

VAC 2011



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Legal Update

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Introduction

- The Bribery Act 2010: the death of corporate hospitality?
Kitty Turner, Associate
- The Agency Worker Regulations 2010
David Hunt, Partner
- Online Data Protection and Consumer Rights developments
Paul Jones, Partner
- IP Update
Anthony Misquitta, Partner

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The Bribery Act 2010 – the death of corporate hospitality?

... Probably not.

Kitty Turner, Associate

The offences and sanctions

Offences

- Active bribery
- Passive bribery
- Bribery of a foreign public official
- The corporate offence

Sanctions

- **Individuals:** Maximum 10 years' imprisonment, unlimited fines
- **Organisations:** Unlimited fines
- Plus reputational damage

The elements of the offences

- Each of these offences involve giving / receiving a **financial or other advantage** to another person with:
- In the case of active / passive bribery, the intention of **inducing or rewarding improper performance** of a **relevant function**.
- In the case of bribery of a foreign official, the intention of **obtaining or retaining a business advantage** (no requirement of impropriety but the offence will not be committed if the action is permitted by written law).

The elements of the offence (cont.)

- The offences are widely defined:
 - **offering, promising, agreeing to receive** (the financial / other advantage) are enough – no need to actually give / accept it;
 - any **financial or other advantage** – includes, potentially, corporate hospitality;
 - **inducing or rewarding** – ie before or after the conduct in question; and
 - cover **almost any business decision** – e.g. certainly the award of a tender / sponsorship deal.

The elements of offences (contd.)

- BUT:
- The Act is aimed at organisations involved in corruption – not at legitimate business dealings.
- There is no offence of active/passive bribery if a reasonable person in the UK would not consider that the gift, hospitality etc. was **intended to breach an expectation of good faith**.
- Precise line where this will have arisen remains unclear but see MoJ Guidance.

Corporate Offence

- Failure of a commercial organisation to **prevent active bribery** by an **associate** to obtain an **advantage for that commercial organisation**.
- Does not apply to passive bribery – but reputational damage likely.
- “Associate” is widely defined. It includes:
 - Employees
 - Trustees / governors
 - Agents
 - Trading subsidiaries
- BUT: Defence if “adequate procedures” were in place.

Adequate Procedures

- Government guidance outlines 6 principles:
 1. Proportionality of procedures
 2. Top level commitment
 3. Risk assessment
 4. Due diligence
 5. Communication
 6. Monitoring and review
- See MoJ Guidance at: <http://www.justice.gov.uk/guidance/making-and-reviewing-the-law/bribery.htm>

Practical steps

- Carry out a risk assessment of bribery risk for your organisation.
- Check existing policies / put in place a sensible anti-bribery policy.
- Maintain a gifts register (covering gifts etc received and given).
- Appoint an anti-bribery officer responsible for overseeing compliance and carrying out regular reviews.
- Communicate policy internally (and externally). Provide regular training.
- Carry out due diligence on contracting parties.
- Include an anti-bribery clause in contracts where relevant.

Kitty Turner, Associate

Agency Worker Regulations 2010 (“the Regulations”)

- The Regulations implement the Temporary Agency Workers Directive 2008/164/EC and came into force on 1 October 2011;
- The key provisions of the Regulations are:
 - (a) to ensure that assigned Agency Workers receive no less favourable basic working and employment conditions than if they had been employed directly by the relevant end-user (referred to hereafter as the “Hirer”);
 - (b) to provide equal access for Agency Workers to facilities and to permanent employment.
- The Regulations apply to “Agency Workers”, “Temporary Work Agencies” and “Hirers”.

“Agency Workers”

- An “**Agency Worker**” is defined as someone who:
 - (a) is supplied by a TWA to work temporary for and under the supervision direction of Hirers [our emphasis]; and
 - (b) has a contract of employment with or any other contract with the TWA to perform work or services personally.
- Who is unlikely to be an Agency Worker? The genuinely self-employed, individuals working on managed contracts, individuals on in-house casual lists, individuals who find direct employment with an employer through a recruitment agent, individuals on secondment.

“Temporary Work Agencies”

A **Temporary Work Agency** (“TWA”) is defined as:

“A person engaged in the economic activity, public or private, whether or not operating for a profit, and whether or not carrying on such activity in conjunction with others, of

- (a) supplying individuals to work temporarily for and under the supervision and direction of Hirers; or
- (b) paying for, or receiving or forwarding payment for, the services of individuals who are supplied to work temporary for and under the supervision and direction of Hirers”.

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“Hirer”

A **Hirer** is defined as:

“a person engaged in economic activity, public or private, whether or not operating for a profit, to whom individuals are supplied, to work temporary for and under the supervision and direction of that person”.

Day 1 Rights

- From the commencement of an assignment Agency Workers:
 - (a) must be told of any employment vacancies with the Hirer and must be given the same opportunity as Hirer employees to apply for those roles. Information can be provided by way of a “general announcement in a suitable place in the Hirer’s establishment”;
 - (b) have the right not to be treated any less favourable than a comparable employee of the Hirer working at the same establishment (unless such treatment can be justified) in relation to access to:
 - (i) the Hirer’s canteen or similar facilities;
 - (ii) child care facilities; and
 - (iii) the provision of transport services (this does not include season ticket loans and the provision of car allowances).

12 Week Rights

- Agency Workers do not gain “12 week rights” until they have undertaken: (a) the same role (on one or more assignments); (b) for the same Hirer; (c) for 12 continuous calendar weeks (“the Qualifying Period”).
- After the Qualifying Period Agency Workers are entitled to equal treatment as compared to comparable employees/workers of the Hirer in respect of:
 - (a) pay;
 - (b) duration of working time;
 - (c) night work;
 - (d) rest periods;
 - (e) rest breaks.
 - (f) annual leave; and
 - (g) paid time off for ante natal appointments.

12 Week Rights

- Agency Workers will not, however, even after the Qualifying Period, be entitled to equal treatment in relation to:
 - (a) sick pay;
 - (b) pension;
 - (c) maternity, paternity or adoption leave pay;
 - (d) redundancy pay;
 - (e) bonuses (which are not directly referable to the amount of quality of work done);
 - (f) payment for time off for trade union duties;
 - (g) guarantee payments;
 - (h) advance payment of wages; and
 - (i) payment of expenses.

Breaking the continuity of the Qualifying Period

- Continuity of the Qualifying Period will be broken if:
 - (a) the Agency Worker starts *a new assignment* [my emphasis] for the same Hirer which is substantially different; or
 - (b) there is a break of at least six calendar weeks between assignments.
- Government guidance lists seven questions to ask when deciding whether an assignment is “substantially different”.

Pausing the Clock

- There are some instances in which the Agency Worker being away from work with the Hirer for more than 6 weeks will only pause the continuity of the Qualifying Period rather than breaking it.
- For example:
 - (a) sickness absence of up to 28 weeks;
 - (b) statutory or contractual time off (such as annual leave); and
 - (c) jury service of up to 28 weeks.

Situations where the Qualifying Period continues to run

- There are then some other situations in which the Qualifying Period continues to run, despite the Agency Worker being absent from work, being:
 - (a) absences due to pregnancy, childbirth or maternity (for up to 26 weeks after the birth of a child); and / or
 - (b) absences on statutory or contractual maternity, paternity or adoption leave.

How is Equal Treatment measured?

- In claiming less favourable treatment, the Agency Worker must identify a real or hypothetical comparator (who may be an employee or a worker) at the Hirer;
- A comparable employee / worker is an individual:
 - (a) working for and under the supervision and direction of the Agency Worker's Hirer;
 - (b) engaged in the same or broadly similar work, having regard, where relevant, to whether he / she has a similar level of qualifications and skills; and
 - (c) working or based at the same establishment as the Agency Worker or, if there is no such person, someone satisfying the definition working or based at a different establishment.
- Whether or not the Agency Worker has received equal treatment will be assessed on a term-by-term basis (rather than by looking at the "package" of terms taken overall).

Provision of Information

- Agency Workers may seek a written statement of information from the TWA where they suspect a breach of their 12 week rights. The TWA is then obliged to respond within 28 days, providing relevant information about:
 - (a) the basic working and employment conditions of the Hirer's workforce;
 - (b) the factors taken into account in determining the Agency Worker's basic working and employment conditions; and
 - (c) any actual comparator relied upon.
- If the TWA does not reply, the Agency Worker may make the same request of the Hirer who also has 28 days to reply. (NB. In relation to breaches of Day 1 rights, the information request can be sent to the Hirer direct).
- Any information provided in this way is admissible in proceedings and inferences may be drawn from a failure to reply or an equivocal / evasive answer. Neither the TWA nor the Hirer is, however, obliged to provide information about basic terms and conditions if the Agency Worker is not entitled to comparable treatment at the time of the request.

Liability

- Hirers alone will be liable for breaches of day one rights;
- Both Hirers and TWA's may be liable for any breaches of 12 week rights, to the extent that they are liable for breach;
- However, TWA has a defence where:
 - (a) it took "reasonable steps" to obtain relevant information from the Hirer about those conditions; and
 - (b) having received that information acted reasonably in determining the worker's conditions after the relevant qualifying condition.

Penalties

- Remedies for breach of the Regulations are:
 - (a) a declaration, compensation (assessed by reference to the infringement or breach and any loss attributable to it of a **minimum** of two weeks' pay); and
 - (b) a recommendation that the adverse effect on the claimant should be reduced or obviated.
- In addition, Tribunals will be able to make a further award of £5,000 for successful claims arising from the anti-avoidance provisions (see below).
- Compensation will be apportioned between the TWA and the Hirer, where appropriate.

Anti-Avoidance

- Under the Regulations, Hirers and Temporary Work Agencies are prevented from intentionally depriving Agency Workers of their right to equal treatment.
- For example, intentionally rotating workers to substantively different roles or hiring Agency Workers on patterns designed to avoid them attaining the Qualifying Period of service (such as 11 week assignments followed by 7 week breaks) will be prohibited.

Practical Tips

- In light of the provisions of the Regulations, you should be:
 - (a) reviewing all existing and potential agency arrangements;
 - (b) making sure that all agency workers have access to vacancy lists and to the facilities set out above (save to the extent any decision not to allow access can be objectively justified (e.g. where car parking is very limited)); and
 - (c) making sure that you have informed any Temporary Work Agencies you use of the basic terms and conditions offered to those of your employees in comparable positions to any Agency Workers being provided where those Agency Workers may end up working for you for 12 weeks or more.

ICO action against Lush for breach of DPA (1)

- Information Commissioner's Office brought action against online retailer
- Lush, the handmade cosmetics retailer, suffered security lapse which allowed hackers to access payment details of 5,000 of its customers between October 2010 and January 2011
- 95 Lush customers complained in January 2011 after their credit card details were used fraudulently
- ICO found Lush had breached requirements of Data Protection Act 1998 to employ appropriate security measures to protect the security of the personal data of its customers
- Lush security measures were in place but not compliant with Payment Card Industry ("PCI") Data Security Standard
- Lush's security measures were inadequate to prevent a "determined attack on their systems"

ICO action against Lush for breach of DPA (2)

- Lush also failed to fully log system activity which led to a delay in detecting the hacking
- However, Lush then took prompt and substantial remedial action
- ICO did not fine Lush (possible fine of £500,000 for serious breaches)
- ICO required undertakings from Lush including:
 - a minimum amount of customer personal data to be stored and retained for only as long as relevant business need existed
 - regular penetration testing and activity logs to be retained and inspected
 - customer credit card data processing to be conducted by PCI compliant external service provider

ICO action against Lush for breach of DPA (3)

- Worth double-checking your systems to ensure compliance with ICO guidance?
- Ensure swift and decisive action in the event of any security breach occurring

New rules on website cookies (1)

- “Cookie” – text file downloaded to a user’s PC to identify user and allow customised webpages to be prepared for them
- Recent changes to the Privacy and Electronic Communications Regulations 2003 require website operator to obtain consent to use cookie and similar technology
- ICO has given 12 month lead-in period for changes (until May 2012)
- Government is keen to consult with internet browser manufacturers and industry to develop more sophisticated browsers to reliably indicate user’s consent to cookie

New rules on website cookies (2)

- ICO's guidance has suggested consent can be indicated by:
 - Changes to website T&Cs (with a warning and active user consent required)
 - Pop-ups
 - Scrolling text at the bottom of the screen

The new Consumer Rights Directive (1)

- European Directive to be published shortly
- Member States will have 2 years to implement (i.e. by September 2013)
- Largely consolidates existing legislation
- UK law in much better state than some other Member States

The new Consumer Rights Directive (2)

- Main changes to UK law for online traders include:
 - Distance Selling Directive to be repealed (but those provisions replaced by new Directive)
 - Increased transparency in relation to price of goods / services before order is placed online
 - Pre-ticked boxes for additional options (e.g. insurance) online not permitted
 - Consumer's contract withdrawal period to be extended from 7 to 14 days
 - Clarity on who pays for the cost of returning the goods
 - Refunds to be made to consumer within 14 days of withdrawal (including delivery cost)

Paul Jones, Partner

IP Update (1)

Hargreaves Review of Growth and IP

- Report commissioned by David Cameron and published by Prof Hargreaves (Cardiff Business School) in May 2011
- Review of UK legislative framework relating to IP with goal of making UK more competitive in Europe and worldwide in the digital age
- 10 recommendations including:
 - Creation of cross-sectoral Digital Copyright Exchange to assist licensing
 - Copyright exceptions to permit digitisation of works for library archiving, format-shifting, parody, and text and data mining
 - Creating a scheme for the use of orphan works

IP Update (2)

- Assessment of the relationship between design rights and innovation
- Introduction of small-claims Court track for low-value IP claims
- Reform of the IP Office to give it powers to issue formal opinions on the application of copyright law and to take on a more active role in ensuring fair competition in relation to IP rights
- Government responded to Review in August 2011
- It broadly accepted all of the recommendations and set out the actions it intends to take and timeline although nothing will be done or published in immediately

IP Update (3)

European Council adopts Directive amending Copyright Term Directive

- Extends copyright protection term for performers and sound recordings from 50 to 70 years (so called “Cliff’s Law” after Cliff Richard’s extensive lobbying)
- Record companies are to pay 20% of the revenues they earn during the extended period into a fund for session musicians
- Rights in a recording to revert to the performer if the record company stops marketing the recording during the extended term and performer notifies his intention to terminate contract (“use it or lose it” provision)

IP Update (4)

- Record producers are prevented from making deductions to the royalties they pay performers after the initial 50 years are over (“clean slate” provision)
- Changes supported by performers and record companies
- Changes opposed by user and open-rights groups as they will not help lesser-known artists who receive very little royalty
- Hargreaves Report of IP and Growth criticised the proposal as lacking evidential support but UK Government surprisingly backed the term extension.
- An indication of what we can expect in the future?

Anthony Misquitta, Partner