



The Bribery Bill 2010

Governance

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Khurram Arif, head of Financial Crime & Regulatory at City law firm GSC Solicitors LLP, analyses the new Bribery Bill and what it means for UK businesses, directors and managers.

The **Bribery Bill** received Royal Assent on 8 April 2010, and whilst the date has not been set to bring it into force, the Act will repeal and replace a number of old laws on bribery with a new and comprehensive anti-bribery code.

The key implications of the new Bill are the development of two new general offences covering paying and receiving bribes and the creation of a corporate criminal offence designed to strengthen the current weak position on corporate attribution to bribery and stiffen the authorities' ability to prosecute companies and the associated persons who commit an offence under the new Act.

UK businesses should also be aware of the dramatically increased geographic reach the new Act will provide the authorities covering not only persons and businesses located in the UK but also any with a "business presence" here.

The general offences

The two general offences are not dissimilar in substance to the current law, but they introduce the new central concept of "improper performance".

They are as follows:

Paying bribes: it will be an offence to offer or give a financial or other advantage with the intention of inducing that person to perform a "relevant function or activity" "improperly" or to reward that person for doing so.

Receiving bribes: it will be an offence to receive a financial or other advantage intending that a "relevant function or activity" should be performed "improperly" as a result.

A "relevant function or activity" includes any function of a public nature and any activity connected with a business. The person performing that activity must be expected to perform it in good faith or impartially or be in a position of trust. "Improper performance" will be judged by whether it breaches the expectation of what

a reasonable person in the UK would expect, however the function or activity does not have to have a connection to the UK.

These definitions are complex and were deliberately widely drafted, so there is a potential risk that they could catch certain types of normal business conduct. This may well encourage an initial round of litigation when offences start to be prosecuted.

Bribery of foreign public officials

This offence will be committed if a person offers or gives a financial or other advantage to a foreign public official with the intention of influencing the foreign public official and obtaining or retaining business.

Failure of commercial organisations to prevent bribery

The most controversial offence will be a new offence which can be committed only by commercial organisations, where

a person associated with a relevant commercial organisation bribes another person intending to obtain or retain a business advantage the organisation cannot show that it had adequate procedures in place to prevent bribes being paid.

This offence is intended to reverse the current rules on corporate attribution in relation to bribery. Currently, a company is likely to be guilty of a bribery offence only if very senior management are involved. Under this corporate criminal offence, the company may be guilty even if no one within the company knew of the bribery. The company's defence is limited to showing that it had adequate procedures to prevent bribery.

That effectively creates a burden on businesses to ensure that their anti-corruption procedures are sufficient to stop any employees, agents or other third parties acting on their behalf from committing bribery.

All of the new offences will have extra-territorial application, namely the offences may be prosecuted if undertaken by a British national or corporate or by a person who is ordinarily resident in the UK, regardless of whether the act or omission which forms part of the offence, took place outside the UK.

In addition, the corporate criminal offence will apply to commercial organisations which have a business presence in the UK. This extends the reach of the legislation well beyond the current regime.

The Act will raise the maximum jail term for bribery by an individual from 7-10 years. A company convicted of failing to prevent bribery could receive an unlimited fine.

The Act was drafted with the intention of bringing those individuals and businesses into line who have traditionally thrived on practices which any "reasonable person" would consider to be improper or excessive.

It is hoped that prosecuting authorities will not crack down too hard on businesses for every minor breach of the Act, as the cost of investigation is high and the courts time is limited. Businesses on the other hand, should use the time before the Act comes into force to minimise the risk of any prosecution and ensure that they have adequate procedures in place to demonstrate the fine line between extensive corporate hospitality and outright bribery.

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