

# Act now or pay later

The UK Bribery Bill 2009



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# Executive summary

The UK Ministry of Justice published the draft Bribery Bill on 25 March 2009. This seeks to enhance the UK's anti-bribery legislation which is generally old and has been subject to serious criticism internationally. The Scottish Government also announced on 24 July 2009 the intention to reform its bribery and corruption laws, modelled on the UK draft Bill proposals.

The Bill replaces previous offences with a general bribery offence and a specific offence relating to the bribery of foreign public officials (both of which are applicable to individuals and UK-registered companies). It also introduces a specific corporate offence of failing to prevent bribery.

The specific corporate offence is designed to make companies and other corporate bodies responsible for bribery committed on their behalf, a familiar concept in the US Foreign Corrupt Practices Act (FCPA). The key potential liability relates to failure to prevent active bribery for or on behalf of the corporate body by its employees, agents or subsidiaries.

A defence to the failure to prevent offence exists if it can be shown "adequate procedures" were in place. Although the Bill does not define "adequate procedures", some definition or guidance is expected prior to the enactment of the Bill. Prior to this, existing US, OECD (Organisation for Economic Co-operation and Development) and related UK guidance gives a good indication of the procedures and processes companies will need to have in place.

It is imperative that companies take steps now to review their current anti-bribery procedures and processes and to rectify any gaps. Ensuring robust and comprehensive procedures are in place and their operation evidenced can take considerable time and resources.

Board members must show leadership, with training provided throughout the organisation to raise anti-bribery awareness. Numerous functions need to be involved in developing, embedding and maintaining an anti-bribery programme, including legal, compliance, internal audit, HR and finance. Mechanisms to support staff, such as compliance helplines and whistleblowing facilities, need to be established.

Organisations should not assume that the government and regulators will be deflected from introducing and enforcing the new legislation. Recent indications are that corporate and individual failures to take action to prevent bribery will meet a tough response. Furthermore, the report of the parliamentary Joint Committee on the draft Bribery Bill, published in July 2009, urged the government to introduce the Bill "as soon as possible" and said, "The Government must now focus on the need for rigorous enforcement including the resources this will require. Given the scale of the problem and what is at stake, this is an investment that is well worth making."

This paper is not intended as a guide to the legal details of the Bribery Bill, but as a prompt to encourage companies to take urgent and necessary action.

# Why companies should take note now

Although the UK has anti-bribery legislation in place, the draft Bill represents a notable enhancement, particularly in the area of corporate liability. Many companies appear unprepared or unaware of the provisions and their implications.

Those most likely to have at least some of the procedures and processes in place are US Foreign Private Issuers, but these are in the minority among UK corporates. In a recent PricewaterhouseCoopers (PwC) poll of non-executive directors, heads of internal audit, heads of risk and other senior executives, 85% of respondents to the survey<sup>1</sup> were from organisations that are not US listed and therefore have not had to face the full force of the FCPA, with its extensive anti-bribery and corruption requirements.

Some 75% of those surveyed said their boards or audit committees had not considered the implications of the Bribery Bill for their businesses. Furthermore, 83% said that either their organisation had not yet started to prepare for the introduction of the legislation, or they did not know whether it had. Over half (53%) said their organisation did not carry out a regular anti-bribery assessment, while 28% did not know.

These findings are concerning. The Joint Committee has emphasised the importance of what a company does “in practice rather than in theory”. In PwC’s experience, establishing adequate processes and procedures for compliance with anti-bribery legislation that are effective in practice takes considerable time, commitment (from top management downwards) and resources. Companies need to be taking action well before the Bill is enacted if they are to be at least substantially compliant by the time its provisions come into force.

Small and Medium Enterprises (SMEs) may believe this legislation will not affect them. However, as the Government has been encouraging SMEs to participate in large overseas public tenders, some SMEs will face significant risk. SMEs are also likely to have less sophisticated compliance systems than larger companies in place.

Some may be wondering whether the Bribery Bill will actually become law, given that an earlier draft Bill, published in 2003, was abandoned. However, the UK government is under considerable pressure to upgrade its legislation. An OECD report last year expressed concern over the UK’s “continued failure to address deficiencies in its laws on bribery of foreign public officials and on corporate liability for foreign bribery”.<sup>2</sup>

Transparency International’s 2008 Corruption Perceptions Index showed that the UK’s score had dropped from 8.4 in 2007 to 7.7 in 2008 – the first time it had fallen below 8 – adding fuel to concerns over the UK’s international reputation.

Most compellingly, the July 2009 report by the parliamentary Joint Committee on the draft Bribery Bill said that the draft legislation represented “an important, indeed overdue, step in reforming the UK’s bribery laws” and urged the government to introduce the Bill “as soon as possible in view of its protracted and faltering history”. The report said, “We particularly welcome the proposed offence that targets companies and partnerships which fail to prevent bribery by persons performing services on their behalf.”

Regulators are also showing intent, through words and actions, to take a tougher stance against bribery and corruption.

<sup>1</sup> Results are based on 40 responses gathered via a paper survey from recent attendees at PwC Fraud Academy and NED events

<sup>2</sup> “Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendations on Combating Bribery in International Business Transactions”, approved by the OECD Working Group on Bribery in International Business Transactions on 16 October 2008

Richard Alderman, Director of the Serious Fraud Office (SFO), when giving evidence before the parliamentary Joint Committee, said:

“Society is entitled to expect of the corporates these days that they have adequate anti-bribery processes and that those processes are carried out throughout the corporation. If there is a significant failure, then it is a board level failure.”

He also noted that the SFO had 17 ongoing investigations into bribery or corruption and was expecting to make more announcements during the year about their progress.

This year has already seen the first prosecution brought in the UK against a company for corruption abroad following an SFO inquiry. Mabey & Johnson Ltd, a manufacturer of bridge equipment, admitted paying bribes to win contracts in Jamaica, Ghana and Iraq

and is expected to receive a severe fine. The case comes after the £2.25m fine imposed on Balfour Beatty to settle allegations of bribery, a settlement that was widely criticised for being too lenient. In January the Financial Services Authority (FSA) fined insurer Aon Limited £5.25m – the largest FSA fine to date for a financial crime offence – for not taking reasonable care to establish and maintain effective systems and controls for countering the risks of bribery and corruption.

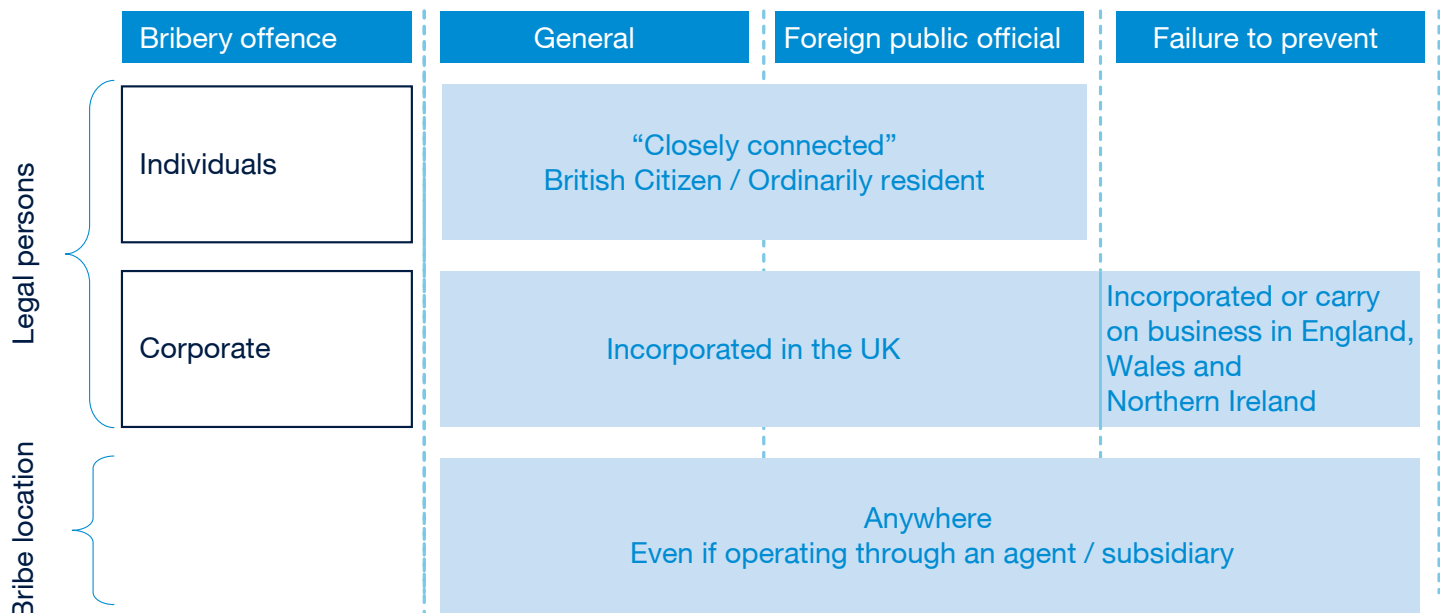
Such figures appear relatively modest in comparison with some US fines – such as the \$800m imposed on German engineering group Siemens in settlement of a long-running bribery and corruption investigation (alongside substantial fines by the German authorities). Nevertheless, UK enforcement is ramping up, and company fines appear set to increase in value and frequency.



# Summary of draft legislation provisions

The Bribery Bill 2009, taken together with the Joint Committee’s recommendations, represents a significant enhancement of current UK anti-bribery legislation.

## Scope and application of the Bill



For UK registered corporates, there are three potential offences:

- a general offence of offering or receiving bribes;
- a specific offence of bribing a foreign public official; and
- an offence of failing to prevent bribery on the corporate’s behalf.

Corporate entities which are not UK registered but which do business in the UK can also be charged with the offence of negligently failing to prevent bribery on their behalf.

Individuals who are British citizens or ordinarily resident in the UK can be charged with the general offence of offering or receiving bribes, and with bribing a foreign public official.

These offences – for corporates and individuals – apply regardless of where in the world the bribes are offered or received, and regardless of whether the bribery is direct or indirect via a subsidiary or third party.

### Penalties

Corporate bodies found to have committed any bribery offence could face unlimited fines. In addition, they may be disbarred from tendering for Government contracts, under Article 45 of the EU Public Sector Procurement Directive 2004. The Joint Committee recommended that clarification should be given as to how fines will be assessed.

Individuals could face a maximum 10 year prison sentence and/or an unlimited fine. This includes senior officers of companies held liable through their consent to or connivance with a general or foreign public official offence by their company.

# Corporate action required

## “Adequate Procedures” defence

A defence to the corporate failure offence exists if it can be shown “adequate procedures” were in place. The burden of proof rests with the organisation and procedures will need to be evidenced in practice. It should be noted that the defence is potentially undermined if a ‘senior officer’ is found to have been involved (including by consent or connivance) in the corrupt act.

Adequate procedures are not defined in the draft Bill, but the Joint Committee has recommended that they should be defined through an appropriate authorised body prior to the Bill becoming effective. As discussed below, existing US and OECD guidance gives an indication of the procedures and processes companies will need to have in place.

## Corporate action required

Companies incorporated in or carrying on business in England, Wales or Northern Ireland need to act now. Although the Bill will not apply retrospectively, once it comes into force companies will need to be prepared to show adequate anti-bribery procedures are in place in practice. Since a comprehensive anti-bribery programme will take many months to implement, companies must start to address any gaps in their programme immediately.

The steps to follow and the likely work involved will vary depending on whether the organisation is already prepared to comply with the FCPA (e.g. Foreign Private Issuers) or equivalent. For these companies, the main immediate action is to review the scope and effectiveness of their existing anti-bribery programme and remediate any gaps.

For companies which have not previously systematically organised themselves to comply with the FCPA or similar legislation, there may be significant work to do.

## A comprehensive anti-bribery programme

How can companies determine the components of an anti-bribery programme needed to comply with the UK legislation?

It is likely that some UK guidance will be developed to accompany the new anti-bribery legislation and help companies comply. The July 2009 Parliamentary Joint Committee report on the Draft Bill called for official guidance on some elements of the draft Bill, particularly the meaning of “adequate procedures”. However, in anticipation of definitive UK guidance as to what framework constitutes adequate procedures for preventing bribery, a number of sources are available.

Given that significant parts of the draft Bribery Bill were driven by and based on the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, various OECD documents are likely to give strong indications of the UK procedures required. Documents with particular relevance are the OECD Guidelines for Multinational Enterprises (Section VI – Combating Bribery) and OECD Business Approaches to Combating Corrupt Practices.

Further insights can be gained from the US Federal Sentencing Guidelines, which define for US courts dealing with FCPA cases an “Effective Compliance and Ethics Program”.

Recently, the SFO published “Approach Of The Serious Fraud Office To Dealing With Overseas Corruption”. This is an important statement by the SFO to the corporate world, making clear the SFO’s focus on anti-corruption enforcement (under the new Head of Anti-Corruption, with a target headcount of 100 staff). It also sets out the SFO’s expectations and guidance on corporate self-reporting (an important area for corporates to be prepared for) and, importantly, the basis on which the SFO will judge the adequacy of the corporate procedures to mitigate corruption risks.

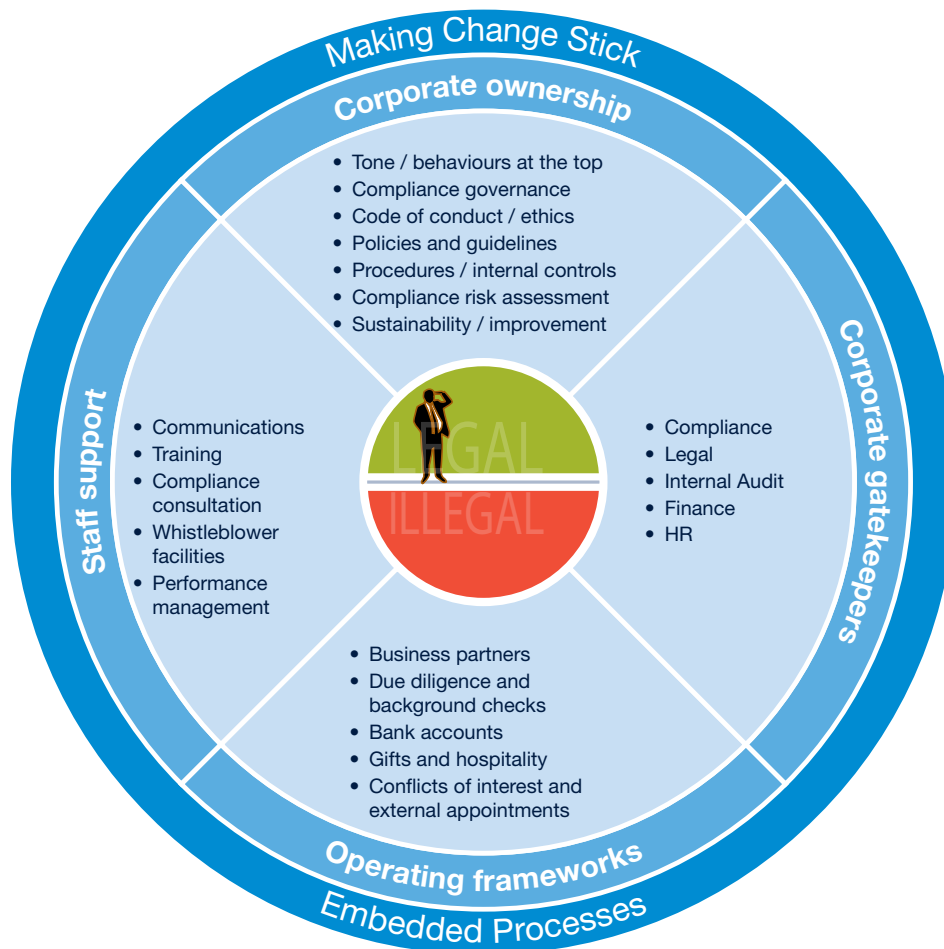
Other relevant sources of guidance include national legislation and practice in other OECD Convention

signatory countries. Meanwhile, a number of industry-specific standards and codes have been developed for sectors that have seen enforcement activity in this area, such as pharmaceuticals and life sciences, aerospace and defence.

Other insights can be gained from various FSA documents and pronouncements, such as its recent Aon ruling, which sets out perceived weaknesses. The FSA has also stated that it is collating examples of good practice across the financial services sector. The recommendations made in the 2008 Woolf Committee Report into BAE Systems provide further useful reference points.

## Do you know your ABC?

Elements of an anti-bribery compliance framework



Drawing on these various sources and based on experience gained working with companies, PwC has developed a framework for a typical anti-bribery compliance programme, as illustrated below.

The PwC framework is a guide to some of the likely requirements for compliance with the final UK Bribery Bill. Organisations that already need to comply with the FCPA may find they have some elements already in place, but this should not be assumed.

### **Assessment of existing anti-bribery programmes**

The assessment of the adequacy of an existing anti-bribery programme should be conducted by experienced individuals who are independent of those carrying out the procedures and processes, such as suitably qualified and experienced members of the internal audit team. The review should be commissioned by the board or one of its committees, such as the audit committee or a separate compliance or risk committee. The final report should be addressed directly to that committee.

Note that internal audit should not review any areas of the programme for which it is responsible itself. Independent external support may be required for any such elements. Note too that committee and board members need to be sufficiently knowledgeable of the anti-bribery legislation and compliance procedures. Specialist training may be required to ensure they are equipped to carry out their anti-bribery responsibilities adequately.

Where any areas of weakness or gaps in the anti-bribery programme are identified, corrective action must be taken. The most serious issues should be addressed first. Any work to improve the anti-bribery procedures and processes should not be performed by internal audit, which needs to retain its independence in order to conduct a later assessment of the adequacy of the work.

### **Developing and embedding an anti-bribery programme**

Some companies may find they do not currently have a systematic anti-bribery programme in place. For these

organisations, considerable work may be required in order to achieve compliance with the incoming UK legislation.

Key steps in the process for developing an anti-bribery programme are summarised below.

Even isolated gaps in compliance, depending on their nature, can take significant time to address, including operational implementation.

#### **Gain board commitment**

The board must indicate the importance of the anti-bribery programme by committing adequate qualified resources to its development. Where necessary board members should undergo training themselves to ensure they have appropriate knowledge of the anti-bribery legislation and its implications, and to set the 'tone from the top'.

#### **Conduct a global risk assessment**

Existing guidelines call for organisations to conduct a global assessment to identify areas of highest risk in terms of potential exposure to bribery and corruption. These are the areas that will need to be addressed first. Note that risk is not necessarily associated with the size of operations in a particular jurisdiction. Small operations in countries with high perceived levels of corruption are likely to be high risk.

The risk assessment should examine a variety of factors including: the high risk areas in which the company operates; whether the business model includes large scale projects, tenders or long term contracts; the degree to which intermediaries are used to do business; whether the company has interactions with government officials; if a new business acquisition or joint venture is planned and the gifts, hospitality and entertainment activities employed. These are some of the most vulnerable areas for businesses which need to be carefully considered and then prioritised. This list is not exhaustive.

## **Develop an anti-bribery implementation plan**

Prioritising high risk areas is essential because implementing a comprehensive anti-bribery programme could take several years. The implementation plan should be set out in sufficient detail to be able to demonstrate to a regulator or court that the organisation is committed to establishing its entire anti-bribery programme. The board needs to allocate sufficient budget and resources in terms of internal and external expertise.

## **Establish governance structures**

The anti-bribery programme should involve a number of functions who act as corporate gatekeepers. These could include a specific compliance function (in larger organisations), legal department, internal audit, finance and HR. Their roles and relationships in terms of the anti-bribery programme need to be clearly specified.

One individual needs to be given specific responsibility for the anti-bribery programme. This individual should be designated as the chief compliance officer. The individual should ideally have not only sufficient knowledge and expertise in anti-bribery compliance, but also experience in running programme implementations.

Oversight arrangements also need to be established, for example, involving a non-executive committee with a compliance remit – this may be the audit committee, the risk committee, or a specific compliance committee. The committee's membership and powers need to be defined, together with its relationships with other non-executive committees, the board and staff who report to it.

## **Establish a values and rules hierarchy**

If the organisation does not already have a code of ethics or code of conduct, this needs to be created.

Such codes should address bribery and corruption, as well as other issues related to general business ethics. Existing codes need to be reviewed and upgraded as necessary to ensure that anti-bribery and corruption aspects are adequately covered. All codes should have board-level approval and reflect the core values the organisation seeks to operate by.

Codes are supported by policies which give more detailed statements designed to give management and staff specific guidance to ensure the aspirations of the code of conduct are related directly to the operational business. There will typically be a number of policies relevant to anti-bribery compliance, including:

- Third party intermediaries and other business partners
- Gifts, hospitality and entertaining
- Facilitation payments
- Political and charitable donations and lobbying activities
- Conflicts of interest
- Bank accounts, cash and petty cash.

In our view it is not necessary or effective that codes and policies attempt to address every possible situation in which a potential bribe or corruption could occur. It is preferable to develop and embed clear values which employees then apply to guide ethical decision-making in any specific situation they may face.

Policies are supported by operating procedures and internal controls. These anti-bribery procedures and controls need to be embedded in the company's regular operational framework, including where applicable the internal controls over the financial reporting framework. Implementing these procedures and controls – and testing their effectiveness – throughout all business locations could involve substantial work.

### **Embed the anti-bribery framework in the business**

Embedding the anti-bribery framework begins with the communication of the code of ethics or conduct, the company's core values and its supporting policies. Employees need training to help them understand how bribery and corruption can arise and to identify situations when they and the business may be at risk. Face-to-face training is necessary to supplement e-learning modules because of the often subjective nature of the material, and training must be tailored to reflect realistic dilemmas staff may face. Individuals do not all need to be expert in the legal detail, but to be able to spot a possible issue and know how to go about making the right decision, including where to go for help and advice. This advice should be provided through an appropriate decision support mechanism, such as a compliance helpline (distinct from whistleblowing facilities).

### **Provide appropriate whistleblower facilities**

Best practice guidelines for countering bribery and corruption typically require provision of whistleblowing facilities. This involves establishing a mechanism whereby individuals can report any suspicions of corrupt behaviour confidentially and, if they wish, anonymously. Companies with international operations must ensure the facility is available to individuals in appropriate languages and time zones.

The processes need to be robust to instil employee confidence in them. They should also establish how matters should be addressed, including their escalation to senior levels, avoidance of actual and perceived conflicts of interest, and follow-up and investigation processes.

Whistleblowing facilities should be recognised as an important source of information for the company in its anti-bribery programme, both to identify individual issues and to enhance the anti-bribery programme.

### **Review disciplinary and other HR procedures**

Companies need to ensure they have appropriate disciplinary procedures and processes in place and that these are always followed correctly. Employees themselves need to understand how the disciplinary process works.

HR should be conducting background checks on potential employees, particularly those in senior or sensitive positions, looking out for evidence of involvement in illegal activity or other question marks regarding integrity.

Performance management systems should be reviewed to ensure they support anti-bribery policies and aims, in particular, appropriate and specific compliance-related performance targets should be set in management objectives (including board members) and then assessed as part of the variable remuneration decision process.



### **Manage third party compliance risks**

Many bribes are paid indirectly, via third party agents, including sales representatives, logistics agents and bogus or disreputable small law firms and marketing consultancies, with or without the commissioning organisation's consent and knowledge. It is essential to ensure that risk-based compliance due diligence checks are carried out on third parties that the organisation plans to employ. Formal contracts with these third parties should require them to behave in an ethical way and in compliance with all relevant legislation, including specifically anti-bribery legislation. Approval and monitoring procedures need to be established to check that payments made to the third party appear reasonable in relation to the service performed.

When a large organisation engages smaller third parties, it should take steps to support those smaller business partners in achieving compliance with anti-bribery laws and regulations. This support could include, for example, providing training in the organisation's expectations of what constitutes compliant behaviour. Third parties should also be given details of how to make use of whistleblower facilities, so that they can report any behaviour that raises suspicions of corruption.

### **Ensure adequacy of monitoring and reporting procedures**

Where employees identify queries relating to anti-bribery and corruption legislation, resolution of those issues should be documented. Given there will be many grey areas, clear documentation is necessary to demonstrate to regulators why a particular decision was reached.

Monitoring should also cover other aspects of the anti-bribery framework, such as the coverage of personnel who have completed anti-bribery training, the gifts and entertainment provided by the company, or performance in large-scale tenders. Clear review responsibilities should be established, whether by line management or board committees, and formal guidance as to when issues need to be escalated to the highest levels.

### **Committing time and resources**

The need for organisations to commit sufficient time and resources to the development and embedding of an appropriate anti-bribery programme has already been highlighted, but it is worth emphasising again.

Experience shows that, particularly for organisations operating in multiple jurisdictions, the work involved in implementing an anti-bribery framework across all areas of the business – and reviewing its effectiveness – is considerable. It can take several years to complete the programme, and involve many hours of internal and external expert time.

As the UK moves towards upgrading its anti-bribery legislation, early action by all companies is essential. Those who delay preparations while waiting for legislation or guidance to be finalised risk their anti-bribery procedures not being effective in practice and thereby attracting the attention of regulators and potentially suffering expensive fines and reputational damage.

# Appendix: Provisions of the draft Bribery Bill 2009

(Following the recommendations of the Joint Committee)

## General bribery offences

The general bribery offences cover:

- active bribery (offering or paying); and
- passive bribery (soliciting or receiving).

They are applicable to individuals and corporate bodies, and include bribery conducted through a third party intermediary.

Where committed by a corporate body, any “senior officer” (see below) who “consents to or connives” with the offence by the corporate body is similarly guilty of the same offence. A “senior officer” in relation to a corporate body is a director, manager, secretary, or other similar officer.

To be an offence the bribe must be associated with an intent to “improperly perform” or an inducement to “improperly perform” certain “functions and activities”.

- “Improperly perform” means an action or omission in breach of an expectation of good faith, impartiality, or when in a position of trust.
- “Functions and activities” include those in the public sector, in commerce and business, in the course of employment, and conducted by or on behalf of a body corporate. They do not need to be related to or based in the UK.

## Bribing of a foreign public official

The Bill contains a separate offence of bribing a foreign public official. This has been drawn up based on the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Section 4).

The offence covers only active bribery (offering or paying). However, like the general bribery offences, it is applicable to both individuals and corporate bodies. Where committed by a corporate body any “senior officer” who consents to or connives with the offence by

the corporate body is similarly guilty of the offence.

To be an offence the bribe must be intended to obtain or retain a business advantage by influencing the recipient of the bribe in their function(s) as a public official. A financial or other advantage will constitute a bribe if it is not legitimately due to the foreign public official. The judgement of what is legitimately due is based on the local “law”. The Joint Committee recommends replacing this with “written law” (which would include statutes, regulations and case law, but exclude local custom or tolerance), to remove the potential for loopholes and provide an “appropriately narrow gateway” restricting the circumstances in which advantages can legitimately be provided to foreign public officials.

The definition of a “foreign public official” is drawn from the OECD Convention. It is a wide definition, including legislative, administrative and judicial functions, the exercise of a public function for countries, public agencies and public enterprises, and officials and agents of public international organisations.

## Failure to prevent bribery

Commercial organisations can “fail to prevent bribery” on their behalf. The offence only relates to active bribery (offering or paying) in connection with the organisation’s business.

It applies to corporate bodies either incorporated in or carrying on business or part of a business in England, Wales or Northern Ireland.

It is a defence to show the organisation had “adequate procedures in place to prevent bribery on its behalf” based on a balance of probabilities standard.

“Adequate procedures” are not defined in the Bill. The Joint Committee recommended an appropriate body should be authorised to issue guidance prior to the Bill becoming law. The Committee also asked for the word “negligent” to be removed from the failure to prevent bribery offence. It welcomes this offence, but proposes removing the requirement for prosecutors to prove that a responsible person was negligent (contained in clause 5(1)(c) of the draft Bill).

## Areas of uncertainty

A number of important terms are not clearly defined within the Bill. The interpretation of these by regulators, enforcement agencies and courts could have a significant impact. Some examples are as follows.

- “Facilitation” or “acceleration” payments: these will remain illegal under the Bill as they are under current UK law. Historically, prosecution discretion has been used to allow some flexibility in this area; this is set to continue but potentially with some guidance as to how this discretion will be exercised.
- “Senior officer”: in particular, the inclusion of “manager” or “similar officer” may include a very wide range of company staff within this role, with significant implications for those individuals (in terms of being held responsible for consenting or conniving with a corporate offence).
- “Consent or connive”: consent implies active knowledge and agreement, but the interpretation of “connive” is likely to be wider. For example, would wilful ignorance be included?
- “Adequate procedures”: what constitutes “adequate procedures” in the context of a corporate defence of failing to prevent bribery is not defined in the current draft. This is probably the most significant area of uncertainty for companies, as it is exactly these procedures that companies need to be ensuring are in place when the Bill becomes law. The parliamentary Joint Committee report on the draft Bill said that official guidance should be available for use before the offences come into force in order to give businesses time to prepare.
- The Bill allows for unlimited fines but does not clarify how these will be calculated. The Joint Committee has recommended that the assessment methodology should be clarified.

## The anti-corruption challenge

To make sure your business is managing corruption risk, these are some of the questions that you need to be asking yourself:

- Is the tone from the top right and do we know if it has the desired impact on our people?
- Do we perform an annual assessment to determine where the exposure to corruption exists?
- Is there an independent challenge when it comes to balancing commercial decisions with anti-corruption requirements?
- Are we comfortable that the typical employee will make the right ethical judgements in difficult situations and will know when and where to get support?
- How many intermediaries do we use, what services do they provide and do we have formal contracts?
- Does staff performance management embed anti-corruption requirements?
- Do we have the right balance between sanctions and support?



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