

RadcliffesLeBrasseur



Healthcare Briefing

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THE BRIBERY ACT 2010 - Focus on the new corporate offence

It has been estimated that global bribery amounts to \$1 trillion per year. [1] The US authorities have long been international leaders in investigating and prosecuting bribery and corruption cases; however, in the last few years other countries have made significant steps.

The UK has been a “notable laggard” [2] and has therefore been under international pressure to tighten up its national bribery laws. In response, the UK government has passed the Bribery Act 2010. [3] The Act is designed to reform the criminal law in order to “provide a new, modern and comprehensive scheme of bribery offences that will enable courts and prosecutors to respond more effectively to bribery at home or abroad.”[4]

The Bribery Act contains four separate offences, namely:

- bribery of another person;
- being bribed by another;
- bribery of foreign public officials; and
- failure by commercial organisations to prevent bribery – the corporate offence.

The new corporate offence, contained in clauses 7 and 8 of the Act, has caused a great deal of concern for businesses, and is the main subject of this note.

When will the corporate offence be committed?

Under the new Act, “bribery” will take place where a person “offers, promises or gives a financial or other advantage to another person”, and the advantage is intended to induce the person to perform improperly a relevant function or activity, or to reward the person for the improper performance of such a function or activity.

An organisation will be guilty of the corporate offence where a person “associated” with it bribes another person to obtain business or a business advantage. A person will be “associated” with an organisation if he performs services for or on its behalf. Therefore, associated persons will include not just employees but also commercial agents, subsidiaries, distributors and joint venture arrangements.

The corporate offence is committed irrespective of whether the acts or omissions which form part of the offence take place in the United Kingdom or elsewhere. It also applies not only to companies incorporated in the UK but to any organisation that carries on a business or part of a business in the UK.

The potential scope of the offence is therefore extremely wide. Of particular concern is the fact that the new rules may outlaw some forms of corporate hospitality, since this could be seen as an “other **advantage**” and therefore a bribe. Corporate hospitality is, essentially, all about giving advantages or perks with the intention of getting or retaining business.

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However, it is a key part of how businesses network, find new business and build relationships with existing customers. To criminalise this kind of activity could seriously inhibit some companies.

The government has said that it will issue guidance on what will and will not fall foul of the law. A spokesman for the Ministry of Justice has said, "Whether hospitality will amount to bribery will depend on the facts. If lavish hospitality is provided in a manner in which it is reasonable to conclude that it is intended to induce a person to improperly perform a relevant function as defined in the bill, it will amount to a bribery offence."^[5]

What is the punishment for the corporate offence?

The penalty for a commercial organisation failing to prevent bribery is an unlimited fine. Recently, courts have become increasingly willing to impose fines at a much higher level than has previously been the case.

A conviction under the Act will almost certainly trigger the debarment provisions contained in the Public Contract Regulations and Utilities Regulations of 2006. These would operate so as to indefinitely prevent a convicted company from being awarded any future contract by a public body. For many companies that could be fatal. Even if a prosecution ultimately proved unsuccessful, the reputational damage to a company charged with a bribery offence could be severe.^[6]

Is there a defence?

The fact that an organisation did not condone their representative's actions, or even know that the bribery was occurring, is not a defence. However, an organisation will have a defence if it can show that it had "adequate procedures" in place, designed to prevent a person associated with the organisation from committing bribery.

The Act states that the Secretary of State must publish guidance about procedures that commercial organisations can put in place to prevent persons associated with them from bribing. This guidance has not yet been published, but is likely to be principles based rather than prescriptive.

Despite the absence of any formal guidance, it would be wise for organisations to be proactive and start reviewing their existing policies and procedures now, especially in relation to corporate hospitality, selection of agents or business associates and the reporting of suspected bribing activities. In essence, companies need to take a tough stance and define what they can and cannot do, and ensure that their staff and associated persons are adequately trained in such rules. An ethics officer could be appointed to oversee this.

Key steps likely to be of assistance will be:

- A clear corporate policy, in writing.
- Dissemination of the policy in a way that evidences a commitment to this and to ensuring staff are aware of this.
- A hospitality log.
- Audit systems.

When will the new Act come into force?

It is expected that the new Act will be in force by October 2010.

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[1] This is considered to be a conservative estimate of actual bribes paid worldwide in both developed and developing countries (*The World Bank Institute*) - <http://www.transparency.org.uk/corruption-data>

[2] The Lawyer, "Bribery and Corruption: The new legal landscape" (2010)

[3] The Bribery Bill received Royal Assent on 8th April 2010

[4] Ministry of Justice, "Bribery Act 2010" (<http://www.justice.gov.uk/publications/bribery-bill.htm>)

[5] Nathalie Thomas, "New rules may outlaw hospitality as bribery" (Scotland on Sunday – 7th February 2010)

[6] Jeremy Summers, "Bribery law heralds welcome scrutiny" (City A.M. - 28th April 2010)

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