribery programme

Due Diligence

- Third party due diligence is key to mitigating risk
- Know who you are dealing with and understand the associated risks
 - *Jurisdiction*: Are they operating in a high risk jurisdiction?
 - *Role/Opportunity*: What role are they undertaking on your behalf? What risks does the business opportunity raise?
 - *Reputation*: Prior investigations relating to bribery or other compliance failings? Compliance policy?
 - *Government/customer relationships*: Any relationships with the Government?

Policies and Procedures

- Public statement of anti-bribery commitment
- Code of Conduct
- Compliance Manual/Policies
 - Gifts and entertainment
 - Political/charitable contributions
- Whistle-blowing/escalation procedures
- Investigation procedures (including “dawn raids”)
- Support with existing controls and processes
 - Financial and auditing controls
 - Disciplinary procedures
 - Performance appraisals

Effective Implementation

- *“Bringing high-level anti-bribery commitment to life”*
- Allocating roles and responsibilities for implementation
- Timeline for implementation
- Internal reporting re implementation
- Training re risks and policies/procedures (including third party business partners?)
- Internal and external communication

Monitoring and Review

- Financial monitoring
- Incident reporting
- Reporting into Audit Committee/Board of Directors
- Trigger events for more in-depth review (e.g. Government reports, convictions of other corporates)
- Review of implementation by business partners and other associated persons.
- External verification
 - External advisors
 - Associations

Top 10 FCPA Settlements (millions)

Start of 2010

Siemens	\$800
KBR/Halliburton	\$579
Baker Hughes	\$44
Willbros	\$32
Chevron	\$30
Titan	\$29
Vetco	\$26
York International	\$22
Statoil	\$21
Schnitzer Steel	\$15

End of 2010

(Based on Company Disclosures)

Siemens	\$800
KBR/Halliburton	\$579
BAE	\$400
ENI	\$365
Technip	\$338
Daimler	\$185
Company A	\$137
Panalpina	\$82
Company B	\$56
Baker Hughes	\$44



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Doing Business in Russia in the age of the Bribery Act 2010

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Transparency International Ranking 2010

Brazil	69
China	78
India	87
Russia	154
Somalia	178

“But that’s just how things are done in Russia”

- Not a defence but an admission of guilt
- Compliance is not static and frozen in time, but requires constant review
- Most significant legal exposure can arise from a failure to re-examine business structures that carry non-compliance risks because such structures have delivered results

Bribery Act 2010 – scenario #1

- ABC (UK) Limited is negotiating a major supply contract with large state owned Russian company
- ABC is informed that localisation requirements require that a supply contract of this nature must be signed with a Russian legal entity and thus they will need to create a Russian subsidiary
- ABC is told “unofficially” that no supply contract is likely to be awarded unless senior management of the Russian company are minority shareholders in the Russian subsidiary

Bribery Act 2010 – scenario # 2

- ABC (UK) Limited does business in Russia through its wholly owned Russian subsidiary, OOO ABC
- OOO ABC in turn sells its products through a number of independent Russian distribution companies
- ABC (UK) Limited receives a call on its “whistleblower hotline” informing them that one of these distribution companies (in Vladivostok) has been paying bribes to win business from prospective purchasers of ABC products

Bribery Act 2010 – scenario # 3

- OOO ABC receives a request from its principal Moscow based distributor
- For the next very substantial order, the distributor requests that the sale be made not by OOO ABC but by ABC (UK) Limited and that the sale be made to the distributor’s “associated company” in Cyprus (but with delivery to Moscow)

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