

THE BRIBERY ACT'S EFFECT ON DEBARMENT

16 June 2011

To Our Clients and Friends:

The UK Ministry of Justice (“MoJ”) has published amended legislation on debarment for bribery offences in the wake of the Bribery Act 2010 (the “Act” or the “Bribery Act”).¹ The amendments provide that conviction for the offences of bribing another person or bribing a foreign public official will attract mandatory debarment. The MoJ has also reiterated that a conviction for the so-called corporate offence will attract only discretionary debarment—but legislation has not been, and will not be, amended to make that explicit.

The EU Public Procurement Directive (2004/18/EC), implemented in UK law by the Public Contracts Regulations 2006 and Utilities Contracts Regulations 2006 (collectively, the “Regulations”), requires EU member states to debar entities from bidding for public contracts under certain circumstances.

Debarment is mandatory for entities convicted of bribery or corruption. There are also circumstances under which debarment is at the discretion of the contracting authority or utility, in particular where an entity has been convicted of a criminal offence in relation to its business or profession, or has committed an act of grave professional misconduct.

The Bribery Act has three active bribery offences: bribing another person, bribing a foreign public official, and failure to prevent bribery by a commercial organisation, known as the “corporate offence,” which is subject to the defence of “adequate procedures to prevent bribery.”

It was always expected that a corporate conviction for bribing another person or bribing a foreign public official would lead to mandatory debarment of the organisation involved. The position has been less clear with regard to the corporate offence, which is widely expected to be a key focus of the Serious Fraud Office (“SFO”), the lead investigator and prosecutor of the Bribery Act. The lack of any requirement under the corporate offence for the SFO to prove

¹ See *The Bribery Act 2010 (Consequential Amendments) Order 2011*, paras. 2-3, <http://www.legislation.gov.uk/uk/si/2011/1441/made?view=plain>.

negligence or any improper intent on the part of a company led to concern among the business community that mandatory debarment would be unfair in these circumstances.

Based on these concerns, on 30 March 2011, Kenneth Clarke, the Secretary of State for Justice, announced that the corporate offence would only be a ground for discretionary debarment, not mandatory debarment. He stated at the time that legislation would be amended accordingly.

However, the MoJ has confirmed that it decided that no change was required to the section of the Regulations dealing with discretionary debarment because the corporate offence fell within the scope of the existing language of the Regulations.

Commercial organisations must nonetheless remain vigilant and ensure the adequacy of their anti-corruption programmes and procedures so as to minimise the risks of a conviction for the corporate offence and thus the possibility of discretionary debarment from public contracts in the UK.

For more on the Bribery Act, including all our previous client updates, please see our website at www.debevoise.com/TheBriberyAct.

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Please call us if you have any questions.

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