

Supply Chain

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BRIBERY ACT 2010 TAKING STOCK

Mark Dunn cautions supply chain players to clean up their game.

After a lengthy gestation, the UK's Bribery Act 2010 finally gained Royal Assent on 8 April 2010, replacing more than 100 years of outdated legislation. The Act is anticipated to come into force in April 2011 and, although the formal guidance that accompanies the Act has yet to be published by the Ministry of Justice, its impact on the role of procurement is expected to be significant. At best, this will prompt firms to review current third-party due diligence procedures, at worst this could lead to a root and branch overhaul of the supplier management process. That said, in preparing for the Bribery Act, there is much that firms can learn from companies that have for some time been tackling the requirements of the Money Laundering Regulations 2007 and implementing anti-money laundering best practice. To briefly recap, at a high level, the Bribery Act sets out four key offences:

- offences of bribing another person
- offences relating to being bribed
- bribery of foreign public officials
- failure of commercial organizations to prevent bribery.

The full text of the Act should be consulted and can be found at www.opsi.gov.uk/acts/acts2010/ukpga_20100023_en_1. The penalties are stringent: an individual guilty of bribing another person, receiving a bribe or found to be bribing a foreign official faces a maximum prison sentence of 10 years and/or an unlimited fine. A company found guilty of failing to prevent bribery will be subject to an unlimited fine. Directors and senior executives may also be personally liable if it is found that they were directly associated with an offence committed by their company. Companies may also find themselves debarred from EU and US procurement lists.

The Act's sole defence against the new corporate offence of failure to prevent bribery is for a company to prove that it had in place 'adequate procedures' designed to prevent 'associated persons' from undertaking such conduct. Owing to government delays, the formal definition of what constitutes 'adequate

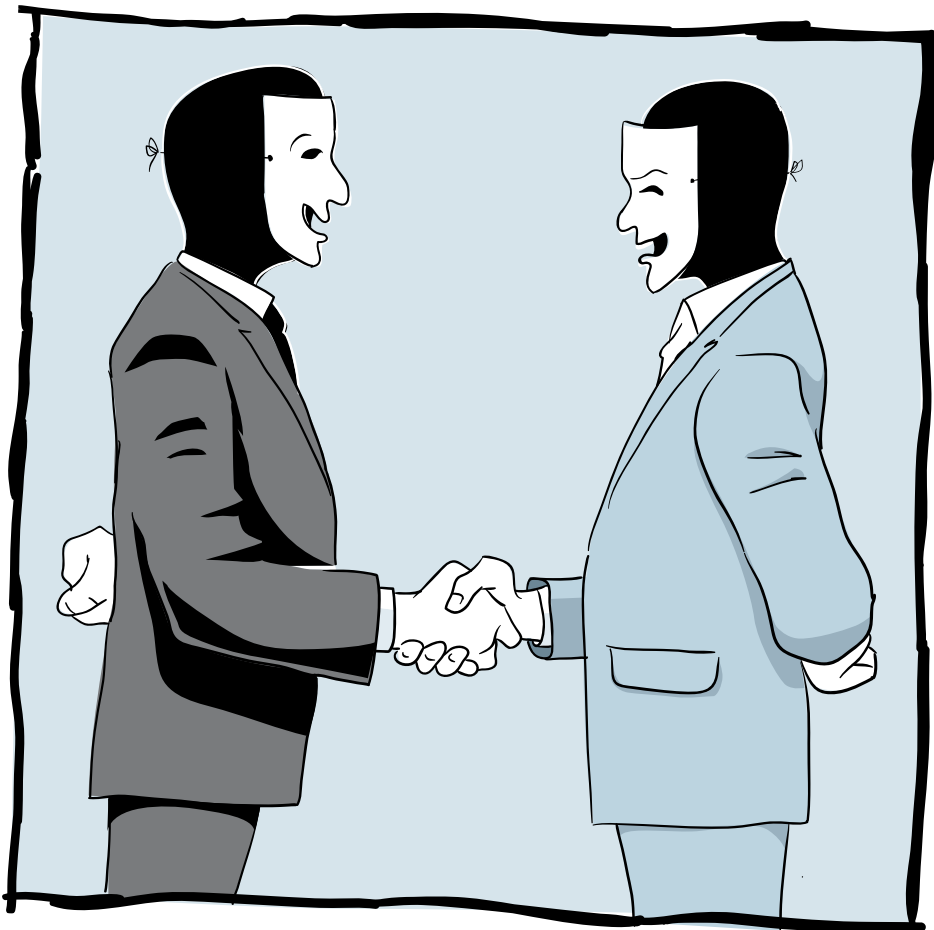
procedures' is not expected to be clarified until later this year when the Ministry of Justice publishes guidance. However, sufficient material and best practice experience already exists to enable procurement professionals to start preparing for the Act now. Those companies already tackling the antibribery provisions contained in the US Foreign and Corrupt Practices Act (FCPA), which to date has netted more than \$1.5 billion in fines, may consider themselves to be adequately prepared. However, the primary focus of the FCPA is on preventing the bribing of foreign officials, whereas the distinct corporate provisions contained in the Bribery Act go much further and should prompt a review of existing processes.

Understandably, the new corporate offence has received the most attention as the Act raises a number of challenges for companies and also puts the roles of procurement and supply chain management firmly under the spotlight. First, definitions in the Act are broad and what constitutes an 'associated person' committing bribery encompasses not only a company's own employees but also the actions of their third-

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party agents. The extraterritorial reach of the Act also means that the new corporate offence is applicable to any UK-registered company or equivalent foreign company that has business operations within the UK. This effectively means that companies not only have to protect themselves against incidents of bribery by their own staff but are also accountable for bribery and corruption committed by third-parties such as suppliers, contractors, introducers and other agents acting on their behalf — whether in the UK or overseas. The UK government delay has prompted anticorruption body, Transparency International (TI), to issue its own comprehensive guidance: "The UK 2010 Bribery Act Adequate Procedures." This guidance highlights procurement and supply chain management as key areas, amongst other parts of the business, where firms should focus their efforts on mitigating bribery and corruption. The checklist that accompanies TI's guidance includes the following recommendations:

- 199:** There is a procedure for undertaking due diligence in evaluating prospective contractors and suppliers to ensure that they have effective antibribery programmes.
- 200:** The company has a procedure to avoid dealing with contractors and suppliers known or reasonably suspected to be paying bribes.
- 201:** The company has a policy to make known its antibribery programme to contractors, subcontractors and suppliers.
- 202:** The company has procedures to make known its antibribery programme to contractors, subcontractors and suppliers.
- 203:** The company reports publicly on measures of training given to contractors and suppliers.
- 204:** The company has procedures to monitor significant contractors and suppliers to ensure they have effective antibribery programmes.



205: There are procedures for the company to have the right of termination in the event that contractors and suppliers pay bribes or act in a manner inconsistent with the company's programme.

206: The company reports publicly on the number of contractors' and suppliers' contracts terminated for non-conformance with the company's programme.

Much of what Transparency International recommends will be familiar to many firms in those sectors that to date have also had to tackle compliance with the Money Laundering Regulations 2007 (MLR 2007). There is an abundance of useful best practice that has been learned the hard way by firms, particularly in the financial services sector, that have been dealing with anti-money laundering under the watchful eye of the Financial Services Authority and its energetic approach to regulatory enforcement.

One area within the MLR 2007, which is very relevant to the Bribery Act, and procurement and supply chain management in particular, is the requirement for firms to undertake due diligence. A risk-based approach to customer due diligence has long been standard practice for compliance with the Money Laundering Regulations 2007 and regulated firms have increasingly started to broaden this policy to include

supplier and employee screening as the economic downturn has brought into focus the increased risks of internal and external fraud and wider financial crime. The risk-based approach involves the customer being put through a thorough risk assessment process, the outcome of which dictates what level of due diligence is then applied to that client both before an account is opened and for subsequent ongoing monitoring and periodic repeat screening. This risk assessment may take into account criteria such as the following:

- How safe is the local jurisdiction from where the customer originates? What do the TI corruption index, economic and political risks indicators look like?
- Is there local regulation in place? Does equivalent local legislation exist and promote high standards?
- How proactive is local enforcement? Is the local legislation being enforced and taken seriously?
- What is the level of financial risk exposure? How much is there to lose?
- What's the level of credit risk? How good a track record does the customer have?
- Are there political affiliations such as local government and other involvement?
- What's the business reputation and conduct?

- How does the corporate entity or individual make their money and is there a reputational risk if I take on their business?

The outcome of the above risk assessment will dictate what level of background screening is conducted. If the customer is deemed to be a low risk, Simplified Due Diligence involving electronic identity verification or company database searches, together with a check against global sanctions lists, may suffice. However, if the customer is deemed to be a higher risk, Enhanced Due Diligence will be conducted, which covers all the essential identity and sanctions list checks but also screens for negative media, political affiliations, law enforcement watch lists, details on corporate structure and ownership, together with comprehensive background checks on directors and shareholders.

This risk-based approach enables valuable compliance resources to be applied to the areas of the business that most require them, enabling a quicker and more efficient 'onboarding' process. As a result, firms can process new customers faster, initiate new business and improve customer service. As due diligence processes have been further refined and fine-tuned, many firms are also conducting more of their essential due diligence in-house and decreasing their dependency and expenditure on outsourced risk consultants, which are being deployed only as required on more specialized corporate investigations. The above approach to due diligence lends itself to the Bribery Act 2010 and much of what is in place for customer checks may be applied to third-parties.

The Bribery Act 2010 is expected to come into force in April 2011 and the UK government's industry guidance is anticipated towards the end of 2010. That said, the time to start preparing for the Act is now and it is critical that companies review the risks to their procurement and supply chain management processes to ensure any new provisions required by the Act are implemented. No firm wants to be the first recipient of a substantial fine under the provisions of the new Act. •

For more information

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