The UK Bribery Act 2010

Stuart Paterson, partner, dispute resolution, Herbert Smith LLP
Bribery is not a new problem

The Holy Quran (Al Baqara, 2:188):

ولا تأكلوا أموالكم بينكم بالباطل وتدلوا بها إلى الحكام لتأكلوا فريقا من أموال الناس بالإثم وأنتم تعلمون

And swallow not up your property among yourselves by false means, nor seek to gain access thereby to the judges and rulers, so that you may swallow up a part of the property of men wrongfully while you know
Transparency International UK
The 2010 Corruption Perceptions Index

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http://www.transparency.org.uk/
http://transparency.org/policy_research/surveys_indices/cpi/2010/results
UK Bribery Act 2010

Content

• Key provisions of the new law
• Guidance on the corporate offence
• Saudi Arabian laws concerning bribery
UK Bribery Act 2010 – an overview

Background to the new law

• Introduced to consolidate and extend existing laws
• New corporate offence of failing to prevent bribery
• Bribery of foreign public officials
• Due to come into force on the 1 July 2011
• Significant areas of uncertainty as to how the law will be applied
• Extraterritorial reach – it will affect businesses in the KSA
Foreign businesses beware…

“…At present I have no jurisdiction over those foreign corporates who commit offences in other countries. That will change when the Bribery Act 2010 comes into force. The new offence means that I shall have jurisdiction where a foreign corporation carries on business in the UK and commits an act of bribery in a third country. This will be an offence even if the act of bribery has nothing to do with the UK business…”

Richard Alderman, Head of the UK Serious Fraud Office, November 2010
Offence by the payer of the bribe

A person directly or indirectly, offers, promises, or gives an advantage to another:

a) intending *(subjective test)* it to induce another person to do something improper or to reward someone for behaving improperly *(objective)*; or

b) to reward a person for improper performance; or

c) knowing or believing that the acceptance of the advantage would itself constitute the improper performance.
UK Bribery Act 2010 – General Offences

Offence by the recipient of the bribe

A person (R) requests, agrees to receive or accepts an advantage:

a) intending that a relevant function or activity should be performed improperly;

b) where the request or agreement itself constitutes the improper performance of a relevant function or activity;

c) as a reward for the improper performance; or

d) in addition, where R improperly performs a relevant function or activity in anticipation of receipt of an advantage.
UK Bribery Act 2010 – Bribing a FPO

Bribery of a Foreign Public Official

A person directly or indirectly offers, promises or gives any financial or other advantage intending to influence the FPO in his capacity as an FPO, and to obtain or retain business or a business advantage.

Wide definition of FPO

No need to intend FPO to act improperly

Ambiguous test of influence/retaining a business advantage
Corporate offence of failing to prevent bribery

A company or partnership ("C") incorporated/formed or which carries on a business in England and Wales is guilty of an offence if:

A person ("A") associated with C bribes another person intending to obtain or retain business or an advantage for C

"A" is likely to include UK and foreign employees, agents, subsidiaries and potentially JV’s and sister companies.
The corporate defence

- Adequate Procedures to prevent bribery
- Statutory guidance (published 30 March 2011)
UK Bribery Act 2010 – Guidance on the corporate defence

• Proportionate procedures
• Top level commitment
• Risk assessment
• Due Diligence
• Communication (including training)
• Monitoring and review
UK Bribery Act 2010 – Penalties

Main offences:
° unlimited fine or 10 years’ imprisonment
° personal liability for executives who “consent” with offence by corporate entity

Debarment under the procurement regime
° Bidding on EU contracts

Confiscation regime
° Proceeds of Crime Act 2002
Saudi Arabia

Combating Bribery Law ("CBL") issued by Royal Decree dated 30 June 1992

Principal offences:

1. Offering a bribe to a public official
2. Receipt/request of bribe by a public official
3. A Corporate Offence

There is no offence of private bribery in Saudi Arabia
Saudi Arabia

Offences

A bribe includes any benefit or advantage, whether financial or not, including gifts and entertainment.

The CBL makes no distinction between a foreign and domestic public official.

The definition of public official includes government employees and employees of banks or companies in which the government holds shares.

The offences apply whether or not the public official intended to actually breach his duty.
Saudi Arabia

A corporate offender may be found guilty where an employee bribes another while serving the company interest.

There is no carve out for facilitation payments.

**Penalties:**

**Individual**
Maximum of 10 years imprisonment and/or a fine of 1M SAR (265,000USD).

**Corporate offender**
A fine up to 10 fold of the value of the bribe as well as banning from Government contracts for at least 5 years.
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**Where are companies at?**

**BRisk™**

Bribery Risk: Know where you stand. Scope your response.

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<td>Has your organisation performed a comprehensive bribery risk assessment?</td>
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<td>46% Yes</td>
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<td>Do you know what &quot;adequate procedures&quot; would look like for your organisation?</td>
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MOJ Guidance on procedures to prevent bribery

Six key areas of focus:

- Proportionate procedures
- Top level commitment
- Risk assessment
- Due diligence
- Communication
- Monitoring and review
Risk Assessment – response should be proportionate to the risk
Conducting a Risk Assessment/Investigation

Know where you stand – scope your response

Our Experience –

- Interview senior management and identify main areas of risk
- Review existing compliance framework and identify the gaps
- Risk rate and prioritise
- Culture, tone and communicated
- Transaction testing
Risk Assessment

Risky Activities

- How you sell
- Movement of goods
- Licences, permits, regulatory clearances
- Tax, duties, etc
- Other dealings with government
- Gifts, hospitality and travel
- Sponsorship and marketing
- Donations
- Lobbying
- Intermediaries
- Joint ventures, consortia, acquisitions
- Use of company assets by third parties
- Large overseas competitive tenders
Top Level Commitment

Tone from the Top

- Consistent and visible sponsorship
- Understanding the culture before making changes
- Leaders who do as they say
- Good behaviours rewarded, poor behaviours acted upon
- Embedding systems and processes to support Tone from the Top
Policies and Procedures

Main considerations

Specific requirements

Reporting and response plan

Common misconceptions
Due Diligence
Who is on the team?

Supply Chain
- Raw material suppliers
- Component suppliers
- Labour suppliers
- Office suppliers

Core Organisation
- Professional advisors (lawyers, accountants, tax)
- Technical advisors (strategy consultants, IT consultants, R&D)
- Lobbyists
- Outsourcing or off-shoring partners

Distribution / Sales Channels
- Commercial adviser, intermediary, consultant
- Logistics providers and customs brokers
- Distributors, agents, licensees, franchisees, maintenance
- Joint ventures, contractors and consortium partners
- Off set advisers

PwC
Communication

- Timetable
- Team
- Dissemination
- Monitoring
Monitoring and Review

Key Elements

• Critical to sustainability of the programme
• Scoping and design of these procedures should focus on high risk activities
• Clear responsibilities and reporting structure to achieve adequate oversight
• Robust and efficient information gathering and reporting
• Higher risk third parties
• Effective reporting to enable continuous improvements
Questions

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