

The Bribery Act 2010

ECBA Conference - Antwerp

Neill Blundell
Eversheds LLP
24 April 2010

Outline of Talk

- Timetable
- Key Offences
- Jurisdiction & Penalties
- Adequate procedures

The Bribery Act - timetable

- Royal Assent on 8th April 2010
- Likely to be in force from 1st October 2010
- Guidance from SFO/MoJ on adequate procedures in relation to new corporate offence due in June/July

The key offences

- Active bribery
- Passive bribery
- Bribing a foreign public official
- Commercial organisation failing to prevent active bribery by employees, agents or subsidiaries
- Wider than the US Foreign Corrupt Practices Act
 - Not just overseas trading
 - Covers all trading – not just public officials
 - Facilitation payments not permitted



Active bribery



- Giving, promising or offering a bribe
- “Financial or other advantage”
- Directly or indirectly through a third party
- Intent to **induce** a person to perform improperly a relevant function or activity
- Intent to **reward** a person for the improper performance of a relevant function or activity

Passive bribery

- Requesting, accepting or agreeing to receive a financial or other advantage:
 - Intending that a relevant function will be improperly performed
 - As a reward for the improper performance of a relevant function
- Relevant function may be performed by another person

Active bribery - scenarios

- A senior employee at a company takes the finance director of a large plc (a former customer) on holiday to Florida with their families
- An agent in your distribution team in Chile requests larger commission payments to allow him to "*help secure business with tips of happiness*"
- You ignore an allegation of corrupt activity because the whistleblower is a known troublemaker with a grudge against the alleged wrongdoer

Passive bribery - scenarios

- Your procurement team accept an invitation to the Monaco Grand Prix from a bidder 2 weeks before finalising your legal panel review
- A facilities manager awards a maintenance contract for the Head Quarters building to an old pal at Bloggs Plc. A month later Bloggs Plc offer to sponsor the manager's son through university

Bribing a foreign public official

- Follows OECD requirements
- Active not passive bribery
- No exceptions for facilitation payments
- Belief that local law permits the payment is no defence
- FPO includes:
 - Legislative, administrative or judicial position, whether elected or appointed
 - Anyone who performs a public function
 - Official of a public international organisation



Personal liability of directors

- For active or passive bribery or bribing a FPO
- “Consent or connivance”
 - Some of coverage is misleading
 - If the company is guilty of one of the above offences, then senior managers / directors can also be guilty if they
 - Consented or connived
 - Turned a blind eye?
 - Chose not to investigate?

The failure to prevent offence

This is the new weapon of choice for prosecutors

- Strict liability
- Knowledge / culpability irrelevant
- Relates to active bribery or bribery of foreign public official
- By your employee, agent or subsidiary
- Bribe paid to retain or obtain business or benefit for your organisation
- Subject to adequate procedures defence

Jurisdiction and penalties



- Applies to bribes in the UK
- Applies to bribes abroad if the individual is resident or incorporated in the UK
- Applies to the conduct of overseas agents and employees if the corporate is registered or trades in the UK
- Up to 10 years imprisonment and unlimited fine

Adequate procedures?

- The SFO suggest the guidance will be principles based (not tick box) but will cover:
 - Senior management responsibility
 - Risk assessment
 - Policies and procedures
 - Implementation and training
 - Due diligence and business relationships
 - Monitoring and review



Questions?





EVERSHEDS

www.eversheds.com