MILLS & REEVE

Bribery Act 2010 – the new strict liability corporate offence
April 2010

Bribery Act 2010 receives Royal Assent, and overhauls outdated anti-corruption laws

Everyone knows what a bribe is and the outlawing of bribery and corruption has been a focus of parliament since the Magna Carta declared that "We will sell to no man …either justice or right".

To actually define bribery and corruption as a matter of law, however, has proved to be more complex. The latest attempt to address the problem has just hit the statute books; the Bribery Act 2010 received Royal Assent on 8 April, in the culmination of over a decade's work on reforming Britain's existing anti-corruption laws. The key provisions of the Act will come into force on a date yet to be specified by the relevant government minister, but likely to be in October of this year.

There was perceived to be a clear need for legislative shake up as far back as 1989, when the UK signed up to the Organisation for Economic Co-operation and Development (OECD)'s anti-corruption convention. Indeed the Law Commission released a new draft Bribery Bill as far back as 1998, although progress was slow as there was no consensus as to the best legislative approach to take.

On average, only 21 people per year (and no corporate bodies) were prosecuted for public sector corruption between 1993 and 2003. By comparison, there were an average of around 23,000 prosecutions per year between 1997 and 2001 for *private* sector fraud. This discrepancy was due not least to the fact that the existing anti-corruption legislation dated back to the early 1900's and was vague and outdated.

The project to reform the law took on a new urgency in the light of several recent high-profile corruption cases, the most infamous being BAE Systems and the "Al Yamamah" fighter jet deal (in which the Attorney-General (a political appointment) called off the investigation into corruption, allegedly at the insistence of prime minister Tony Blair). These cases have resulted in Britain's plunging to an embarrassing 17th place in Transparency International's 2009 "Corruption Index".

What is the new law?

The Bribery Act 2010 simplifies the existing law on bribery, enabling the courts to deal with it more effectively.

The Act creates offences of, amongst others, bribing another person/company/public body or accepting a bribe in return for giving an advantage to the briber. It also creates a "strict liability" offence for companies who negligently fail to prevent bribery within the business. The Act also introduces a new offence of bribery of foreign officials, which will be particularly

relevant to multinational companies who operate in areas of the world where corruption and "facilitation payments" are commonly found. It also removes the requirement for Attorney-General consent to prosecution; proceedings may now only be brought at the instigation of the Director of a relevant prosecuting authority.

The new corporate offence

Of particular interest to companies is the offence under section 7 where there is a failure by a "relevant commercial organisation" to prevent bribery by its employees, agents or subsidiaries (whether domestic or foreign). The definition "relevant commercial organisation" is a wide one and includes bodies corporate and a wide variety of partnership forms.

This new so-called "corporate offence" is a "strict liability" offence, meaning that there is no need for the prosecution to show that the company intended to make the bribe in bad faith, or that it was negligent as to whether any bribery activity took place.

In order to succeed, however, the prosecution must be able to demonstrate that the bribe was paid not merely in connection with the business, but that it was paid with the intention to obtain/retain business for the company itself. This late amendment was welcomed by business as addressing concerns that a company could potentially find itself being prosecuted for the bribery activity of, for example, a joint venture partner or a fellow member of a consortium.

A defence is available to a company which is charged with this corporate offence; a prosecution will fail if the defence can show that the company had in place "adequate procedures" to prevent bribery and corruption. That is, a company will have a defence if it can show that, despite the fact that the bribe took place, the failure to prevent it was not a systemic one. There is as yet little guidance as to the meaning of "adequate measures" but we are likely to see guidance published by the summer. The Conservative Party has said that, should it be the next government, it will look into setting up a helpline for businesses wanting guidance on how to comply.

Penalties for the basic bribery offence under the Act include fines and/or imprisonment for up to ten years (for the more serious offences). The penalty for the corporate offence is an unlimited fine.

Companies should consider whether their anti-bribery and corruption procedures would be judged "adequate" by a court if they ever came to be tested. Companies which regularly operate in jurisdictions where bribery and corruption are commonplace need to consider this particularly carefully, especially given the "strict liability" nature of the offence (offences committed outside the UK and/or by foreign agents/subsidiaries are still caught by the new law).

Jenny Beresford-Jones is a professional support lawyer specializing in commercial and public procurement law at Mills & Reeve LLP. She maintains the free-to-use procurement law resources website www.procurementportal.com.