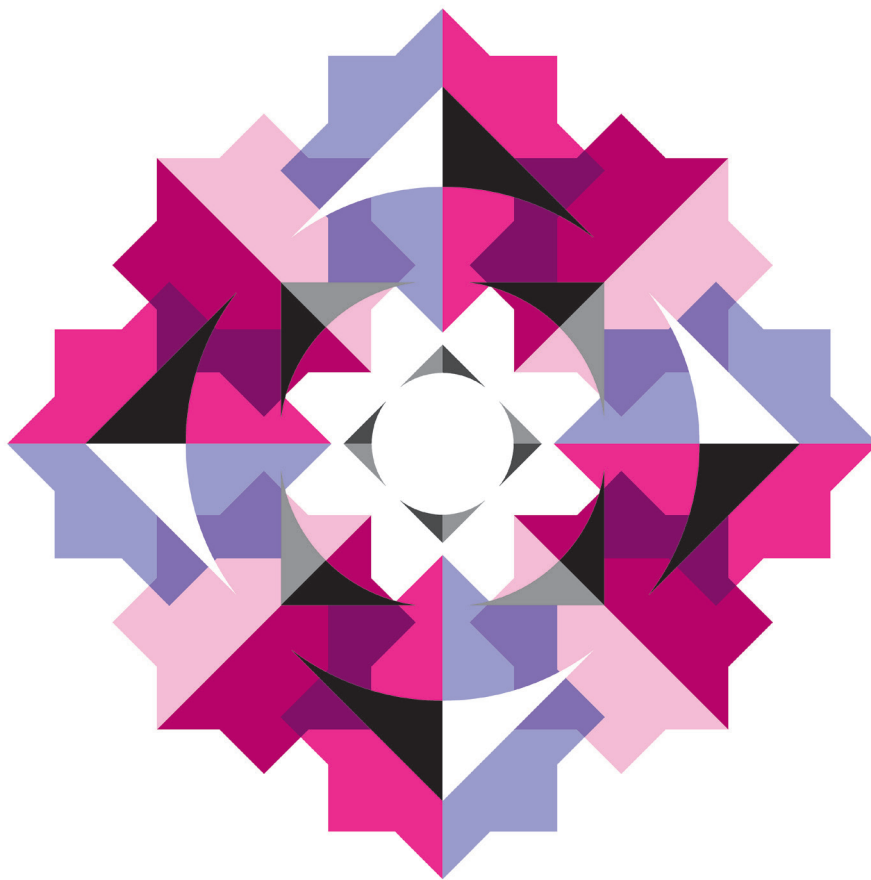


The Bribery Act 2010 and its impact on the advertising industry



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Introduction

It has been called the 'toughest bribery legislation in the world' and has been rumoured to spell the end for corporate hospitality, media rebates and the client lunch, but what are the real implications of the Bribery Act 2010 for the advertising industry?

In force from 1st July 2011, the Bribery Act consolidated and modernised the existing offences of offering and accepting bribes, and created two new offences: bribing a foreign public official, and the failure of a commercial organisation to prevent bribery. We will look at each of the four offences in turn and some potential scenarios relevant to media and creative agencies.

Bribing another person (the 'section 1 offence')

If someone offers, promises or gives financial or other advantage to another person, intending it to secure 'improper performance' of a 'relevant function or activity', then they will have committed an offence.

Understanding what is meant by 'improper performance of a relevant function or activity' is clearly crucial.

- The types of function or activity that are relevant under the Act (i.e. those which might be 'improperly performed') are broader than in the past: they now include not only the functions of public authorities, but also transactions between private parties.
- The Act defines 'improper performance' as the breach of any expectation of trust, impartiality or good faith that applies to the relevant function or activity. The courts will weigh this up by reference to what a reasonable person in the UK would expect in relation to the relevant function or activity (so it is no defence to point to the local customs of foreign countries unless you can show that its written law sanctions the payment).
- The reach of the new Act is global. Not only do the sections 1, 2 and 6 offences apply if the act takes place in the UK, but they also apply to British citizens, individuals ordinarily resident in the UK and bodies that are incorporated in the UK, wherever the act of bribery takes place.

Being bribed (the 'section 2 offence')

Under the Act it is unlawful to accept a bribe, and there are various ways in which someone is classified as having done so. Most obviously, if someone requests, agrees to receive or accepts a bribe with the intention of improper performance, they will have committed the offence.

Bribing a foreign public official (the 'section 6 offence')

The Act creates a separate offence of bribing a foreign public official. Unlike the section 1 and 2 offences, there is no element of 'improper performance' that has to be demonstrated, but there is instead the requirement to show an intention of influencing the official to obtain business advantage.

Failure of a commercial organisation to prevent bribery (the 'section 7 offence')

This new offence represents a significant addition to the pre-existing law, placing much more of an onus on businesses to take pro-active steps to prevent bribery taking place on behalf of their organisation. The offence is committed by a commercial organisation when a 'person associated' with it bribes another person intending to gain advantage for the organisation's business. The associated person need not have any connection with the UK and the act of bribery may have been performed anywhere in the world, and so it may not be possible to convict the associated person himself/itself of an offence.

As the liability of the commercial organisation depends upon bribery committed by 'persons associated' with it, the question of who counts as 'associated persons' is crucial. The Act defines them as persons who 'perform services for or on behalf of' the organisation, including both individuals and companies. Employees are presumed to be associated persons, and then (depending upon the particular circumstances) a whole range of agents, subsidiaries, contractors and suppliers may also count as 'associated' depending upon whether they do actually 'perform services' for or on behalf of the organisation.

The types of organisation that the section 7 offence applies to are (a) companies or partnerships incorporated or formed in the UK and carrying on business anywhere in the world, and (b) companies or partnerships wherever incorporated or formed that carry on business, or part of a business, in the UK.



The 'adequate procedures' defence

The offence of failing to prevent bribery is one of 'strict liability' (i.e. the prosecution does not need to prove any intention to commit it), but crucially there is a defence available if the organisation can show that it had in place 'adequate procedures' designed to prevent associated persons from committing bribery offences on its behalf.

The Ministry of Justice has published statutory Guidance to help explain what kind of procedures it regards as likely to be 'adequate' and thus to protect an organisation from liability under section 7. Ultimately it will be for the courts to decide on the correct interpretation of the Act, however, and so the Guidance does not have the force of law. It is principles-based and non-prescriptive, leaving the onus upon each organisation to work out its own 'risk-based' approach with 'procedures proportionate to the risks'. These should be based upon six key principles:

- Risk assessment
- Proportionate procedures
- Top level commitment
- Due diligence
- Communication (including training)
- Monitoring and reviewing.

Liability and Penalties

For the section 1, 2 and 6 offences, the maximum penalties are unlimited fines and/or imprisonment for up to 10 years, whilst the section 7 offence (failure of a commercial organisation to prevent bribery) is punishable by an unlimited fine.

The first three offences are most obviously aimed at individuals, but corporate bodies can also be guilty of them if perpetrated by a person who is the 'directing mind or will of the organisation'. If an offence under sections 1, 2 or 6 is committed by a body corporate 'with the consent or connivance' of a senior officer (or someone purporting to be such) then that officer/person is also guilty of the offence.

There is also the possibility that a commercial organisation found to have committed a bribery offence would face debarment from bidding for future public contracts as a result of the EU Public Procurement Regulation 2004/18/EC.

The Bribery Act in practice

Although the drafting of the Act is deliberately broad and the penalties severe, 'prosecutorial discretion' is likely to temper the draconian black letter of the law. Even in cases where the authorities think that they have sufficient evidence to prove an offence beyond reasonable doubt, those that are felt to be minor or one-off, or that are self-reported by a company, may not be 'in the public interest' to be prosecuted. Joint guidance from the Director of the Serious Fraud Office (which has primary responsibility for enforcing the Act) and the Director of Public Prosecutions confirms that the Act 'is not intended to penalise ethically run companies that encounter an isolated incident of bribery.'

Subject to what the courts may say, the Guidance from the Ministry of Justice has also given greater comfort on issues such as corporate hospitality (provided it is not too lavish), and liability for offences by subsidiaries or joint venture partners. So, despite its harsh appearance, the Act may not cause the massive upheaval in business practices – such as those between agencies and clients in the advertising industry – that some doom-mongers have been predicting.

Case study: corporate hospitality

Corporate hospitality is an important feature of the industry in that it allows agencies to showcase their services, and allows clients and agencies to build solid working relationships. Calls to write a specific exemption for corporate hospitality into the Act were rejected, since policy-makers maintain that it is an area open to significant abuse. However, the Ministry of Justice Guidance (supported by similar comments from the SFO) makes it clear that there is no intention to criminalise reasonable and proportionate 'bona fide hospitality and promotional or other business expenditure which seeks to improve the image of a commercial organisation, better to present

products or services, or establish cordial relations.' As Kenneth Clarke says in his Foreword: 'no one wants to stop firms getting to know their clients by taking them to events like Wimbledon or the Grand Prix.'

Specific guidance as to what is 'reasonable and proportionate' is still slim, depending in part upon the standards and norms in the relevant sector. If the hospitality offered is very lavish compared with industry norms then it is more likely to be seen as intended to influence the recipient in an illegitimate manner. Likewise the timing of generous hospitality may also be relevant, for example if it seems to be aiming to influence a particular procurement decision rather than to foster a more general good working relationship. Transparency and proper record-keeping will also be important.

Agencies should adopt a common sense approach, thinking twice before any dramatic increases in client entertainment budgets, and mindful that the timing of gifts, meals and event tickets around pitches and reviews would be unwise. The person at a brand-owning organisation charged with deciding the result of a pitch process should transparently do so in the best interests of his employer, and not as a result of lavish corporate hospitality.

Case study: TV production

Any procurement process presents an area of risk for fraudulent or corrupt activity. In creative agencies, the sub-contracting of production companies and the myriad of additional suppliers for TV production is an example of such a risk area. Informal appointment processes, and shooting abroad makes it difficult for companies to know what is going on by 'associated persons' acting on their behalf. Since it is not practical to have total knowledge and control of every detail, it will be important for agencies to make sure they instil 'adequate procedures' against bribery in order to protect themselves from committing the section 7 offence. Such measures, amongst others, might be the inclusion of anti-bribery clauses in all contracts and an insistence that sub-contractors, freelancers and other associated persons do the same.

Case study: media rebates

There has been some comment that the common practice of discounts and rebates could put media owners and agencies at risk. In fact, where media owners and media agencies enter into contracts as 'principals' (rather than agents), there is no need for the media agency to disclose or share any rebates they have obtained. On the other hand, if the media agency is acting for their advertiser client as an 'agent' (as opposed to a principal), they should disclose rebates and not make secret profits. Should they fail to do so, there may be a case of fraud – as there would be under current law.

Media rebates and other inducements or payments are only likely to become an offence under the Bribery Act if an intention to induce improper performance is found. An example of this might be if a media owner were to offer a rebate to a media agency with the intention that the media agency did not enter into negotiations with other media owners on the client's behalf. Nevertheless, it would seem that the vast majority of media rebates which are documented and are transparent will go unaffected by the new law.

Conclusion

Although in force from 1st July 2011, there have as yet been almost no prosecutions under the Bribery Act, and certainly none with direct bearing on the advertising sector. On the other hand, a new Director of the Serious Fraud Office appointed in 2012 has issued statements that might indicate a stricter approach going forward. Therefore, for the time being the Bribery Act remains untested and, in the absence of clearer guidance, a rather uncertain law. In theory it does create many situations in which agencies could find themselves at risk, though it is likely that, in practice, prosecutions will come down to a question of degree and circumstance. However,

given the potential penalties, not to mention the adverse PR an accusation of bribery could cause, agencies would be wise to give their internal procedures and relationships with third parties a thorough review so as to steer clear of difficulty (perhaps over a moderately priced meal).

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