

Corporate M&A

Application of the UK Bribery Act 2010

Application of the UK Bribery Act 2010 to Irish Companies and Partnerships Carrying on Business in the UK

The UK Bribery Act 2010 (the Act), which was enacted on 8 April 2010, is scheduled to come into force on 1 July 2011. The Act is designed to reform the existing UK criminal law regarding bribery and corruption by replacing the existing statutory and common law regime with a more coherent, comprehensive and far reaching legal framework of anti-bribery laws which have potential implications for Irish companies and partnerships carrying on business in the UK.

- Irish companies and partnerships carrying on business in the UK should now consider:-
- the extent to which the Act will apply to them; and
- what steps they should take to ensure compliance with the Act.

Bribery Offences

The Act contains five bribery offences:-

- Active bribery - that is, offering, promising or giving a bribe (Section 1);
- Passive bribery - that is, requesting, agreeing to receive or accepting a bribe (Section 2);
- Bribery of a foreign public official in order to obtain or retain business advantage in the conduct of business (Section 6);
- Senior officer offence - that is, where a corporate body has bribed or been bribed and a senior officer (being a director, manager, secretary or other similar officer or a person purporting to act in such a capacity) has consented to or connived in the bribery (Section 14); and
- Corporate offence - that is, the failure by a commercial organisation to prevent bribery (Section 7).

The offences have extensive extra-territorial reach, criminalising activities which may take place entirely outside the UK.

Section 7 - Corporate Offence

The new corporate offence under Section 7 of the Act introduces strict liability for commercial organisations where they fail to prevent bribery. The Section 7 offence is committed by a "relevant commercial organisation" which fails to prevent persons "associated" with it from committing bribery on its behalf.

Relevant Commercial Organisation

The definition of a "relevant commercial organisation" under Section 7(5) of the Act extends to an incorporated body or partnership which carries on a business or part of a business in the UK irrespective of its place of incorporation or formation. Therefore, an Irish company or partnership, which carries on business or part of a business in the UK, could be liable under the Act for bribery committed by any employee or person who performs services on its behalf anywhere in the world.

Associated Person

A person "associated" with a commercial organisation is defined under Section 8 of the Act as a person who performs services for or on behalf of the organisation. This person can be an individual or an incorporated or unincorporated body. The capacity in which a person performs services for or on behalf of the commercial organisation does not matter - the scope of Section 8 of the Act can extend to not only employees, agents and contractors of the relevant commercial organisation but may also extend to suppliers, subsidiaries and joint venture arrangements.

Section 8(4) of the Act states that the question as to whether a person is performing services for a commercial organisation is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between that person and the organisation.

Adequate Procedures Defence

Under Section 7, it is a full defence for an organisation to prove that despite a particular case of bribery it had adequate procedures in place which were designed to prevent persons associated with it from bribing. While recognising that no bribery prevention regime will be capable of preventing bribery at all times, the Section 7 defence is designed to encourage commercial organisations to put procedures in place to prevent bribery by persons associated with them.

Guidance Issued by the UK Ministry of Justice

In March 2011 the UK Ministry of Justice issued a guidance note (the Guidance)[1] which serves both as a commentary on the Act and which also details some recommended procedures which commercial organisations should consider putting in place to prevent persons associated with them from bribing with a view to enabling the commercial organisation to avail of the adequate procedures defence. The Guidance is designed to be of general application rather than providing a prescriptive policy. The overriding principle is that businesses should adopt a risk-based approach - where the risk of bribery faced by a business is minimal, there is no requirement under the Act for complex procedures to be put in place.

Carrying on Business in the UK

The Guidance endeavours to provide some clarity in relation to what is meant by "carries on business in the UK". The Guidance applies a common sense approach to the question of whether a non-UK organisation can be regarded as carrying on business or part of a business in the UK and is therefore a commercial organisation capable of committing the corporate offence.

The Guidance states that while the question is ultimately one for the UK courts to decide, organisations that do not have a demonstrable presence in the UK should not be caught. By way of example, the Guidance suggests that:-

- the mere fact that a company's securities have been admitted to trading on the London Stock Exchange would not, in itself, qualify that company as carrying on business or part of a business in the UK; or

- having a UK subsidiary will not, in itself, mean that a non-UK parent company (or an affiliate) is carrying on business in the UK, since the subsidiary may act independently of its parent and the other group companies.

In the case of a joint venture operating through a separate legal entity, the Guidance confirms that joint venture members will not necessarily be liable where they benefit from a bribe through their investment in a joint venture, although they could be if the bribe was specific to their business. In relation to a contractual joint venture arrangement, the Guidance suggests that a "degree of control" test should be applied in determining whether or not an organisation is in breach of the provisions of the Act. For example, there is a presumption that where a person is retained solely by one of the joint venture partners, that person will be providing services to the joint venture partner who engaged him or her rather than to the other contracting joint venture parties and the joint venture partner retaining that person will have a degree of control over that person and may therefore be liable under the Act for the actions of that person.

The Six Principles

The Guidance is formulated around six key principles. The Guidance is not intended to be a one-size-fits-all document and the application of these guiding principles will vary depending on the size and particular circumstances of the organisation.

The six guiding principles which should be considered by commercial organisations when putting adequate procedures in place are as follows:-

- **Proportionate Procedures:** The Guidance suggests that a commercial organisation should adopt clear, practical and accessible procedures and policies to prevent bribery by persons associated with it which are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities. These procedures and policies should be effectively implemented and enforced and some of the suggested elements to be covered in the procedures and policies include:-
 - a statement of the organisation's commitment to bribery prevention;
 - details of the organisation's general approach to mitigating specific bribery risks such as those arising from the conduct of intermediaries and agents and those associated with hospitality and promotional expenditure; and
 - an overview of the organisation's strategy to implement its bribery prevention policies.
- **Top-Level Commitment:** The Guidance requires that top-level management of a commercial organisation (such as the board of directors, owners or other governing bodies) make a commitment to preventing bribery by associated persons and foster a culture within the organisation in which bribery is never acceptable. It is recommended that the organisation's zero tolerance to bribery should be communicated both internally and externally and that top-level management should have an appropriate degree of involvement in the development of the organisation's bribery prevention procedures.
- **Risk Assessment:** The Guidance suggests that the organisation should assess the nature and extent of its exposure to potential external and internal risks of bribery and that this assessment should be periodic, informed and documented. The risk assessment procedures to be adopted should be proportionate to the organisation's size and structure and to the nature, scale and location of its activities. The commonly encountered external risks identified by the Guidance which should be assessed by organisations include country risk, sectoral risk, transaction risk, business opportunity risk and business partnership risk.

- **Due Diligence:** The Guidance encourages organisations to put in place due diligence procedures in respect of the individuals and entities who perform or which will perform services for or on behalf of the organisation in order to mitigate identified bribery risks. As employees are presumed to be persons associated with the organisation, the Guidance recommends that appropriate due diligence procedures are incorporated in the organisation's recruitment and human resources procedures where the relevant employee's position merits such due diligence procedures. The organisation should also consider the outcome of its risk assessment (as outlined above) when considering the extent of the due diligence that should be conducted.
- **Communication (Including Training):** The Guidance recommends that the organisation should ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks it faces. The Guidance focuses on training, internal communications conveying the "tone from the top" and on the importance of establishing "speak up" procedures which provide a secure, confidential and accessible means for internal and external parties to raise concerns about bribery.
- **Monitoring and Review:** In view of the fact that the bribery risks which an organisation faces may change over time, the Guidance suggests that the organisation should monitor and review procedures designed to prevent bribery and should identify deficiencies and make improvements where necessary.

The Guidance includes some illustrative case studies covering issues such as joint ventures, hospitality and promotional expenditure and due diligence of agents - these case studies include details of certain practical steps which can be taken to apply the six principles outlined above so as to ensure compliance with replica watches the Act

Bona Fide Business Entertainment Permissible

The Guidance expressly states the Act does not criminalise genuine, bona fide hospitality and promotional or other business expenditure provided that it is reasonable and proportionate. The Guidance expressly states that tickets to sporting events or taking clients to dinner will not constitute an offence under the Act so long as it is reasonable and proportionate to the organisation's business. In the context of bribing a foreign public official, for an offence to be committed there must be an intention for a financial or other advantage to influence the official in his or her official role.

Facilitation Payments

Facilitation payments are currently illegal under UK law and remain illegal under the Act, however, the Guidance acknowledges the problems that commercial organisations face in certain countries and in certain sectors and states that the eradication of facilitation payments is a long term objective that will require economic and social progress and sustained commitment to the rule of law in those countries where the problem is most prevalent. The Guidance recognises that there are circumstances where such payments may be made in order to protect against loss of life, limb or liberty and acknowledges that in those circumstances the defence of duress is likely to be available to any bribery charge.

Penalties

If an organisation is found guilty of the corporate offence under the Act, both the organisation and its directors and officers could be subject to the penalties for breaching the provisions of the Act, with convictions carrying up to ten years imprisonment and/or an unlimited fine in the case of individuals and an unlimited fine in the case of organisations. Businesses convicted of an offence under the Act also risk being debarred from competing for public contracts under the UK Public Contracts Regulations 2006.

Conclusion

While the Guidance makes it clear that the Act is not intended to unduly burden the vast majority of companies, the new legislation signals a new stricter approach to bribery and corruption in the UK and requires Irish companies and partnerships carrying on business in the UK to take the necessary steps to ensure compliance with the Act.

For further information on this topic please contact: Sharon McCaffrey, Partner, Corporate M&A,
E: smccaffrey@efc.ie