



The UK Bribery Act

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Does the UK Bribery Act apply to your organisation?

- Do you do any business in the UK?
- Do you have a subsidiary in the UK?
- Is your company registered or listed in the UK?
- Do you have a representative office in the UK?
- Is one of your directors a UK national?
- Is one of your directors resident in the UK?
- Do you do business with other organisations that fall within the scope of the Bribery Act?

Legal and Other Consequences

- Unlimited fines
- Huge legal costs
- Possible debarment from public contracts
- Up to 10 years in prison
- Fines affect shareholders by a factor of 10 [Financial Times 20.09.2010]
- Civil suit
- Difficulty of selling your business if no “adequate procedures”

Offences

- Offences of bribing another person (s.1)
- Offences of being bribed (s.2)
- Bribery of Foreign Public Officials (s.6)
- Corporate Offence of failing to prevent bribery (s.7)
- Individual offence by a senior officer in a company of conniving or consenting to the company bribing or receiving a bribe (s.14)

Bribing (s.1)

It is an offence to **offer, promise or give** a **financial or other advantage** to **another person** with the intention of:

- Inducing a person **to perform improperly** a **relevant function or activity**; or
- Rewarding a person for the **improper performance** of a **relevant function or activity**

Being bribed (s.2)

It is an offence to **request, agree to accept or to accept** a **financial or other advantage** in return for the **improper performance** of a **relevant function or activity**.

Bribing or being bribed – key points

- Offences apply to both the **private and public** sectors.
- Offences can be committed either **directly or indirectly** (i.e. through a third party).
- Bribery Act applies even if the relevant function or activity is **performed outside the UK**.

Bribing a foreign public official (s.6)

It is an offence for a person to intend to influence an FPO by **offering, promising or giving** any **financial or other advantage**:

- to an FPO; or
- to another person at an FPO's request or with an FPO's assent or acquiescence,

in order **to obtain or retain business or an advantage in the conduct of business.**

The defence to Section 6

It is a defence to show that the FPO is permitted under the local **written** laws applicable to the FPO to be influenced in the FPO's capacity by the bribe.

Note that "facilitation" payments are not permitted. Small, one-off payments are unlikely to be prosecuted, but a series of small payments could result in liability.

Failure of commercial organisations to prevent bribery (s.7)

A **relevant commercial organisation** is guilty of an offence if **a person associated** with the organisation bribes another person with the intention of either:

- **Obtaining** or **retaining business** for the organisation, or
- **Obtaining** or **retaining** an **advantage** in the conduct of business for the organisation

The defence to Section 7: adequate anti-corruption procedures in place

It is a defence if the relevant commercial organisation can show that it has put in place **adequate procedures** designed to prevent persons associated with the organisation from undertaking corrupt activities.

Liability of senior officers (s.14)

Where an offence is committed under ss.1, 2 or 6 **by a company**, then:

- A **senior officer** of the company will be **personally liable** for the offence under ss.1, 2 or 6 if they are found to have **connived in or consented to** the offence and they have a **close connection with the UK**.

“Relevant commercial organisation”

A **relevant commercial organisation** is defined as either:

- A body or partnership **incorporated or formed in the UK** and which **carries on a business**; or
- A body corporate or partnership **incorporated or formed outside the UK** which **carries on a business**, or part of a business, in any part of the UK.

“Associated person”

Someone who performs services for or on behalf of the organisation e.g.:

- Employees
- Agents
- Subsidiary
- Consultant
- Joint Venture Partner
- Consortium Partners
- Intermediaries
- Contractors
- Distributors
- Advisers

Extraterritorial effect

Offences under sections ss.1, 2 and 6 are capable of prosecution in the U.K. if:

- any element of the offence has been **committed in the UK**; or
- no element of the offence has been committed in the UK, but **the offender has a close connection with the UK** e.g. British citizen, an individual ordinarily resident in the UK, a body incorporated under the laws of the UK.

Extraterritorial effect – s.7

Offences under s.7 are capable of prosecution in the U.K. if:

- the organisation **is incorporated or formed in the UK**; or
- the organisation **carries out some of its business in the UK**; and
- The offence is committed by an **associated person**, irrespective of whether the relevant acts or omissions are committed in or outside the UK.

Scenario – who could be liable?

- A US citizen is resident in the UK and is employed by a US company.
- The US company in question has a representative office in the UK, which carries out modest business in the UK. There is no subsidiary incorporated in the UK.
- The US citizen arranges for a bribe to be paid by a foreign agent (i.e. they are neither American nor British) to secure a contract for the US company in that agent's country.

What are adequate procedures?

Ministry of Justice Guidance, required by s.9, was (finally) issued on 30 March 2011 and identified six principles for bribery prevention:

1. Proportionate procedures
2. Top level commitment
3. Risk assessment
4. Due diligence
5. Communication (including training)
6. Monitoring and review

www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf

Focus on third parties

Recommended reading:

UK Financial Services Authority report on Anti-Bribery and Corruption in Commercial Insurance Broking, dated May 2010:

http://www.fsa.gov.uk/pubs/anti_bribery.pdf

Other commercial considerations

- Is your organisation an “associated person”? Are you able to provide:
 - Details of your compliance programme
 - Certification of Bribery Act compliance
 - Warranties and indemnities
- Mergers and acquisitions – are you doing proper due diligence? If you buy the company, are you buying the crime?

Summary – why does the UK Bribery Act matter to you?

- If you have a footprint in the U.K. you fall within the scope of the Act.
- You could be held strictly liable for actions of third parties.
- Your contracting parties/vendors may well ask for details of your compliance programme and refuse to deal with you unless Bribery Act compliant.

Summary – why does the UK Bribery Act matter to you? (cont)

- Adequate procedures are business insurance – would you own factories and offices without insuring them?
- A criminal prosecution may be followed by a civil law suit e.g. by competitors or by business partners for breach of warranties as to compliance.

Questions or Comments?

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