

# Is corporate hospitality now a Crime?

Commercial lawyer, Jo Tall, looks at the implications of the new Bribery Act 2010 and suggests action points that businesses should consider taking now

After much debate and controversy, the Bribery Act ("Act") will definitely come into force on 1 July 2011. It sets out the offences of:

- Bribing another person (section 1)
- Being bribed (section 2)
- Bribing a foreign public official (section 6) NEW
- Commercial organizations failing to prevent bribery (section 7) NEW

Whilst the criminal sanctions under the Act are severe - with individuals facing up to 10 years imprisonment - a very substantial part of the risk is reputational. Any entity involved in or convicted of bribery offences may find its business activities, both within and outside of the UK, significantly curtailed.

Any commercial businesses- and it is not just the big corporates- will be most concerned about section 7: failing to prevent bribery. The press has been full of scare stories suggesting that even just taking a client to the tennis in Wimbledon or for a day out at the races, may now amount to bribery! So is that really the case? Put as simply as possible, the offence will occur if:

- 1 a person associated with a business -let's call it Struggling Business Ltd- bribes (within the meaning of sections 1 and 6) another person;
- 2 intending to obtain or retain business or a business advantage for Struggling Business Ltd
- 3 in the UK or overseas .

Most importantly the offence is committed simply by the happening of the bribe. There is no requirement to show fault on the part of Struggling Business Ltd. It will only have a defense, if it can show that it had in place "adequate procedures" designed to prevent bribery.

#### Who is an "associated person"?

"Associated person" is defined widely to include people who perform services for, or on behalf of, the organization regardless of their capacity. Therefore, an associated person may include, for example, the business's:

- Employees.
- Agents.
- Subsidiaries.
- Joint venture partners.

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#### What are "adequate procedures"?

The Ministry of Justice has published a guidance note that I would urge you to read. It covers the key areas of concern and also sets out six related and overlapping principles (illustrated with case studies) that are intended to give all commercial organizations a starting point for planning, implementing, monitoring and reviewing their bribery free business regime. Most useful are the 11 case studies which look at how the six principles might relate to hypothetical situations. The case studies cover:

- Facilitation payments.
- Proportionate procedures.
- Joint ventures.
- Hospitality and promotional expenditure.
- Risk assessment.
- Due diligence of agents.
- Communicating and training.
- Community benefits and charitable donations.
- Top level commitment

The case studies also give a suggested list of actions that an organization facing the situation given might consider.


#### How far does the Act reach?

The offence is not limited to acts within the UK. It is possible for any commercial organization formed or incorporated in the UK to commit bribery entirely outside the UK by a person who has no connection with the UK performing services outside the UK. So, if for example, you employ an agent in Germany to act on your behalf and he bribes an official, you would still be guilty of bribery, even though the act happened outside the UK.

Conversely, any commercial organization formed or incorporated outside the UK, which carries on part of its business in the UK, may commit bribery entirely outside the UK by a person who has no connection with the UK and who is performing services outside the UK.

#### What steps should a business owner take?

- 1 Establish the top-level team to be accountable for communications and involvement.
- 2 Read the Ministry of Justice guidance note and understand what amounts to bribery.
- 3 Conduct a risk assessment of possible bribery areas (on a sector, business structure and geographical basis following Principle 3 guidance)
- 4 Create an anti-bribery policy or update the existing one to include the new offences
- 5 Set up a system to review and evaluate the operation of those policies on a regular basis
- 6 Review its standard terms with potential "associated persons" e.g. associates, contractors, agents, channel partners so as to include anti bribery provisions
- 7 Review terms of employment of its employees
- 8 Set out procedures for carrying out due diligence on outside advisors and third parties, and on acquisitions
- 9 Make sure its business is known (both within and outside the organisation) to have a strong anti-bribery stance i.e. publish policy internally and externally (on website, literature)

Alternatively you could take your lawyer out for a nice long lunch and ask him or her to do it for you. On second thoughts....perhaps not! 

#### Further information:

For the Ministry of Justice Guidance Note: [www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf](http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf)

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