

The Bribery Act 2010 – a corporate perspective



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Introduction

This guide summarises the main provisions and practical issues arising from the new UK anti-corruption law effected by the Bribery Act 2010 (the “**Act**”) in the context of a corporate body (the “**Company**”) or group (the “**Group**”) that carries on business in the UK or overseas, from 1 July 2011, the Act’s implementation date.

What are the main issues?

- The Act’s criminal offences are very broadly defined and the Act has significant extra-territorial reach;
- it creates a new strict liability offence for a commercial organisation of failure to prevent bribery;
- it extends to private sector transactions (previously UK bribery offences were confined to transactions involving public officials and agents); and
- the Act’s penalties are unlimited fines for organisations and individuals and up to 10 years’ imprisonment for individuals.

What are the Bribery offences?

The “**Individual Offences**”:

- **bribing another**: offering, promising or giving a bribe;
- **being bribed**: requesting, agreeing to receive or accepting a bribe; and
- **bribing a foreign public official** to obtain or retain business.

The “**Corporate Offence**”:

- **failure of commercial organisation to prevent bribery** by someone acting on its behalf.

Individual Offences

If part of an Individual Offence takes place in the UK, the offence has been committed, even if the offender has no connection with the UK.

If no part of an Individual Offence takes place in the UK, the offence will still be committed if the offender has a “**close connection with the UK**”. An “**individual**” has a close connection with the UK if he or she is a British citizen or is ordinarily resident in the UK. A “**body corporate**” has a close connection with the UK if it is incorporated in any part of the UK.

A corporate body will be liable for one of the Individual Offences where the offence is committed by an individual who is the directing mind or will of the organisation.

If an Individual Offence is committed by a corporate body, with the consent or connivance of one of its senior officers, that senior officer is also guilty of the Individual Offence, alongside the corporate body. A “**senior officer**” is a director, manager, or other officer of the corporate body, or a member of an LLP. If the Individual Offence is committed outside the UK, the senior officer will not be guilty unless he himself has a close connection with the UK. Omitting to act might be regarded as consent or connivance.

Corporate Offence

A company or partnership will commit the Corporate Offence if an “**associated person**” (see below) bribes another in order to obtain or retain business, or an advantage in the conduct of business, for the company or partnership. There is no need to prove that any individual within the organisation intended to commit the offence.

There is a **defence** if the organisation can show that it has in place adequate procedures designed to prevent such bribery by its associated persons.

It is irrelevant where the bribe took place.

The organisation just has to be a “**relevant commercial organisation**”. This is:

- a company or partnership incorporated or formed in any part of the UK, and carrying on a business anywhere in the world; or
- a company or partnership incorporated or formed anywhere else in the world and carrying on any part of its business in any part of the UK.

The Act does not define “**carrying on a business in the UK**”. The Ministry of Justice has stated that, while it is for the courts to make the final decision, it would not expect the mere fact that a company’s securities have been admitted to trading on the London Stock Exchange, in itself, to qualify that company as carrying on a business in the UK. Likewise, simply having a UK subsidiary will not, in itself, mean that the parent company is carrying on business in the UK, since the subsidiary may act independently of its parent. However, the head of the Serious Fraud Office takes a contrary view.



Therefore, until the courts have clarified these issues, it would be prudent to assume that the Company could be liable for the offence of failure to prevent bribery, if its only connection with the UK is that its shares are admitted to trading on the London Stock Exchange, or even that it has a UK subsidiary.

An “**associated person**” is one who performs services for or on behalf of the organisation.

Employees are presumed to be associated with their employer organisation. A commercial organisation's agents and subsidiaries and, where it has the requisite degree of control or influence, joint venture vehicles may also be associated persons. Distributors, joint venture partners and, potentially, suppliers could also be caught.

The organisation may be found guilty of this offence, even if the associated person itself is not, or cannot be, prosecuted for the bribe.

For example, if the associated person is incorporated, and performs the bribe, outside the UK, it cannot be prosecuted. But that wouldn't hinder the organisation from being prosecuted for the Corporate Offence.

This may be the offence most likely to lead to the majority of convictions of corporate bodies under the Act. On the other hand, defendants may be able to use the defence of having “adequate procedures” in place without difficulty. We explain “adequate procedures” in more detail below, but the vagueness of this expression may help defendants to prevent such convictions. Time will tell as to how the courts will test this.

Criminal penalties and other consequences

If convicted, the potential criminal penalties are:

- **individuals:** imprisonment for up to 10 years and/or liable for an unlimited fine for any of the Individual Offences.
- **organisations:** unlimited fines for any of the offences.

Fines for commercial organisations are likely to be substantial. Fines of over US\$100 million for similar offences in the United States would be a suitable benchmark.

A commercial organisation which is the subject of a regulatory investigation will typically incur significant financial and management time costs. If an independent monitor is appointed, this too can have substantial cost implications. Furthermore, a commercial organisation may have the proceeds of its criminal conduct confiscated under the UK Proceeds of Crime Act 2002.

A commercial organisation convicted of the Corporate Offence won't be automatically barred from participating in tenders for public contracts. But public authorities will have the discretion to exclude them. Public procurement laws elsewhere in the world may include similar restrictions.

Other potential consequences involve private claims from competitors, shareholders and other affected third parties who have incurred loss as a result of corrupt practices. Any asset that was obtained through bribery is also at risk of being lost because there is a general principle of international law, followed in most jurisdictions, that a contract, licence or award obtained through fraud or corruption is void or voidable.

The reputational damage, which could result from such criminal convictions, should also not be underestimated.

Senior officers can also be convicted alongside their corporate body.

A director is also likely to be **disqualified from holding a director position** in a company incorporated in the UK for up to 15 years.

Adequate procedures guidance

The Ministry of Justice has published guidance (on the link below) on what procedures commercial organisations can put in place to prevent their authorised persons from bribing, and thus take advantage of the defence to the Corporate Offence.

<http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf>

The guidance includes the following principles:

- risk assessment;
- proportionate procedures;
- top-level commitment;

- due diligence;
- communication (including training); and
- monitoring and reviewing.

What would carry risk of conviction for the Company and the Group?

The following is a brief overview of some of commercial activities and operations that may expose a corporate entity to particular risks of being involved in corruption and suggests how some of the risks may be avoided:

- **Corporate hospitality and gifts.** Some types of corporate hospitality, such as customer or supplier entertainment and the giving or receiving of gifts, might be seen as bribery, especially in dealings with foreign public officials. Lavish hospitality or gifts should be avoided; both the giving and receiving of them.
- **Facilitation payments.** These are payments demanded by officials (or others) simply to secure or expedite the performance of their normal duties (for example, granting a licence or allowing goods to cross a border). These are commonplace in some jurisdictions, but the making of such payments, regardless of how small, will be an offence under the Act, if they are not permitted by the written local law. We understand that the equivalent US legislation currently exempts such payments but the Act does not.
- **High risk countries.** If the Group operates in countries where corruption is perceived to be commonplace, particular care needs to be taken.
- **High risk transactions.** If the Group's business involves interactions with public officials, charities, or multi-party transactions, especially in high risk countries, care is needed.
- **High risk business partners.** The Group should be alert to, and perhaps investigate, whether any of its agents, intermediaries, joint venture partners, customers or suppliers has a reputation for corruption.

Is there a need for immediate action?

UK and international companies are reviewing their anti-corruption policies and procedures to ensure that they are sufficiently robust to prevent corruption and to mitigate the risk of committing an offence under the Act. Even if the Group already complies, or has policies and procedures designed to ensure it complies, with the anti-corruption laws of any other jurisdiction, the Act goes further than any of those regimes.

The following indicates the initial actions that the Group could take. These follow the Ministry of Justice's guidance for commercial organisations' procedures to prevent bribery, referred to above:

- conduct a comprehensive Group-wide risk assessment;
- conduct an immediate review of existing anti-corruption policies and procedures, especially taking into consideration corporate hospitality, donations and facilitation payments;
- prepare and publish a global code of conduct across the Group which addresses, amongst other things, a clear policy on corporate hospitality, donations and facilitation payments and which is continually monitored and reviewed;
- conduct due diligence on all "**associated persons**", especially third parties in high risk jurisdictions or sectors. In particular, perform tailored, ethical and anti-corruption due diligence on any proposed mergers and acquisitions, joint ventures or consortiums or when appointing agents, contractors and other third party service providers;
- appoint a compliance officer either at Company board level or reporting directly to the board or the Company's CEO;
- adopt a robust anti-corruption stance at the highest level, including making a public statement of the Group's zero tolerance to corruption both internally and externally;
- institute disciplinary measures and remedial action to deal with unethical behaviour;
- publish and make accessible, internally and externally, the Group's anti-corruption statement and code of conduct; and
- provide adequate budget for the implementation of the revised policy (for example, extensive training and monitoring of staff in key risk areas and establishing disciplinary mechanisms).

For further information on this subject please contact:

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