

# **The Bribery Act 2010: How will it affect your business?**

A Guest Article by Claus Andersen  
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### The implications of the Bribery Act 2010

On 1 July 2011 the Bribery Act 2010 ("the Act") comes into force. What this means in practical terms is that companies operating in the United Kingdom are required to review their policies and business procedures to ensure that they do not contravene the Act. The penalties for contraventions include fines, which can be unlimited.

The Act introduces four new offences:

- bribing another person
- being bribed
- bribing a foreign public official
- a corporate offence of failing to prevent bribery.

Three areas of interest emerge:

1. Corporate hospitality
2. Facilitation payments
3. The corporate offence of failing to prevent bribery.

#### 1. Corporate hospitality

To what extent does corporate hospitality violate the Act? It seems that the deciding factor will be whether the hospitality is for legitimate business purposes and whether it is proportionate and reasonable.

On the one hand, if a company invites members of a public institution to the company's premises to demonstrate that it has the capability and/or experience to carry out a particular contract with the public authorities, it seems unlikely that the company will contravene the Act by, for example, serving refreshments during the meeting.

On the other hand, disproportionate or lavish corporate hospitality where there is absolutely no technical content or any business discussion is more likely to violate the Act.

#### 2. Facilitation payments

This concept includes unofficial payments made to public officials to secure or expedite the performance of routine or necessary action. Facilitation payments are illegal under the Act.

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However, it has been submitted that payments made under “duress”, which include payments made to protect loss of life, limb or liberty, will not be prosecuted under the Act.

Where facilitation payments are made in circumstances that cannot be characterised as “duress”, it will be down to the prosecutorial discretion whether proceedings will be commenced. The decision will turn on all the circumstances of a matter.

This means that large, repeated or premeditated payments are more likely to lead to prosecution than payments made in situations where the payer was in a vulnerable position.

### 3. Corporate offence of failing to prevent bribery

The Act states that a commercial organisation (C) is guilty of an offence if a person (A), associated with C, bribes another person. This offence can be committed in the UK or overseas. A person associated with C may, for example, be C’s employee, agent, subsidiary or joint venture partner.

However, C will have a defence against a bribery allegation if C demonstrates that it has put in place “adequate procedures designed to prevent bribery”. So if C can demonstrate that it has put in place measures to counter bribery and that these measures are “adequate”, C will not be liable.

The practical effect, therefore, is that C’s directors must put in place adequate procedures designed to prevent bribery.

The recently published guidance from the Ministry of Justice lists six principles that could form the basis of “adequate procedures”:

1. **Proportionality:** The procedures must be proportionate to the bribery risks the organisation faces and to the nature, scale and complexity of the company’s activities.
2. **Top-level commitment:** The board of directors, owners or equivalent body must establish a culture in which bribery is never acceptable.
3. **Risk assessment:** An organisation must regularly assess and understand the risks of corruption that it faces.
4. **Due diligence:** Carrying out risk-based due diligence on an organisation’s business partners is an essential aspect of managing the risks of bribery.

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5. **Communication (including training):** Policies and procedures must be embedded and understood throughout the organisation through internal and external communication, including training.
6. **Monitoring and review:** Organisations could consider internal processes needed to review anti-bribery policies.

These measures could be implemented in the following way:

- prohibition on bribery in any form – whether direct or indirect and whether by or for the organisation
- a statement of values and code of conduct with a clear anti-corruption and anti-bribery element, including detailed policies on gifts, corporate hospitality, vetting of employees, agents, advisors and political contributions
- risk management procedures – for example, regular auditing of compliance, and ensuring that appropriate checks are carried out during the processing of payments
- monitoring employees', agents' and subsidiaries' compliance with anti-bribery measures
- implementation of whistleblowing procedures to counter bribery
- constant review of the adequacy of internal procedures to prevent bribery
- staff training and guidance to ensure that written procedures are available to staff and contracted consultants
- incorporating compliance with anti-bribery measures into contracts of employment, consultancy contracts and in the commercial contracts of the organisation
- carrying out due diligence before entering into arrangements with other parties.

*Claus Andersen*  
*Solicitor – Miller Rosenfalck LLP*

**This information was correct to the best of our knowledge and belief at the time it was submitted. It is, however, written as a general guide, and is not intended to apply to specific circumstances. The content should not, therefore, be regarded as constituting legal advice and should not be relied on as such. Accordingly, we recommend that specific professional advice be sought before any action is taken.**

If you would like more information on any of the points covered in this Guest Article, please contact **TCii** on **020 7099 2621**.