

## Company Commercial

The Company Commercial team at Magrath are very happy to take enquiries from clients, both new and existing, and from our business partners on any aspect of this briefing sheet, or any aspect of Company Commercial Law in general.

We work with other departments across the firm to provide clients with straightforward advice, based on detailed knowledge of market conditions and current legislation.

Please refer to the back of this briefing sheet for contact details.

### Bribery Act 2010: Are You and Your Business Ready?

The Bribery Act 2010 (the "Act") was enacted in April of this year and is due to come into force in April 2011.

The Act aims to rid the business world of using bribery as a means to gain competitive advantage in business. A simple cursory glance through the Act makes it clear that it will have an impact on every UK business to varying degrees and it is essential that all businesses familiarise themselves with the terms of the Act now. What is yet to be seen is how far reaching the implementation of the Act will be; something which will remain unknown until it is tested in the courts.

#### Autumn Briefing Sheet Topics:

Bribery Act 2010; are you ready?

- Are you ready for the shake up in UK anti-corruption laws?
- Offences under the Bribery Act 2010.
- What does this mean for business acquisitions?
- Post Completion; adequate anti-bribery procedures.

Is financial return to owners/shareholders of your business not a priority for you?

- Social Enterprises
- CIC's
- Charities
- UK establishments
- The future

#### Offences Under the Bribery Act 2010

The Act builds on and consolidates current UK bribery law so as to bring it in line with EU law in this area (which the UK ratified in 1998). The Act sets out 4 categories of offence which you should be aware of:

1. **Bribing** – if you offer, promise or give a financial advantage to another person and such action brings about improper performance of a relevant activity or function.
2. **Being bribed** - requesting, agreeing to receive or accepting a financial or other

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advantage in return for improper performance (whether the improper performance is carried out by you or another person).

### 3. Bribing a public official

4. **Failure of commercial organisations to prevent bribery** (adequate procedures defence) – your business will be guilty of an offence if someone associated with it (e.g. subsidiary, employee, agent) commits a bribery offence in intending to obtain or retain business or a business advantage for you. We anticipate that this offence will be of greatest concern to our clients and therefore discuss this in more detail below.

A **relevant activity or function** includes all activities connected with a business, trade or profession, those performed in the course of employment, any activity performed on behalf of a corporate or unincorporated body of persons and all functions of a public nature. It is therefore very far reaching.

### Bribery Act 2010 and Business Acquisitions

The Act covers all private sector transactions and will therefore be of particular relevance if you are looking to buy a new business (whether a share or assets purchase). The Act will need to be considered as an important aspect of the **due diligence process**, drafting of **contractual documents** and conduct of **business post completion**.

The Act is not retrospective and therefore only corrupt conduct that occurs after the Act has come into force will be an offence. Despite this it is still essential that you carefully consider the Act as part of the purchase process so as to avoid, limit or protect yourself against corrupt practices.

### Identify Risks – Due Diligence

**It is essential that bribery is given careful consideration during the due diligence process as information you discover may affect the purchase price, or whether or not you decide to proceed with the transaction.**

We suggest that you consider both the individual company or business you are looking to buy and also give consideration to the industry and jurisdictions that it operates in (is it associated with corrupt practices?). As standard you should request information and documentation relating to any anti bribery policies the

company currently operates and how these policies are implemented. In addition consideration should be given to the role that senior management currently take and their level of involvement in the enforcement of such policies.

Risks will be higher where the company conducts business through a number of third party agents, intermediaries, joint ventures etc and therefore particular attention should be given to these type of arrangements – remembering that an organisation can be liable for the act of third parties (it is an offence of strict liability meaning that no knowledge is needed).

### What risks can bribery have on the value of a company?

- Seemingly good revenues actually based on corrupt practices
- Fines for corrupt acts prior to acquisition
- Costs post completion to remedy practices in breach of the Act
- Loss of reputation leading to lack of faith in brand and loss of clients and suppliers
- Loss of contracts which were secured by the business on basis of corrupt practices and can only be maintained if corrupt practices continue
- Senior officers can in some circumstances be prosecuted under the Act and in this event senior staff may be lost

### Limit Risks – Contractual Documentation

Whether or not you have found any corruption you should consider obtaining warranties and indemnities from the seller in respect to this. By incorporating warranties into the sale agreement you (a) have protection if post completion the warranties are breached and (b) you force the seller to disclose to you any known problems, in the disclosure letter. If a previously unknown matter is disclosed then you can deal with that accordingly.

**If there are corrupt practices:**

- Consider requesting an indemnity from the seller
- Reconsider the purchase price and whether it should be reduced
- Consider how the corrupt practice could be resolved and request the seller to take appropriate action

- Where you were intending to purchase the share capital of the company consider whether to proceed by way of an assets purchase and extract the 'corrupt' practices aspect of the business from the sale

### Post Completion; Adequate Anti-Bribery Procedures

Although you may be satisfied that you have purchased a company free from corrupt practices and liability under the

Act it is important that post completion you consider next steps for best practice.

Whether you have just completed on the purchase of a company or business, or not, now is the time to take action to ensure that you have workable anti-bribery policies in place. A commercial organisation will have a defence of failing to prevent bribery where they can show that they have adequate anti-bribery procedures in place.

### Putting in Place Adequate Procedures

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| <b>ASSESS</b>    | assess the risks within your organisation and note any particularly vulnerable areas.  |
| <b>COMMITT</b>   | involve the board of directors/management/partners/owners in anti-bribery measures and ensure that you have commitment from the top of the business to the importance of enforcement and prevention.   |
| <b>REVIEW</b>    | carry out due diligence on your business partners.   |
| <b>POLICY</b>    | ensure your organisation has clear, workable anti-bribery policies in place that make it clear that bribery is prohibited and offers practical guidance to members of your organisation on how to achieve your businesses aims. Consider the use of examples and case studies.   |
| <b>IMPLEMENT</b> | policies and procedures are only as good as the methods used to implement them. Consider what training is necessary for all levels of your business and different methods of training e.g. worked case studies, Q&A sessions and clear and accessible business policy on bribery which is readily available to all.                                  |
| <b>MONITOR</b>   | consistently monitor how effective your business is in implementing adequate anti-bribery procedures. Ensuring adequate procedures is an ongoing obligation and a one off review of policies will not be sufficient. Consider how best to maintain your policies through repeat training to both existing and new staff and provide regular updates. |

# Not for Profit?

Is financial return to owners/shareholders of your business not a priority for you?

The corporate structure that you choose for your business is as much about how you and your business partners want to shape the business (maximising cash and minimizing tax) as it is about the image you want your business to portray to your clients and suppliers.

If you are setting up a primarily profit focussed entity then the corporate structures available to you are well known; limited company, plc, partnership, limited liability partnership. All of these can be set up with speed and minimal effort.

What if you want to incorporate a social enterprise – what corporate structure do you use which demonstrates your business objectives to clients, such that they can easily establish you as a social enterprise and one they therefore wish to do business with?

## What is a social enterprise?

Social enterprises are businesses driven by a social or environmental purpose e.g. Jamie Oliver's restaurant Fifteen, and the company Divine Chocolate.

Social enterprises compete to deliver goods and services but the profits they make are reinvested towards achieving their social purpose. The government defines them as *“a business with primarily social objectives whose surpluses are principally reinvested for that purpose in the business or in the community, rather than being driven by the need to maximise profit for shareholders and owners”*.

## Limited Liability Partnership

It is not generally considered to be a social enterprise, though social aims can be included in the partnership agreement.

## Limited Company

A company can state in its constitution that it is a social enterprise and provide as much or little detail as it wishes relating to this. In some instances this may be sufficient to secure the contracts you wish to achieve. It is likely however that this will not often be sufficient as (a) clients and suppliers would have to carry out research to establish the social enterprise element (company searches etc) and (b) although detailed in the company constitution, this is

not regulated and clients may feel that there is not enough guarantee and protection of the social enterprise aspect of the business.

Social enterprises use a wide variety of legal forms with the most relevant ones listed below:

- **Community interest company (CIC)** A CIC is a legal form created specifically for social enterprises. It has a social objective that is "regulated" ensuring that the organisation cannot deviate from its social mission and that its assets are protected.
- **Industrial and provident society** This is the usual form for co-operatives and community benefit societies and is democratically controlled by their members in order to ensure their involvement in the decisions of the business.
- **Companies limited by guarantee or shares** These are the most common legal structure for businesses and often considered to be the most flexible. While they can ensure they have a social objective written into their Memorandum and Articles of Association, this is not regulated.
- **Group structures and charitable status** Tax is an important consideration for some organisations where the retention of surpluses is essential, particularly if they can't take on equity. In these cases the tax breaks associated with charitable status can be an important factor.

## Charitable Limited Company

A charitable company is a limited company with exclusively charitable aims and accountable to the community. To achieve charitable company status the company must register with both Companies House and the Charity Commission. There are 2 types of Limited Company:

- (a) **A Company Limited by Guarantee** – no shareholders and any surplus is reinvested in the company. This is recommended by the Charity Commission.
- (b) **A Company Limited by Shares** – the members invest

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money in the hope of gaining a profit (common in the commercial sector).

### Uses of companies limited by guarantee

A guarantee company is a not-for-profit company, and is the type most often formed by charitable organisations. A guarantee company does not have share capital, and the members do not own the company. All income generated is used to cover operating costs and to achieve the objectives of the company.

Its limited liability status, the lack of any requirement for members to contribute towards initial working capital and the lack of share capital makes a company limited by guarantee an attractive vehicle for not for profit organisations such as:

- Charities
- Clubs and societies
- Trade and research associations
- Community Interest Companies

### Community Interest Company

The **Companies (Audit, Investigations and Community Enterprise) Act 2004 (the Act)** created these. We discussed CIC's in our winter 2009 briefing sheet so will refer to these only briefly now. Should you want any additional information on CIC's then please contact a member of the Company Commercial department.

A CIC is a limited liability company, designed with the specific aim of providing a benefit to a community using its income, assets and profits for the community it is formed to serve. The primary purpose of a CIC is to benefit the community and not its shareholders, directors or employees. CICs can be incorporated as a new company or converted from an existing company.

### Options available for foreign businesses?

**In addition to the social enterprise structures detailed above, a foreign business could consider registering a UK establishment.** Registering a UK establishment is a method of setting up a branch company in the UK and would be applicable where the international business is already successfully operating as a social enterprise.

Registering a UK establishment allows the establishment's constitution to be governed by the parent company's laws.

### Key Characteristics of a CIC

- **Community Benefit**
- **Community interest test** A CIC will satisfy the community interest test if it can show that a reasonable person might consider that its activities are being carried on for the benefit of the community.
- **Transparency** A CIC has to deliver an annual community interest report.
- **Limited liability**
- **Simple to set up**
- **Asset lock** Restrictions on the transfer of assets.
- **Flexibility** It can be formed using a company limited by guarantee or shares.
- **Supervision and regulation**
- **Compliance with company law**

If therefore the parent company is operating as a known social enterprise (and this is detailed in the company constitution), then the UK company would be similarly classed, as it would be founded on the same constitution. This also means that the liability of the establishment is the same as the parent company.

There may also be tax advantages to registering a UK establishment although advice from UK accountants should always be taken.

### Developments in this area

Charitable Incorporated Organisation's (CIO) are a new corporate structure designed specifically for charities and will be an alternative to the current forms of charitable structures.

A CIO must be registered with and regulated by the Charity Commission but unlike charitable companies, CIOs will not also be registered with Companies House. Like any corporate structure, CIOs will have a separate legal personalities allowing them to contract and hold property in their own name and will benefit from reduced personal liability for their trustees and members.

The Charity Commission is currently in the process of creating guidance, documents and systems for the implementation of CIOs. It is therefore expected that CIOs will not be an available option until the beginning of 2011.

David Little  
Partner  
[david.little@magrath.co.uk](mailto:david.little@magrath.co.uk)  
0207 317 6728

Abigail Nevill  
Solicitor  
[abigail.nevill@magrath.co.uk](mailto:abigail.nevill@magrath.co.uk)  
0207 317 6768

magrath LLP solicitors 66/67 Newman Street London W1T 3EQ  
tel 020 7495 3003 fax 020 7317 6766 [www.magrath.co.uk](http://www.magrath.co.uk)