How to prevent bribery and corruption

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Now that the final guidance has been published for the UK Bribery Act 2010 which will come into force on 1 July 2011 it is important to check how the Act will impact Manx companies doing business in UK. ***Adam Kelly*** *from the Corporate and Commercial department of Simcocks Advocates explains the implications.*

Those doing business in the Island might be forgiven for assuming that if they comply with Manx law they have little to fear if they also conduct business in other jurisdictions, particularly the UK.

Such an assumption would be misplaced in the case of the UK's Bribery Act 2010, hurried on to the statute book shortly before the General Election and now scheduled to come into force on I July 2011, now that the final guidance has been published,. This Act is significantly more extensive in scope than the Island's Corruption Act 2008 and has application outside the UK, including potentially in the Island.

For example, if a company in the Island owning property in the UK has a surveyor who offers a bribe the company will be liable to prosecution unless it has "adequate procedures" in place.

The Act has several features which are new, but two in particular should be taken into account by those doing business in the Island and the UK. Their combined effect is to make criminal in the UK conduct in the Island which is not criminal under Manx law.

The first feature of the Act consists of a new offence of the failure of a business to prevent bribery. This offence is committed where:

■ A person associated with a relevant commercial organisation commits a bribery offence intending to gain a business advantage, and

■ The organisation cannot show it has adequate provisions in place to prevent the bribe.

"Associated person" includes external third parties and "relevant commercial organisations" include companies and partnerships, wherever formed, which carry on a business in the UK.

A bribery offence is likewise widely defined (using language not dissimilar to that in the Manx Act) to cover the offer or receipt of a "financial or other advantage" with the intention of inducing a person to "improperly perform" any "function of a public nature" or "activity connected with a business".

The second new feature of the Act is that the new offence of failing to prevent bribery will have extra territorial application and may be prosecuted whether the acts or omissions which form part of the offence take place in the UK or elsewhere.

An effect of the Act, for example, will be to require Manx companies owning property in UK to have adequate procedures in place to prevent bribery by any persons associated with it in UK.

Whilst under Manx law a company is likely to be guilty of bribery only if senior management is involved, under the new Act the company may be found guilty in the UK even if no-one in

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the Manx company was aware of the bribe, unless it has adequate procedures in place to prevent it.
The UK's Ministry of Justice has now, after an initial delay introduced guidelines to advise businesses on what steps they should take to ensure they are trying to prevent bribery. The Quick Start version of the guidance makes it clear that it is based on a common sense application of the following six principles.
■ **Proportionality** – if the risk of bribery is small only modest procedures may be needed.
■ **Top-level commitment** – senior managers need to make it clear throughout the business that bribery will not be tolerated, and they should be personally involved in making sure that proportionate steps are taken to prevent bribery and that adequate procedures are in place
■ **Risk assessment** – businesses should check the markets you operate in and the people they deal with to assess the likelihood of bribery, particularly for new projects. For example, in smaller organisations, existing controls over company expenditure, accounting and commercial or agent contracts may be a sufficient procedure, perhaps supplemented by oral reminders to staff. However, what will be crucial, irrespective of the size of the organisation, will be for it to be in a position to demonstrate that a proper assessment has been carried out of the risk of bribery and the adequacy of the procedures which are, or will be put, in place.
■ **Due diligence** – it will be important to ask a few questions and carry out a few checks before engaging people to represent you
■ **Communication** – it is essential that staff know what procedures are in place. Training or awareness raising may be needed.
■ **Monitoring and review** – check your procedures remain appropriate.

Applying these principles to corporate hospitality the guidance makes it clear that expenditure which is reasonable and proportionate is unlikely to be criminal, so allowing staff to entertain clients or others at events like Wimbledon, Twickenham or the Grand Prix is unlikely to be caught.
On the other hand so called "facilitation payments" (other than legitimate administrative fees and fast track payments) are bribes and failure to prevent them may well result in prosecution, unless the prosecuting authorities have reason to believe no public interest would be served in doing so.
The Ministry of Justice has gone out of its way to emphasise that the extensive use of consultants is not necessary. What is essential, however, is that businesses in the Island, as in UK, need to be able to demonstrate that the above issues have been properly addressed and that adequate are in place or are put in place.

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