

The Bribery Act 2010 - an employment law perspective



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Introduction

The Bribery Act 2010, which came into force on 1 July 2011, is responsible for sweeping away antiquated British bribery laws to create a regime of criminal offences described by the Director of the Serious Fraud Office as “the toughest bribery legislation in the world”.

This Inbrief provides a summary of the offences and penalties, the principles involved in assessing risk and practical guidance on implementing and reviewing anti-bribery procedures.

Bribery offences

There are four key criminal offences under the Act:

Bribing another person

A person is guilty of a crime if he or she “offers, promises or gives a financial or other advantage to another person” intending that advantage to “induce the person to perform improperly a relevant function or activity” or to reward a person for such behaviour.

A function or activity is “performed improperly” if it is performed in any way other than a reasonable person in the UK would expect it to be performed. An important point to note here is that it is the UK standard by which the expectation of performance is judged. This means that if the performance of the function or activity takes place outside the UK, then any local custom or practice must be disregarded unless it is permitted by the written law applicable to that country.

Following business concerns that corporate hospitality would fall foul of this offence, Government guidance on the Act provides a helpful example: an organisation’s invitation to foreign clients to attend a Six Nations match at Twickenham as part of a public relations exercise designed to cement good relations or enhance knowledge in the organisation’s field, is unlikely to be caught as there is unlikely to be evidence of an intention to induce improper performance of a relevant function.

Being bribed

A person is guilty of this offence if he or she requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly.

Bribery of a foreign public official

This is where a person offers, promises or gives a financial or other advantage to a foreign public official with the intention of influencing the official in the performance of his or her official functions. The person must intend to obtain or retain business or an advantage in the conduct of business by doing so. Importantly, there will be no offence where the official is permitted or required by the applicable local

written law to be influenced by the advantage.

A foreign public official is one who holds a legislative, administrative or judicial position of any kind or a country or territory outside the UK. It can also include those who perform public functions for foreign governments or public agencies in foreign countries, and officials or agents of public international organisations such as the United Nations.

Again, Government guidance seeks to reassure business by stating that it is not the intention of the Act to prohibit reasonable and proportionate hospitality and promotional or other similar business expenditure intended for these purposes as it is recognised that this is an established and important part of doing business. It made clear, however, that there will be circumstances where such activity can amount to bribery.

Failure of commercial organisation to prevent bribery

The fourth and final offence is the strict liability offence of failure of a commercial organisation to prevent bribery. A commercial organisation will be liable to prosecution if a person “associated with” it bribes another person, intending to obtain or retain business or an advantage in the conduct of business for that organisation.

The definition of “commercial organisation” is wide. A body or partnership that is incorporated or formed in the UK, irrespective of where it carries on business, will be caught, as well as an incorporated body or partnership which carries on a business or part of a business in the UK (irrespective of where it was incorporated or formed). It does not matter whether the business is charitable, educational, public or private: if it is incorporated or a partnership and engages in commercial activities it will be caught.

Similarly, the definition of “associated” persons is very broad. It will include a person (whether an individual or an incorporated or unincorporated body) who “performs services” for or on behalf of a commercial organisation. It will cover employees, agents and subsidiaries and even suppliers who are providing services for the organisation (except suppliers who are simply acting as the resellers of goods). Joint

ventures could also be caught if the joint venture is performing services for the commercial organisation.

However, there will be a full defence for the organisation if it can show it had “adequate procedures” in place to prevent the persons associated with it from bribing - see below.

Penalties

Individuals or organisations convicted of the offences of bribing another, being bribed or bribing a foreign public official can be liable on conviction to unlimited fines, and individuals can receive a jail sentence of up to 10 years. An organisation can be convicted for failure to prevent bribery with the penalty being an unlimited fine.

It is made clear in the guidance however, that no one can be prosecuted in England and Wales unless one of the two most senior prosecutors (the Director of Public Prosecutions or the Director of the Serious Fraud Office) is personally satisfied that conviction is more likely than not and that prosecution is in the public interest. Factors taken into account will include whether the organisation reports an incident of bribery using its procedures, and the organisation’s willingness to make full disclosure and co-operate with an investigation under the Act.

“Adequate procedures”

As mentioned above, an organisation will not commit the offence of failing to prevent bribery if it can show that it had adequate procedures in place. Government guidance makes it clear that adequacy of procedures will depend on the risks of bribery faced by the organisation. In practice, this means that a risk assessment should be undertaken which takes into account a number of factors which will affect risk, including the size of the organisation, the countries in which the organisation carries out business, the business sector and the value and duration of the work.

There are six core principles which should be considered in assessing whether procedures are adequate or whether further measures need to be taken. These are as follows:

1. Proportionality of procedures

Bribery prevention procedures should be

proportionate to the bribery risks faced. For example, if the organisation operates in overseas markets where fraud is perceived to be more common place, then more may need to be done. The procedures should also be clear, practical, accessible, effectively implemented and enforced.

The Government guidance sets out a non exhaustive list of the topics that bribery procedures may cover which includes: involvement of top level management in the commitment to prevent bribery; risk assessment and due diligence procedures; provision on promotional and hospitality expenditure; governance of business relationships; financial and commercial controls; transparency of transactions; procedures for the reporting of bribery; sanctions and disciplinary procedures for breaching anti-corruption rules; training and communication of policies and procedures; and ongoing monitoring, evaluation and review.

2. Top-level commitment

The senior level management of an organisation should be committed to a culture of integrity where bribery is unacceptable. A formal internal and external statement appropriately communicated by senior management can be effective in establishing an anti-bribery culture, and the statement should be drawn to people’s attention on a periodic basis and be generally available on an organisation’s intranet and internet site. Such statements could include a commitment to carry out business fairly, honestly and openly; zero tolerance towards bribery; clear consequences for breaching the policy; explaining the business benefits of rejecting bribery, explaining how prevention procedures are being implemented and identifying those involved in development and implementation of procedures.

The guidance suggests that top-level managers, who may themselves benefit from training on this, may want to be personally involved in developing and implementing anti-corruption procedures and making critical decisions.

3. Risk assessment

An organisation’s exposure to risk should be assessed in terms of external and internal risks. External risks can generally be categorised into five groups:

- Country risk: perceived high levels of corruption and an absence of implemented bribery legislation in the countries in which the organisation does business
- Sectoral risk: examples of high risk sectors include the extractive industries (mining) and large scale infrastructure sectors
- Transaction risks: there may be higher risks in making charitable or political contributions, in obtaining licences and permits, or in transactions relating to public procurement
- Business opportunity risk: this may involve projects not apparently undertaken at market prices or which do not have a clearly legitimate objective
- Business partnership risk: for example using intermediaries in transactions with foreign public officials, consortia or joint venture partners, or where a politically exposed person or public officials are involved

The internal risk assessment should examine the extent to which internal structures or procedures add to the level of risk. This will include assessing training; whether there is a culture of reward for risk taking; and the clarity of policies, financial controls and an anti-bribery message from top-level management.

4. Due diligence

Appropriate questions and checks should be undertaken before engaging others to represent the organisation in business dealings. The extent of questions and checks should be assessed on the risk assessment principles above and will apply not just to taking on employees, but also engaging other “associated persons”.

5. Communication (including training)

Policies and procedures, setting out the basis on which the organisation does business, should be communicated to staff and others who will be providing services. which is proportionate to risk) could be mandatory for employees as part of an induction process, but consideration should also be given to tailored training for those involved in higher risk functions, for example purchasing, contracting, distribution and marketing and those working in high risk countries.

6. Monitoring and review

As risks may change over time, there should be regular monitoring of the effectiveness of an organisation's anti-bribery procedures, and a review of procedures when any particular change to bribery risks occurs, for example, when the business enters new markets. Staff surveys, questionnaires and feedback from training can also provide a source of information on the effectiveness of procedures.

Facilitation Payments

Before the Government guidance was published, there had been some debate as to whether facilitation payments (which are payments to induce officials to perform routine functions they are otherwise obligated to perform) were caught by the Act. It is now clearly stated in the guidance that facilitation payments are bribes, although it is also made clear that in cases involving hospitality, promotional expenditure or facilitation payments, prosecutors will consider very carefully before deciding whether to prosecute. The guidance recognises that this prosecutorial discretion provides a degree of flexibility which is helpful to ensure the just and fair operation of the Act. It is also made clear that payments for legally required administrative fees or fast-track services do not constitute facilitation payments.

Practical guidance

The Government's guidance makes it clear that whilst the Act is uncompromising in its application, the aim is to make life difficult for those intent on corruption not "unduly burdening the vast majority of decent, law-abiding firms". As a result, combating the risk of bribery should be about common sense and not burdensome procedures, hence the

emphasis on proportionality. If having assessed the risk, there is very little risk of bribery being committed by the organisation, then it may not feel the need for any additional procedures to prevent bribery.

Practical steps which an organisation may wish to take in parallel to the risk assessment could include:

- Review, or consider implementing, a code of ethics to ensure that the anti-bribery message is clear
- Review related policies such as conflict of interest, gifts and entertainment policies. Consider inserting specific maximum limits on expenditure and a prohibition on entertainment at certain times or circumstances (e.g. when a pitch is underway). Consider applying these policies to contractors
- Check that disciplinary rules cover bribery and that the consequences of breach are clear
- Review employment contracts. Consider inserting an express obligation to disclose wrongdoing and, depending on the potential risk, introducing an annual self-certification process
- Review the whistleblowing policy. Consider whether this is adequate for the risks faced, and whether it should be extended to those who are not just employees but who provide services on behalf of the organisation
- Review remuneration and commission arrangements to ensure that they do not pose a risk or encourage risk taking which may incentivise bribery. Consider referring to anti-corruption statements or an anti-

bribery policy

- Review and introduce training where appropriate, which should be supported by senior management. Ensure that guidance is available for those who may face circumstances which are prohibited by the Act, for example facilitation payments
- Issue a top level statement both internally and on the website, confirming the commitment of senior management to anti-bribery measures

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