

## UK Bribery Act Raising the bar



The UK Bribery Act came into force on 1 July 2011. The Act has replaced the UK's previous anti-bribery legislation, much of which had been criticised as being unfit for purpose by prosecutors, pressure groups and non-governmental organisations.

Under the provisions of the Act, UK enforcement authorities have at their disposal new and more easily applied offences which UK companies need to factor into their risk management processes. Given that complying with the provisions of the Act may require significant changes and additions to compliance programmes, companies need to address this issue as a matter of priority.

### **Anti-corruption enforcement already an issue**

In spite of the much maligned anti-corruption legislation which the Bribery Act replaced, authorities in the UK have become significantly more active in bringing corruption related enforcement actions which have been both civil and criminal in nature. Penalties as high as £30 million have been levied against a number of UK corporations.

The only defence available to companies charged with the new corporate offence is to demonstrate that they have 'adequate procedures' in place to prevent bribery. The Ministry of Justice has published guidance on what constitutes 'adequate procedures' but this is principles-based rather than prescriptive.

The more easily applied offences included in the Bribery Act make it reasonable to assume that the upward trend in enforcement activity in the UK is likely to continue.

### **Penalties and offences**

The maximum penalty for bribery under the Bribery Act is increased for individuals from seven to ten years imprisonment and/or a fine. The amount of the fine that can be levied on companies is unlimited and the fact that the Act is silent as to how such fines will be assessed is of particular significance.

### **The Bribery Act contains:**

- Two general offences of (i) offering, promising or giving a bribe and (ii) requesting, agreeing to receive or accepting a bribe.
- A new specific offence covering bribery of a foreign public official for which the burden of proof is apparently lower than the general offence.
- Most importantly for companies, a new corporate offence of failing to prevent a bribe being paid on their behalf by an 'associated' person.

An 'associated' person is defined in the Act as one who performs services on behalf of a commercial organisation (UK companies and partnerships, or other companies and partnerships which carry on their business, or part of their business, in the UK). The Act gives the examples of employees, agents and subsidiaries. The definition in the Act is sufficiently broad however that the possibility of other third party representatives and business partners satisfying the definition is potentially high.

Companies need to ensure therefore that they have appropriate procedures in place to monitor and control the activities of all potentially associated parties whose actions could give rise to liability for the company under the Act.

Examples of such associated parties could include joint venture partners and distributors as well as those referred to in the Act.

### **Defence of ‘adequate procedures’**

The only defence available to companies charged with the corporate offence is to demonstrate that they had in place ‘adequate procedures’ to prevent bribery. The Ministry of Justice published final guidance on what constitutes ‘adequate procedures’ in March 2011.

#### **Key questions from enforcement authorities**

In our experience in situations where corrupt payments are discovered to have been made by employees, representatives or business partners of a company, among the key questions asked of the company by enforcement authorities are:

- Did the company effectively communicate to the employee, representative or business partner that it was company policy that bribes should not be offered or paid on its behalf?
- Did the company effectively control and monitor the activities of the employee, representative or business partner to ensure compliance with the policy?

We would suggest that these questions are considered when senior management are assessing the adequacy of anti-corruption procedures.

In many respects the provisions of the Bribery Act are wider than the US Foreign Corrupt Practices Act (FCPA) which covers bribery of foreign government officials but not private individuals. Current compliance programmes tailored to the FCPA will therefore have to be revisited in order to ensure they satisfy the requirements of the Bribery Act. In particular there is no exemption contained in the Bribery Act for either facilitation payments or sponsored delegation visits by government officials

The extraterritorial nature of the Bribery Act means that UK companies, or companies with operations in the UK, will have to maintain anti-corruption procedures that satisfy the requirements of the Act wherever they operate in the world.

It should be noted that the countries and operations with the highest corruption risk may not necessarily correspond with the largest operations of the company in revenue terms.

### **Questions senior management should be asking**

In light of our experience of working on enforcement actions and our knowledge of the existing guidance we have set out below questions that we believe should be asked regarding anti-corruption policies, procedures and controls. To the extent that the answer to any of these questions is “No”, we would suggest that the relevant policies, procedures and controls are reviewed and appropriate remedial action taken as a matter of priority.

#### **Culture, tone and ownership**

- Does responsibility for anti-corruption procedures rest with a designated member of senior management with appropriate access to the board?
- Does the company have a clear anti-corruption policy and code of ethics that are visibly and consistently supported by senior management creating the appropriate ‘tone from the top’?
- Are employees, representatives and business partners required to certify on a regular basis that they have read and understood the company’s anti-corruption policy and complied with its provisions?

#### **Anti-bribery and corruption risk assessment**

- Does the company regularly perform a corruption risk assessment on its operations in order to identify potential high risk areas and ensure the continued effectiveness of the company’s anti-corruption procedures? Factors to be considered would include:
  - business conducted in countries with a high propensity for corruption;
  - business conducted through sales agents, joint ventures or other third parties;
  - business conducted with government customers;
  - business conducted in industry sectors with a high propensity for corruption;
  - operations where business entertainment is a significant element of the sales process; and
  - previous incidents of bribery within the company or the industries/countries in which the company operates.

**Training and awareness**

- Does the company provide regular training on its anti-corruption procedures to its employees, representatives and business partners and is attendance at this training evidenced?
- Does the company have a mechanism in place for providing specific and immediate guidance to directors, officers, employees, representatives and business partners on complying with the company’s anti-corruption procedures when dealing with potentially problematic situations? One example would be a compliance helpline.
- Does the company promote its anti-corruption procedures to its employees, representatives and business partners through its performance management processes?

**Compliance**

- Is compliance with anti-corruption procedures by employees, representatives and business partners regularly monitored by the company, for example through Internal Audit or Compliance reviews?
- Does the company have a mechanism in place to allow employees, representatives and business partners to report suspicions of corrupt activity in a confidential manner, for example through a telephone hotline?
- Does the company have a response plan in place to deal quickly and effectively with incidents of potential corruption?
- Does the company have an appropriate disciplinary process that addresses violations of the company’s anti-corruption procedures applicable to employees, representatives and business partners?

**Embedded controls**

- Are anti-corruption procedures and controls included in day to day business processes? Examples would include:
  - due diligence on prospective sales agents, joint venture and other business partners;
  - appropriate review and authorisation controls over the nature and purpose of payments;
  - right of audit over the activities of any sales agents, joint ventures and business partners; and
  - specific procedures and controls covering the areas of gifts, hospitality, entertainment, customer travel, political contributions, lobbying activities, charitable donations, sponsorships and facilitation payments.
- Does the company have a system of internal controls designed to maintain accurate books and records which prevent their use to facilitate or hide corrupt payments?

- Does the company factor corruption risk into its transactional due diligence programmes? (Corruption issues can be a key issue in the ‘buy’ decision and are better dealt with pre rather than post acquisition.)

**Demonstrating an effective anti-bribery and corruption programme**

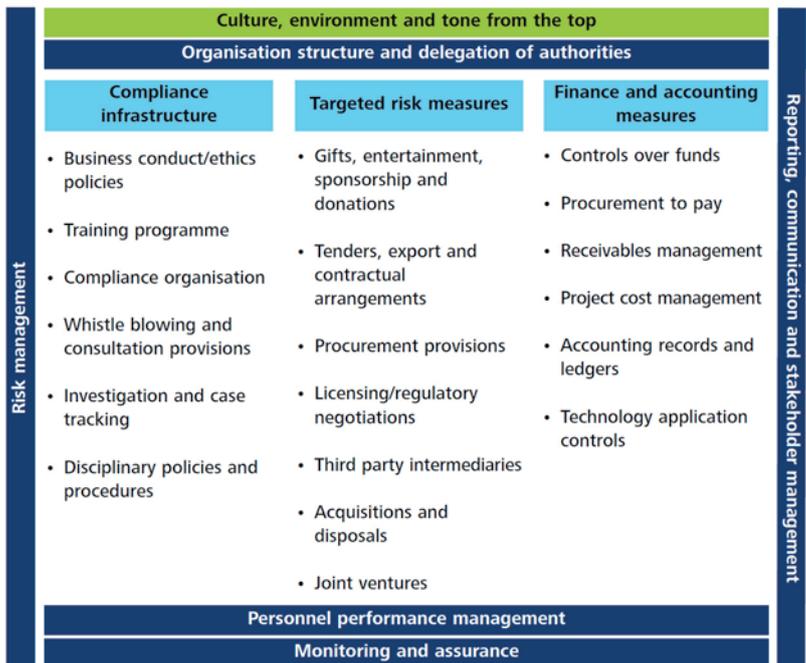
We have developed our Deloitte Anti-Bribery and Corruption Controls Framework (see Figure 1 below) which can be tailored to individual organisations and their specific anti-bribery and corruption risks

Our framework is based on the COSO controls framework and is designed to facilitate the reinforcement of existing, or development of, anti-bribery and corruption controls. The framework is supported by a benchmark set of detailed controls which form the basis of our approach to assessment.

Our framework illustrates that an effective anti-bribery and corruption programme must balance an effective culture with functioning process controls.

It will not be sufficient to rely on an established code of conduct or company values because an organisation will remain vulnerable to rogue employees. However, process controls won’t prevent collusion and cannot cater for every eventuality so it’s important that the company culture is right.

**Figure 1. Anti-Bribery and Corruption Controls Framework**



## How Deloitte can help

Anticorruption specialists at Deloitte have helped some of the world's leading companies navigate the risks arising from anticorruption legislation. Our clients seek our assistance on a broad range of corruption related matters including:

### Adequate Procedures and Anti-Bribery and Corruption Compliance Programmes

We can assist with the development, implementation and review of antibribery and corruption compliance programmes. This can involve supporting organisations in:

- Understanding and prioritising the risks they face.
- Establishing the control objectives and key controls necessary to enable them to determine if the risks are controlled.
- Assessing the effectiveness of the controls in place.
- Developing enhancement plans to improve controls.
- Training and awareness facilitation.

### Forensic Data Analytics

Our Forensic Data Analytics team has a number of relevant tools and techniques which are used to assist clients in their anticorruption efforts. These include:

- Data mining and interrogation capabilities that can highlight potentially problematic transactions quickly and efficiently.
- Online survey tools that can quickly gauge the state of awareness of staff with a company's anti-corruption policy and related procedures and controls as well as highlight potential corruption risk areas.

## Business Intelligence Services

Our Business Intelligence team are able to obtain information relating to the background and reputation of potential joint venture partners, sales agents or other business partners who may fall into the definition of 'associates'.

## Transactional Due Diligence

Our corruption specialists have worked with both buyers and sellers to identify corruption risks as part of the due diligence process. The results of such work can influence deal price and also allow acquirers to mitigate identified corruption risks both pre and post acquisition.

## Forensic Investigations

Our corruption and forensic accounting specialists have deep experience of conducting investigations and producing reports that are responsive to the needs and expectations of regulators and enforcement authorities.

## Contacts

If you would like additional support and insight on this topic please speak to any of our experts below.

### Austria

#### Mag. Karin Mair, CFE

Partner | National Leader Forensic  
+43 1 537 00-4840  
kmair@deloitte.at

#### Mag. Svetlana Gandjova, CFE

Director | National Leader BIS  
+43 1 537 00-4621  
sgandjova@deloitte.at

#### Mag. Christa Janhsen, WP

Senior Manager  
+43 1 53700-4843  
cjanhsen@deloitte.at

**Für weitere Informationen  
besuchen Sie unsere Website  
[www.deloitte.at/forensic](http://www.deloitte.at/forensic)**

### Germany

#### Uwe Heim, Partner

Service Line Leader  
Deloitte Forensic  
+49 211 8772-3777  
uheim@deloitte.de

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