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April 2010

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# Review



## Commercial & Dispute Resolution

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### Corporate liability: The Bribery Act 2010

#### BACKGROUND

The Organisation for Economic Co-operation and Development (“**OECD**”) Convention requires signatories, including the UK, to ensure that corporate bodies can be liable for bribery. In recent years, the OECD Working Group has repeatedly complained that UK law contains deficiencies with regard to laws on bribing foreign officials and on corporate liability for bribery. On numerous occasions it has called on the UK to amend its law to rectify these deficiencies to ensure the provisions of the Convention are honoured.

In response, the Government published a draft Bribery Bill in March last year. The Bill completed its passage through the Lords and was hurriedly passed by MPs in the Commons just a few days ago on 7 April as part of the 'wash up' of Parliamentary business prior to the general election. It received Royal Assent on 8 April and now has the status of an Act.

The Act sweeps away existing UK anti-corruption laws and introduces a new and complete scheme of bribery offences, with similarities to the anti-corruption regime in the US under the Foreign Corrupt Practices Act.

#### WHO WILL BE AFFECTED?

- The main provisions of the Act apply to England, Scotland, Wales and Northern Ireland.
- UK corporate bodies, UK nationals and UK residents will be caught by the new provisions.
- The Act provides for extra-territorial jurisdiction to prosecute bribery offences committed abroad by UK residents, UK nationals and UK corporate bodies.
- The Act also covers situations where only part of an offence is committed in England, Scotland, Wales or Northern Ireland.

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The Act reforms the law to provide a comprehensive scheme of bribery offences

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- The offences are directed at improper conduct in business and public activity. This applies even if the activity has no connection with the UK.

## THE OFFENCES

There will be two new general offences:

- Offering, promising or giving a financial or other advantage (an active offence); and
- Requesting, agreeing to receive or accepting a financial or other advantage (a passive offence).

The two general offences of bribing another person and being bribed are linked to the 'improper performance' of an activity. This concept applies equally to both public and private functions, including "any activity connected with a business".

The Act also creates two new discrete offences of bribery of a foreign public official (only in respect of the active offence) and of failure of a commercial organisation to prevent bribery. The latter of these offences is considered in detail below.

Additionally, where active bribery, passive bribery or the bribery of a foreign public official is found to be committed by a corporate body, a senior officer or a person purporting to act in such a capacity who has "consented or connived" to the bribery will also be guilty of the offence. For example, a senior officer could be guilty of this offence if he or she knew that acts of bribery were happening but took no action to prevent them.

## OFFENCE OF 'FAILURE OF A COMMERCIAL ORGANISATION TO PREVENT BRIBERY'

This offence will be committed when:

- A person who performs services for or on behalf of a relevant commercial organisation (an 'associated person') commits bribery (only the active offence); and
- The bribe was intended to obtain or retain business or an advantage in the conduct of business for the commercial organisation.

A relevant commercial organisation includes:

- any body or partnership incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere); or
- any other body corporate or partnership (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom.

## Defences

The commercial organisation will have a defence if it can show that it had 'adequate procedures' in place to prevent its 'associated persons' from committing bribery. There has been considerable uncertainty over what these 'adequate procedures' are likely to be. A recent amendment to the Act requires the government to issue guidance to commercial organisations on this issue. The government has committed to doing so before the Act comes into force although how detailed or prescriptive the guidance will be remains to be seen.

## Implications for businesses of this new offence

The 'failure of commercial organisations to prevent bribery' offence is broad and will apply to most businesses. UK companies and partnerships carrying on business in the UK or elsewhere fall within its scope as do non-UK companies and partnerships that carry on business in the UK.

These businesses will be criminally liable if anyone 'associated' with it makes a bribe in order to win work, regardless of whether the bribe is made in the UK or another country. This will catch the actions of employees, agents and intermediaries performing services for or on behalf of the business. It is currently unclear whether 'associated' will be given a wide interpretation to cover franchisors, distributors and others in a similar commercial relationship with the business. The Act requires the courts to have regard to 'all relevant circumstances' when assessing this and not just the nature of the relationship between the parties.

A bribe is defined as a 'financial or other advantage'. Would this include paying a premium to secure business, or promising return business or even providing corporate hospitality? If such a broad interpretation is given to what constitutes a bribe, this could change the way in which deals are done by restricting the usual 'give and take' bargaining that happens routinely in commercial negotiations.

Businesses are advised to put in place procedures to monitor the activities of those negotiating deals on their behalf. Given the secret nature of bribes, these procedures may not prevent them entirely but will at least maximise the chance of the 'adequate procedures' defence being available.

## PENALTIES

- A corporate body found guilty of a bribery offence could face an unlimited fine.
- Individuals found guilty of a bribery offence could face a maximum sentence of ten years imprisonment or an unlimited fine or both.

A director convicted of a bribery offence may also be disqualified from acting as director for up to 15 years.

The fines imposed could be severe. The FSA fined insurer Aon Limited £5.25m for a failure to "properly assess the risks involved in its dealings with overseas firms". Aon were found not to have taken reasonable care to establish and maintain effective systems and controls to avoid the risk of corruption and bribery.

## WHAT SHOULD YOUR ORGANISATION DO?

With regard to the offence of failure of a commercial organisation to prevent bribery, the only available defence is that the organisation had adequate procedures in place to prevent bribery. If prosecuted for this offence, once the prosecution has proved that a bribe for the benefit of the organisation was made, the burden will shift to the organisation to prove that it had such adequate procedures. In light of this, organisations need to put in place a robust internal anti-corruption regime. Exactly what this will be will differ from organisation to organisation but might include some or all of the following:

- Putting in place an anti-corruption code of conduct which is communicated to all employees;
- Establishing an anti-corruption committee with responsibility for ensuring compliance with the Bribery Act;
- Providing anti-corruption awareness training for staff which is regularly updated;

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- Introducing screening processes for payments to third parties;
- Putting in place a confidential facility for employees to whistle-blow where they suspect corruption;
- Drafting policies on giving and receiving corporate hospitality; and
- Improving due diligence around the selection and appointment of third party service providers.

Any government guidance should also be specifically followed.

## TIMEFRAME

The Act is not yet in force but is expected to come into force in October.

## HOW CAN HAMMONDS HELP?

Hammonds regularly advises clients on anti-corruption issues. We also offer in-house training seminars on anti-corruption awareness. The seminars are prepared bespoke, taking into account your existing policies and procedures, and can be adapted to cover non-UK jurisdictions.

## FURTHER INFORMATION

For further information on how the Bribery Act will affect your business or for details of our anti-corruption training programme, please contact:

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