Bribery Act 2010

On the 30 March 2011, the Government finally published its long-awaited guidance on the Bribery Act. The revised guidance is significantly more helpful than the original consultation draft, emphasising that anti-bribery procedures should be proportionate both to the nature and scale of the business and to the risk of bribery, and specifically that there is no intention to clamp down on 'ordinary' corporate hospitality. It also gives some comfort on the issue of whether a private equity firm will be liable for bribery at portfolio company level, indicating that the "failure to prevent bribery" offence will not arise simply through ownership of or investment in a company that commits bribery on its own account. However, the legislation remains widely drawn and, in the light of statements by both the Government and the Serious Fraud Office reiterating their commitment to stamping out bribery and corruption, it would be advisable for firms to spend some time assessing and addressing bribery risks before the Act comes into force on 1 July 2011.

The "failure to prevent bribery" offence (under which a commercial organisation commits an offence if a person associated with the organisation bribes another person with the intention of obtaining a business advantage for the organisation, unless the organisation can demonstrate that it has adequate anti-bribery procedures in place designed to prevent such conduct), in particular, has given rise to a number of key questions for private equity firms:

- Whether the firm, its funds and/or any of its portfolio companies are "commercial organisations" within the scope of the offence.
- Whether a private equity firm or fund is responsible for implementing anti-bribery procedures at portfolio company level.
- What anti-bribery policies and procedures the firm should implement.

The Government guidance is broadly helpful on all these points, although it does not provide any formal "safe harbour" from prosecution.

Which organisations are covered?

The offence of failing to prevent bribery applies to any organisation (whether a company, LLP or partnership) that:

- is incorporated or established in the UK, wherever it carries on business; or
- that carries on a business, or part of a business, in the UK, wherever it is incorporated or established.

So, private equity firms incorporated as UK companies or LLPs, private equity funds established as English or Scottish limited partnerships, and UK-incorporated portfolio companies are all within scope, as are non-UK firms that carry on any part of their business in the UK. It is worth noting that the Serious Fraud Office has indicated publicly that businesses should not rely on being "foreign" as grounds for avoiding investigation or prosecution under the Bribery Act.

Are private equity firms responsible for their portfolio companies?

It is unlikely that a private equity firm will commit the offence of failing to prevent bribery if a portfolio company commits bribery in the furtherance of its own business without the knowledge or involvement of the private equity firm or its investor directors.

A portfolio company will be treated as "associated with" a private equity firm (or fund) for the purposes of the offence only if it "performs services for or on behalf of" the private equity firm (or fund), which is a question of fact in each case. In addition, for the private equity firm (or fund) itself to be liable, any act of bribery by a portfolio company would have to be committed with the intention of securing a business advantage for the firm (or fund). The Government guidance helpfully confirms that receipt of an indirect benefit is very unlikely, in itself, to amount to proof of such an intention, so liability should not arise simply from owning, investing in, receiving dividends from or making loans to a portfolio company.

However:

- allegations of bribery or corruption at a portfolio company could potentially cause significant damage to a firm's reputation;
- where a private equity fund has a majority stake in a portfolio company, or has extensive control rights under a shareholders' agreement, it would be prudent to operate on the basis that a prosecutor might seek to allege that the portfolio company is an associate, especially as the Serious Fraud Office has indicated informally that businesses should not look to rely on technical arguments as a basis for avoiding investigation, which indicates that the SFO will be seeking to push the boundaries of interpretation;
- if a portfolio company itself commits an offence under the Bribery Act, a director or officer (which may include an investor director) who consents to or connives in that offence may be liable to personal prosecution; and
- the fund may still be committing an offence under anti-money laundering legislation if it receives the proceeds of unlawful bribery or corruption or, indeed, share dividends payable from profits and revenues generated by contracts obtained by bribery and corruption.

It would therefore be advisable to ensure (as part of normal portfolio company oversight) that portfolio companies are assessing potential bribery risk and implementing appropriate policies and procedures, especially where the portfolio company itself is within the ambit of the Bribery Act or where a UK resident investor director sits on the board.

What anti-bribery policies and procedures should firms implement?

The first step is to identify where risks of bribery might arise in relation to the private equity firm's own business. This will vary from firm to firm, but key areas to consider include:

- Fundraising, where there is a risk that investors may be improperly influenced to invest in funds managed or advised by the firm. Additional considerations arise where a firm engages a placement agent to assist with fundraising, as the firm will have less direct control over discussions with prospective investors.

- Deal origination, where there is a risk that prospective counterparties or co-investors may be improperly influenced to deal with the firm. Again, additional considerations will arise where the firm uses third party consultants or agents.

The next step is to develop policies and procedures to address the risks identified. Many private equity firms will already have policies and procedures that should be helpful in preventing bribery, so the firm's existing compliance manual is a good place to start. Relevant policies might include:

- Gifts and hospitality policy;
- Expenses policy;
- Vendor validation procedures;
- Risk control and internal audit procedures;
- Policy on use and engagement of placement agents;
- U.S. Foreign Corrupt Practices Act policy;
- Political contributions policy;
- Anti-money laundering policy (in particular, due diligence checks on counterparties).

In some cases, policies may need updating or expanding to ensure that all angles are covered. In addition, firms should consider:

- Creating a specific anti-bribery policy (potentially incorporating or referencing existing policies where relevant), which should include a monitoring and review procedure.
- Drafting an express statement of the firm's zero-tolerance approach to bribery and corruption, to be included on the firm's intranet and website.
- Delivering anti-bribery training to staff.
- Developing formal policies on investor-related expenses such as travel to investor meetings or advisory board meetings.
- Carrying out formal due diligence on placement agents' (and other agents') anti-bribery policies and including express anti-bribery obligations in contracts.

The Government has emphasised repeatedly that firms should take a common sense approach to anti-bribery procedures. In particular, the Act is not intended to outlaw ordinary corporate hospitality, so taking clients for meals or to sporting events should not cause problems if events are not unreasonably lavish or extravagant. However, firms should be alert to situations that might give rise to an appearance of impropriety. It is necessary to take particular care when dealing with public officials (which may include, for example, representatives of sovereign wealth funds or public pension plans), where inferences of impropriety may be more readily drawn. A good litmus test is whether the firm would be embarrassed if a particular gift or event were to be reported in the press.

Is there anything else to be aware of?

Both firms and individuals also need to be conscious of the primary bribery offences (including giving or receiving a bribe in a business context, and bribery of foreign public officials), to avoid inadvertently committing or facilitating an offence. The territorial scope of the Act is wide, and an offence will be committed if any act or omission forming part of a bribery offence takes place in the UK, or if an act or omission that would be a bribery offence under UK law is committed elsewhere in the world by:

- a UK company, LLP or partnership; or
- a British citizen or by any person who is ordinarily resident in the UK.

This may have implications, in particular, for UK-resident directors of non-UK portfolio companies.

In addition, it is worth noting that (in contrast to the U.S. Foreign Corrupt Practices Act) there is no exception for facilitation payments, and making such payments will be a criminal offence under the Bribery Act.

Finally, as bribery is a criminal offence, proceeds derived from acts of bribery are likely to constitute "criminal property" for the purposes of UK anti-money laundering legislation. Consequently, where an FSA-regulated private equity firm has reasonable grounds to suspect that another person (including a portfolio company) has committed a bribery offence, this is likely to trigger a SOCA reporting obligation.

Useful materials

- Bribery Act 2010
- Quick Start Guide
- Bribery Act 2010: Guidance about commercial organisations preventing bribery
- Transparency International

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