

3 February 2010

UK Bribery Act 2010

The purpose of this advisory is to highlight aspects of the new UK Bribery Act, expected to come into force in 2010.

On 25 March 2009, the UK Government published a draft Bribery Bill aimed at consolidating and modernising UK anti-corruption and bribery laws. The Bill is still being considered by the UK parliament and amendments may be made before it becomes law. The current Secretary of State for Justice has indicated an intention to get the legislation on the statute books before May 2010 and the Bill appears to have broad cross party support.

The principal change introduced by the Bill is a new strict liability corporate offence which imposes criminal liability on businesses in the event that employees, subsidiaries, agents or consultants pay bribes in relation to the organisation's business anywhere in the world. There is a single statutory defence—if the organisation can show it has “adequate” anti-corruption systems and controls in place (see below).

A further development is that the new strict liability corporate offence of failing to prevent bribery applies to non-UK businesses too, so that if a US corporate operates a small branch or subsidiary in London, the US corporate will be criminally liable in the UK if an employee, agent or subsidiary were to pay or accept a bribe, whether in the public or private sector, anywhere in the world. There is no requirement that the bribe be approved by or paid through the UK branch or subsidiary. The mere fact of having a UK branch or subsidiary will give the UK prosecutors and courts jurisdiction. As mentioned above, the only statutory defence will be to prove the existence of adequate systems and controls.

Key features of the Bribery Bill in its current form:

- Two general bribery offences: bribing someone or being bribed.
- Corporate liability: bribes paid with the intention to obtain or retain business; bribes paid by employees, agents and subsidiaries. It does not matter whether the bribe is paid in the UK or overseas.
- New strict liability corporate offence of failing to prevent bribery (so no need for prosecutors to prove negligence on the part of any individual within the organisation).
- Specific strict liability offence of bribing a foreign public official. Belief that local law permits a payment will not, in itself, constitute a defence. A “local law” defence can only be invoked where local written law actually permits or requires the official to be influenced by the payment.
- Adequate procedures defence: there is a limited defence for those organisations (including partnerships and non-UK organisations doing business in the UK) that can show (on the balance of probabilities) that they had “adequate procedures” in place to prevent bribery. The Bill provides no further detail on what would

If you have any questions about the UK Bribery Act or the implications for your business, please contact:

Imran Sami, Partner

+44 (0) 20 7776 7658

imran.sami@kattenlaw.co.uk

Mark Silveira, Associate

+44 (0) 20 7776 7640

mark.silveira@kattenlaw.co.uk

constitute adequate procedures but the Government has pledged to liaise with business and relevant organisations in order to provide further guidance before the new law comes into force. It is expected that the test will be applied with regard to the size of the company, its business sector and the degree to which it operates in high risk markets.

- Senior officers who consent to or connive in a corporate offence are liable as individuals.
- Applies to UK companies, UK citizens and individuals ordinarily resident in the UK, regardless of whether the relevant act occurs within or outside the UK.
- Applies to non-UK nationals or companies if an act or omission forming part of the offence took place within the UK or, in relation to the corporate offence, no matter where the act or omission took place.
- 10 year imprisonment and/or an unlimited fine for individuals.
- Unlimited fines for corporates.
- Wider than the US Foreign Corrupt Practices Act: the UK legislation covers private-private bribery; does not allow facilitation payments (e.g. certain types of corporate hospitality could be prosecuted if intended to subvert duties of good faith or impartiality that the recipient owes to his or her employer).

It seems clear that organisations cannot merely pay lip service to anti-bribery and corruption compliance. The Bill puts the onus firmly on businesses to ensure that effective measures are in place to prevent those acting on their behalf from engaging in bribery. Rigorous and demonstrable anti-corruption procedures will be a “must-have” for any organisation.

Katten

Katten Muchin Rosenman Cornish LLP

1-3 Frederick's Place • Old Jewry • London EC2R 8AE
+44 (0) 20 7776 7620 tel • +44 (0) 20 7776 7621 fax

Katten Muchin Rosenman Cornish LLP is a Limited Liability Partnership of solicitors and Registered Foreign Lawyers registered in England & Wales, regulated by the Solicitors Regulation Authority, whose registered office is at 1-3 Frederick's Place, Old Jewry, London EC2R 8AE. Registered No. OC312814.

The Members of Katten Muchin Rosenman Cornish LLP (who for convenience only refer to themselves as Partners) are: Martin Cornish, Jack Governale (US lawyer), Arthur W. Hahn (US lawyer), Daniel Huffenus (US lawyer), Sloan Kelly, Andrew MacLaren, Imran Sami and Andrew Turner.

Katten Muchin Rosenman Cornish LLP of England & Wales is associated with Katten Muchin Rosenman LLP, a U.S. Limited Liability Partnership with offices in:

CHARLOTTE

CHICAGO

IRVING

LOS ANGELES

NEW YORK

WASHINGTON, DC