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BRIBERY ACT 2010

Background

The Bribery Act 2010 (the “Act”) will have significant implications for UK companies and companies with a presence in the UK. Although the Act received royal assent in April 2010, it is not yet in force. The Ministry of Justice has, however, indicated that the Act will come into force later this year. Therefore, now is the time to start preparing for when the Act does take effect.

The Act will repeal the existing law on bribery (a mixture of common law and statutory offences set out in the Prevention of Corruption Acts 1889 to 1916). The new provisions were considered necessary because the existing law is unclear and difficult to enforce. In addition, the current law is inconsistent with the Organisation of Economic Co-operation and Development (“OECD”) Anti-Bribery Convention, which the UK ratified in 1998.

Offences

The Act sets out four offences:-

- bribing another person;
- being bribed;
- bribing a foreign public official; and
- failure of a commercial organisation to prevent bribery.

What is a “bribe”?

A bribe is referred to as a “financial or other advantage”. Arguably this could include paying a premium to secure business, promising return business or even providing corporate hospitality. The UK Government has indicated that corporate hospitality would trigger the bribery offences only where it was proved that the person offering the hospitality intended the recipient to be influenced to act improperly. Lavish or extraordinary hospitality could be caught, but most routine and inexpensive hospitality would not lead to a reasonable expectation of improper conduct. This all points to organisations having to review their rules on corporate hospitality.

Improper conduct

The first two bribery offences are committed where the bribery or acceptance of a bribe is intended to induce improper conduct, i.e. to induce a person

performing a public or business activity to act in a manner which would not meet the expectation of a reasonable person in the UK in relation to that activity. The Act applies even where a bribe is paid overseas and where it relates to a public or business activity overseas, provided that the person committing the offence has a “close connection” with the UK (broadly, where the person is a UK citizen, ordinarily resident in the UK or a company incorporated in the UK).

Where the bribe relates to performance of an activity overseas, the test for improper conduct is still the expectation of a reasonable person in the UK, rather than a reasonable person in the country in which the activity is performed. Local practice and custom must not be taken into account unless such practice or custom is permitted or required by written law. Clearly, it would be very unusual for bribery to be permitted expressly by local law (rather than tolerated as a matter of custom).

Concern has been expressed over the fact that, in contrast to the US Foreign Corrupt Practices Act 1977, the Act does not permit “facilitation payments”, i.e. payments of a small sum of money to an official to expedite performance of their duty (e.g. expediting the release of goods from customs). UK companies may be at a competitive disadvantage compared to US and other foreign companies which are permitted by their laws to make facilitation payments.

Bribing a foreign public official

The offence of bribing a foreign public official closely follows the requirements of the OECD Anti-Bribery Convention. This offence does not require any intention to induce the foreign public official to act improperly, but merely requires a financial or other advantage to be offered or given with the intention of influencing the official in his capacity as an official. The UK Government has acknowledged concerns about criminalising reasonable corporate hospitality but has decided to rely on prosecutors to differentiate between legitimate and illegitimate corporate hospitality and to decide whether or not it would be in the public interest to bring a prosecution. Accordingly, companies may be left in the uncomfortable position of offering hospitality to foreign public officials which is technically illegal, and relying on prosecutors to take a sensible view.

Failure of commercial organisations to prevent bribery

The fourth offence, of failing to prevent bribery by a relevant commercial organisation, is entirely new and has prompted much concern. The Act provides that a relevant commercial organisation is guilty of an offence if a person associated with the organisation bribes another person, intending to obtain or retain business or a business advantage for the organisation. A “relevant commercial organisation” includes UK companies and partnerships and foreign companies and partnerships with a place of business in the UK. The offence can be committed in the UK or overseas.

“Associated person” has been defined broadly to include people who perform services for, or on behalf of, the commercial organisation regardless of their capacity so may include, for example, employees, agents, subsidiaries or joint venture partners. The breadth of the definition is an area of concern.

It is a defence for a commercial organisation to show that it had in place “adequate procedures” to prevent bribery. The Act imposes a duty on the Secretary of State to provide guidance on the adequate procedures defence and the UK Government has said that it will publish guidance at least three months before the Act comes into force, to allow organisations to prepare.

Penalties

With the exception of the offence committed by commercial organisations of failing to prevent bribery which carries an unlimited fine, offences can carry a maximum penalty of 10 years in jail and/or an unlimited fine. In addition, organisations that have been convicted could be permanently debarred from tendering for public sector contracts.

If a company is convicted of bribery or acceptance of a bribe and the offence was committed with the consent or connivance of a senior officer of the company (i.e. a director, manager, secretary or similar officer), that senior officer is guilty of the same offence as the company and is liable to prosecution.

Bribery offences should also be reported under the Proceeds of Crime Act 2002.

The adverse publicity generated by a conviction could also have serious consequences for a company.

Practical steps

Authorities have recently demonstrated that they are clamping down on improper activities. For example, in January 2009 the FSA fined Aon Limited £5.25m for failings in its anti-bribery and corruption systems and controls.

Whilst UK Government guidance on the Act is not yet available, there are steps organisations can take now to prepare for the introduction of the Act. This will help ensure that they have “adequate procedures” in place to prevent bribery.

Commercial and public sector organisations should consider taking the following steps:-

- carry out a risk assessment of their business;
- review the adequacy of their internal systems and procedures to prevent bribery;
- adopt an anti-bribery policy;
- train staff on the prevention of bribery;
- include clauses prohibiting bribery in commercial contracts;
- update employment terms and consultancy arrangements to prohibit expressly bribery or accepting bribes;
- carry out due diligence before entering into arrangements with customers and joint venture arrangements, particularly overseas;
- carry out background checks on agents and distributors: if they use bribes to win business, your company could be liable under the Act;
- review their policy on corporate hospitality and gifts; AND
- put in place a confidential facility for employees to whistle-blow if they suspect corruption.

This Bulletin is written as a general guide only. It is not intended as a substitute for specific legal advice. For specific advice on any of the issues raised in this Bulletin please contact the person you normally deal with or David Gourlay, Partner, by email at dgourlay@mcclurenaismith.com or by phoning David on his direct line 0131 272 8377.

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