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Being prepared

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Michael Littlechild explains why the Bribery Act is necessary and what we can do to prepare for it.

Since its introduction in the dying days of the Labour administration, the Bribery Act has generated a lot of headlines. It has been accused of putting jobs and growth at risk; of destroying the UK's corporate hospitality industry; of damaging UK competitiveness abroad and of jeopardising executives' reputation through damaging legal action if their firm falls foul of the new legislation. Those in favour of the new laws have argued their case equally strong. Delays to the implementation of the Act were described as recalcitrant and lamentable in the *Financial Times*.

Countries such as France, Germany and the US already implement relatively tough anti-corruption laws. They are said to be running out of patience with the UK, whose current anti-bribery laws were introduced a century ago and as such are perceived to be antiquated. The Bribery Act was intended to meet that criticism by bringing the UK closer in line with more rigorous anti-corruption legislation, most notably the US Foreign Corrupt Practices Act.

Bodies such as the Organisation for Economic Development and Co-operation (OECD) and the International Corporate Governance Network have argued that weakening the Act would damage both the UK's reputation and its competitiveness abroad, with the OECD threatening to blacklist UK exporters if the Government delays any further. This is well within the OECD's powers and it has already taken such action against Russia, Israel and Nigeria.

Raising alarm

Why has the Act caused so much controversy? One of the principle reasons is the introduction of a new corporate offence, which is the failure by a commercial organisation to prevent bribery where it is committed by an erring employee. The only defence against this is to demonstrate that 'adequate procedures' have been put in place by the company to prevent corruption from taking place. If convicted, board directors face up to ten years in jail and unlimited fines. Faced with this prospect, there has been much deliberation as to what constitutes 'adequate procedures', some of which has amounted to little more than scaremongering. Justice Secretary Ken Clarke made it clear in a recent interview in the *Financial Times* that he does not want the Act to become a 'money spinner for compliance lawyers'. So how do companies tell the difference between alarmist advice and best practice?

Practical steps

A properly embedded code of conduct is an essential first start, with appropriate training and due diligence to ensure that it is thoroughly understood and implemented. This seems to be understood by the majority of companies,

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although a recent survey by KPMG revealed that 14 per cent of UK companies still lack an anti-bribery plan of any sort.

Senior management needs to assess the risk of bribery occurring within the company on a regular basis and implement reviews and processes to ensure that safeguards against bribery are routinely checked. Senior level commitment to a zero tolerance policy towards bribery and corruption needs to be widely known within the organisation and due diligence must be carried out regularly in all high-risk areas of the business. Anti-bribery and corruption policies must be clearly communicated to staff, customers, clients, suppliers, partners and third parties and implementation must be ensured by the senior management. Much of this constitutes good management practice, but there are a number of more challenging requirements flowing from the Act that have caused more concern, most notably managing relationships with suppliers, third parties and overseas agents and clarifying the position on gifts and hospitality.

Under the new legislation, companies will be held liable for the corrupt activities of suppliers or agents acting on the company's behalf, unless adequate procedures have been put in place to prevent it. Businesses are concerned that in a global market place this will be impossible to monitor. Fear of how widely the definition of adequate procedures will be interpreted has resulted in much advice being given based on the most literal interpretations. Once the Ministry of Justice has produced its promised finalised guidance, much of this fear may be allayed. But the guidance will not be a blueprint, so what practical steps can businesses take? GoodCorporation has worked with many leading global businesses over the last ten years, helping them to develop robust anti-corruption policies. Managing the supply chain can be one of the biggest challenges. In our experience, once a company has made its policies clear to third parties, the key to success is undertaking due diligence to ensure, as well as can be reasonably expected, that third parties are behaving ethically. However, with some businesses engaging with tens of thousands of suppliers, this can seem like an impossible task. To make this simpler and more manageable, GoodCorporation has developed a step-by-step decision process, to enable businesses to decide when and how to undertake due diligence on their suppliers.

- **Step 1:** Is the supplier interacting with a government official on your behalf? Here the risks are obviously elevated and these suppliers should be screened carefully and controls put in place, combined with a strong anti-corruption procedure.
- **Step 2:** Is a supplier providing a product or a service? When a service is being provided, there is always some risk of corruption taking place with other parties – government entities, customers or other suppliers. If the supplier is providing a product without any service element, then the risks of its customer being prosecuted under the Act are, by comparison, fairly slight (even if a product supplier is bribing to get the goods through customs, its customer is not likely to be implicated in the wrong-doing). Therefore suppliers of products can generally be removed from any due diligence exercise.
- **Step 3:** Is the supplier selling on behalf of your company? In most circumstances, a business should conduct a careful screening exercise before allowing sales agents to operate on its behalf. Again strong, specific anti-corruption controls will be needed in most cases (see below).
- **Step 4:** Is the supplier selecting or managing other suppliers on your behalf? Companies that hire or project-manage suppliers or contractors for their clients pose a similar risk. A consulting engineer selecting and managing a construction company would be a typical example.

Following these simple tests should allow a company to decide which suppliers should be subject to due diligence. Doing so usually reduces the number to be monitored to a small fraction of the total. While the due diligence itself can be complex, the decisions on whether or not to undertake it are not.

Managing agents, advisors or intermediaries requires a clear set of rules. Such third parties are widely used in various sectors to carry out business development or win contracts and they should be very carefully managed. Again, this has been regarded as a massive potential headache for businesses, but a robust framework can help reduce the risk considerably in this area. The framework needs a clear set of rules for the selection and management of these intermediaries.

There are clear due diligence procedures to examine the ethical practices of current and prospective agents or intermediaries. These are:

- They sign up to clear terms and conditions.
- Their remuneration is appropriate and justifiable.
- Their remuneration is paid through bona fide channels.
- They follow clear rules and controls on the offer and acceptance of gifts and entertainment, which ensure that these do not influence business

decisions.

- They follow the principal's policies on bribery and corruption.
- There are clear rules stipulating that any lobbying they undertake does not have undue influence on government and customer decisions.
- Their interactions with third parties on behalf of the principal are properly recorded.
- There are well-defined guidelines for carrying out major bids, which ensure that expenditure is devoted to the quality and communication of the bid only.

That's entertainment

The future of client entertainment has generated the most headlines, from those declaring that the Act will bring about an end to the UK's corporate hospitality industry, to those revealing the extent to which some are entertained at the expense of the corporate purse. Again, much of the worry is overblown. In his interview with the Financial Times, Ken Clarke said that it 'won't matter if you take somebody off to a hospitality box at Twickenham. Anybody that tries to tell you that's going to be a criminal offence in this country is trying to get money off you.' But companies do need to ensure that hospitality is proportionate and clearly designed to build on business relationships rather than influence decisions.

In our experience, the rules that most businesses have in place in this area are vague enough that virtually any level of entertainment could be either justified or outlawed, depending on your mood. What is needed is a clear and simple decision-making process. A simple 'decision tree' can be put in place that will make it clear whether hospitality can be offered in 95 per cent of cases. There are always grey areas, but this shouldn't rack one's brains, as some commentators are suggesting. As the recent coverage of the entertainment of NHS senior managers by companies demonstrates, a great arbiter is to ask oneself: 'how would this look if it hits the headlines'?

In addition to undertaking such a decision process, there should be very clear rules on gifts and entertainment, which make it clear to all employees what it is acceptable to both give and to receive. This is rarely spelt out, but under the new Act it is essential that it should be.

Fears that the Act may be delayed indefinitely have been set aside. Indeed, Ken Clarke has reassured the US attorney general that Britain is committed to tackling corruption globally. The Act should become law following the publication of further guidance on adequate procedures. There will be work to do, at least for those companies which have previously taken a relaxed attitude to this subject, but tackling corruption on a global scale will give UK businesses a fair basis on which to operate. This should help rather than hinder its competitiveness. With senior management committing to stamping out corruption and establishing clear management practices in this area, failing to prevent bribery need not be as impossible as some fear.

Michael Littlechild is a director of GoodCorporation, auditors of ethical business practice. They can be found online at www.goodcorporation.com.