



The UK Bribery Act 2010: implications outside the UK

BRIEFING PAPER



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1 Introduction

The purpose of this paper is to highlight the implications of the UK Bribery Act 2010 (the Act) when working outside the UK and to offer practical steps to mitigate the risk of falling foul of the Act.

Legal terms, from the Act, referred to in the text are placed in inverted commas.

2 Corrupt business practice and its implications for the economy

Bribery has a detrimental effect on business and the economy. It leads to contracts being awarded on the basis of the bribe paid, rather than the merits of the bid. Legitimate and ethical business partners are unable to compete fairly, resulting in limited and damaged commerce.

Corruption is particularly damaging when it involves public officials but is also harmful when being performed outside of the public sector. The wider casualties of bribery are equity, the principles of free and fair competition and meritocracy. Bribes, even small payments, are socially damaging as they promote a cultural acceptance of bribery in a way that tends to lead to the spread of corruption, undermining legitimate governance and the rule of law.

Nefarious business practices not only stifle a country's internal national economic development but also significantly curtail sustainable and beneficial foreign direct investment opportunities. Countries that lack transparency and clarity of regulations pertaining to business are generally less attractive for legitimate foreign investors.

In some cases the blame of perpetuating and intensifying corrupt business practices in emerging and developing economies has been apportioned to international companies from developed economies. There is a perception held by some that these companies have increased and embedded bribery in some jurisdictions by being in a position to pay the highest bribes to secure lucrative contracts. This was one factor that led the UK to legislate extraterritorially on the issue of bribery and to hold both their own citizens and their international companies accountable for both national and overseas business practices.

3 An overview of the UK Act and its implications outside the UK

Implications of the UK legislation on bribery

The existing UK legislation had dealt with bribery and corruption within the UK, but until the enactment of the UK Bribery Act 2010 (the Act) UK citizens and companies were not held accountable to similar high standards when conducting themselves outside the UK, due in part to the difficulties faced by the regulators in securing a conviction. In particular UK courts had been reluctant to find companies liable under previous bribery legislation unless prosecutors could prove that the directing mind of a company had been involved in the commission of the offence.

The Act is purposely broad in scope with the main implication being that now UK citizens and UK companies are caught within this law even when doing business or other activities outside the UK. For UK citizens the Act covers both their behaviour in the corporate sphere and also their private non-corporate behaviour. Importantly, the UK and some international companies (where they carry out part of their business in the UK) are responsible for the actions taken by those that are acting on their behalf including, but not limited to, employees, agents or subsidiaries. As a result, non-UK citizens who are 'associated persons' of UK companies operating outside of the UK are also caught by the Act in that their actions can result in a criminal offence being committed by their company and its UK directors.

Penalties for persons found guilty of the offence of bribery include imprisonment and substantial fines. Where a 'commercial organisation' is in breach of the law both the company and its directors could be subject to criminal penalties and substantial fines. Many countries cooperate in law enforcement activities. As one example, the United Arab Emirates and UK have signed a Judicial Cooperation Treaty and an Extradition Treaty which are routinely used when individuals are charged with offences and require repatriation to be tried under their national law. Other examples include the European Arrest Warrant under which UK courts are compelled to hand over UK accused executives to other EU countries and the US Extradition Act which governs the basis of jurisdiction of the US courts over UK executives.

The main defence against the failure of a 'commercial organisation' within the scope of the UK Act to prevent bribery is that there are 'adequate procedures' in place to minimise the risk of bribery. The UK Ministry of Justice (MoJ) has provided guidance on what these procedures might be (see below). Particular risk areas, in many jurisdictions, are agency arrangements and facilitation payments.

Professionals working outside the UK also need to consider the legislation of the country in which they are working. In some jurisdictions, there may be elements of local law that are more rigorous than the Act. In addition, local written law may provide a defence to behaviour that would otherwise be an offence under the UK legislation.

4 What does the UK Bribery Act 2010 cover?

The UK Bribery Act 2010 came into force on 1 July 2011. It incorporates the requirements of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, although in some areas it goes beyond those requirements.

The Act covers three broad offence categories.

1 Offences of bribing another person and being bribed

This core offence is widely defined and covers all bribes, given or received in a personal capacity as well as those made in a corporate setting for a business advantage. This means the offences can be committed either by natural persons or by a company.

The core offences relate to the giving or receipt of bribes to 'improperly perform' a function which is expected to be carried out:

- in good faith;
- impartially; or
- where the person involved is in a position of trust.

'Improperly perform' is defined in terms of the expectations of persons performing those functions if they were in the UK, even if the functions are carried out abroad. As a result UK citizens will be held to UK standards of behaviour, wherever they are located, unless local 'written law' provides for different standards.

The Act refers to local written law to allow for variations in what is accepted practice in different jurisdictions. This is in line with the principles of transparency, that the Act is upholding, as it ensures clarity and a level playing field for all.

The law applies whenever:

- any part of the offence (including but not limited to the improper performance) takes place in the UK; or
- all parts of the offence take place outside the UK, but the offender is:
 - a UK citizen, or overseas citizen;
 - an individual ordinarily resident in the UK; or
 - a UK incorporated body.

These offences go beyond OECD convention requirements in that:

- there is no exemption for small 'facilitation payments', defined as a small bribe paid to facilitate routine government action;
- bribe receivers are covered as well as bribe payers. Action can also be taken against foreign nationals being paid bribes in the UK;
- all bribes are included, not just bribes to obtain or retain business or a business advantage; and
- bribes to private persons are covered, not just public officials.

2 Bribery of a foreign official

This specific offence covers any financial advantage paid, offered or promised where the intention is to:

- influence foreign officials, in performance of their 'functions'; or
- obtain or retain business or a business advantage.

No actual improper performance is required for the offence to have been committed.

'Functions' is defined in terms of what would be expected of that function if it were being performed in the UK, unless the applicable local written law differs. This again allows for legitimate and legal local variations to take place.

3 Failure of commercial organisations to prevent bribery

'Commercial organisations' commit an offence if they themselves or any person associated with them bribes another person intending to obtain or retain business or a business advantage for them. Senior officials that are found to be consenting or conniving to any of the bribery offences also commit an offence.

This offence can be committed not just by UK companies, but by any non-UK commercial organisation which carries on a business, or part of a business, in any part of the UK. This would cover any internationally active companies conducting some part of their business in the UK.

'Commercial organisations' are widely defined to include any body or partnership incorporated or formed in the UK or any body or partnership which carries on a business in the UK irrespective of the place of incorporation or formation.

In addition, of particular relevance in an international context, the law extends to the offence being committed by any 'associated persons' of a UK company even if the 'associated person' is operating outside of the UK.

'Associated persons' include anyone who performs services on behalf of the organisation which may specifically include employees, agents or subsidiaries, but may also extend to contractors, suppliers or joint ventures.

4 Culpability of senior management

Under section 14 of the Act, if an offence has been proved to be committed with the consent or the connivance of senior management, then the latter are also guilty of the offence and can be charged as such.

5 Penalties and punishments

The Act imposes unlimited fines on companies and individuals. The latter can also face a maximum of 10 years in prison if found to be in breach of the Act.

There are also other potential consequences for a company found to be in breach of the legislation. These include, but are not limited to:

- confiscation orders under the Proceeds of Crime Act;
- indefinite debarment under the Public Contract Regulations for tendering for public sector contracts;
- debarment from tendering for new contracts funded by an international development bank;
- the possibility of incurring tax penalties and interest if bribes have been entered into a company's books and records as business expenses and deducted to calculate taxable profits;
- possible penalties under the Companies Act for failure to keep proper records;
- incurring of significant legal costs in defending companies and individuals; and
- reputational damage.

5 Protecting yourself in a corporate setting – adequate procedures

The Act creates a new offence which can be committed by commercial organisations which fail to prevent persons associated with them from committing bribery on their behalf. However there is a full defence for an organisation if it can prove that, despite a particular case of bribery, it nevertheless had 'adequate procedures' in place to prevent persons associated with it from bribing.

The MoJ advises that procedures put in place by a company to prevent bribery should be informed by six principles to enable a common sense risk-based approach to managing bribery risk. The six principles are set out below.

1 Risk assessment

Periodic bribery risk assessments should be undertaken that are clearly documented and take into account the nature of the organisation's bribery risk profile. This will depend, for example, on the geographical location of the organisation, the sector or markets in which it operates and its business model. The risk assessment must consider not only employees but all 'associated persons'.

Steps to take include:

- Document bribery risk assessment and procedures.
- Introduce specific procedures to prevent and detect bribery in high-risk areas.

2 Proportionate procedures

The application of the MoJ guidance is not intended to be overly burdensome and therefore procedures should be proportionate to the risk of bribery within the organisation, taking into account, for example, the size, business sector, geography, nature and complexity of the organisation. Often it will be simple and practical procedures that require effective implementation and enforcement for bribery risk to be mitigated.

Steps to take include:

- Develop a corporate anti-bribery and corruption policy based on the risk assessment referred to above.
- Prepare ancillary policies and procedures to cover particular risk areas eg, corporate gifts and entertainment, charitable giving.
- Establish bribery incident management procedures so that there is a process of investigation and escalation in the event of a suspected incident of bribery.

3 Top-level commitment

This requires that there is a demonstrable commitment to anti-bribery procedures by the Board and senior management, and that there is promotion of a culture within the organisation in which bribery is never acceptable.

Steps to take include:

- Develop a clear statement of your organisation's anti-bribery position.
- Involve senior management in anti-bribery procedures (steering committees, decision making and monitoring).
- Demonstrate the anti-bribery message in internal and external communication.

4 Due diligence

Due diligence reviews, applying a proportionate risk-based approach, should be undertaken periodically. In particular, there should be a focus on 'associated persons', for example, those business partners who perform or will perform services on behalf of the organisation, including agents, distributors and high-risk vendors. This is especially important as an organisation may be liable if those acting on the organisation's behalf commit acts of bribery. Interestingly, there has been an increased focus on the actions of those acting on behalf of organisations by the US regulators enforcing the US Foreign Corrupt Practices Act ('FCPA') in recent years and this is reflected in the MoJ guidance for the Act. In addition, it is appropriate to consider the practices of joint venture partners and mergers and acquisitions targets, since entrenched organisational practices are very often difficult to change.

Steps to take include:

- Assess who are your business partners and the associated risk.
- Determine the adequacy of and documentation of due diligence of business partners.
- Ensure that the organisation's business partners are aware of the importance of complying with the Act.
- Incorporate contractual clauses in contracts with business partners which require adherence to anti-bribery practices.

5 Communication (including training)

Periodic communication and training ensures that anti-bribery policies and procedures are properly communicated and embedded throughout the organisation. This can be promoted by internal and external communications (with 'associated persons') and training focused on high risk areas or functions of the business.

Steps to take include:

- Develop whistleblowing policies and helpdesks.
- Offer risk-based management and staff training.
- Maintain communications with 'associated persons' on anti-bribery policies.
- Include appropriate terms in contracts of employment.

6 Monitoring and review

There should be due regard for the governance framework, monitoring, reporting and review of anti-bribery procedures.

Steps to take include:

- Ensure there is demonstrable senior management oversight.
- Link reporting mechanisms and Key Performance Indicators (KPIs) to anti-bribery procedures.
- Incorporate anti-bribery processes, including risk assessment, into the independent review processes of internal audit/risk management.

7 Bribery allegations

As well as considering the six principles referred to above, directors and managers should also consider how allegations of bribery can arise and by whom. Some are more obvious than others but include:

- internal (employee) whistleblowers;
- external (supplier/customer) whistleblowers;
- internal auditors;
- external auditors;
- investigative journalist;
- liquidator of a counter-party;
- vindictive action by a co-conspirator;
- complaint by a (disgruntled) competitor;
- National Crime Agency (NCA) report; and
- tip off from another regulatory authority.

6 Particular bribery risk areas when operating outside the UK

1 Associated persons

The corporate offence of failing to prevent bribery can be committed by the company itself or a person associated with the company. 'Associated persons' defined in the Act include agency arrangements which are common practice in many jurisdictions. In some it is routine practice to appoint registered or non-registered agents for various matters relating to obtaining trade licenses, office premises and employee work visas. These agents may be individuals or companies who offer these and related services.

There is clearly nothing illegal about using agents and their involvement can be a legal requirement of conducting business in some jurisdictions. However, companies caught by the Act need to be careful that both their dealings with the agents and the activities of the agents comply with the Act.

'Associated persons' also includes subsidiaries and employees, not just agents. The use of intermediaries may also indicate an increased risk of bribery. Factors to be aware of include:

- Intermediaries are recommended or required by the end customer when none is strictly necessary.
- A written contract is absent or informal.
- The place of business cannot be easily corroborated.
- The client is operating through a new company or one that has been previously dormant.
- The nature and size of the intermediary is inconsistent with the services to be rendered.
- Lack of background checks or supporting documentation.
- Intermediary interaction is sporadic or for a single purpose.
- There are multiple distributors with related parties.
- There is evidence of unusual success in securing public bids or services.

Practical measures include:

- Meet your agents, preferably in their offices, understand their business and carry out a due diligence report;
- Enter into a written formal agreement to detail the arrangement, including remuneration;
- Make clear reference to the legal basis (including compliance with the Bribery Act) in your formal agreement and ensure that the agent understands their obligations and agrees to these conditions;
- Share your own corporate training on anti-corruption and bribery with your agents and require attendance as a contract term, unless proven understanding is available in other ways; and
- Negotiate the right to conduct an audit of the agent's books and records insofar as they relate to transactions carried out by the agent for the company.

These measures will help to provide a stronger defence that 'adequate procedures' were in place if an offence is subsequently committed by the agent or other associated person.

2 Facilitation payments

'Facilitation payments' are described in the guidance to the Act as a small bribe paid to facilitate or speed up routine government action. These are illegal and could trigger an offence. The Act provides no exemption on the amount of the facilitation payment. However, any payment made that is required or permitted and written in local law is outside these provisions and does not count as a bribe.

Payments are often made when accessing various services at government departments. Where these fees are codified in the local law they are legal payments under the UK Act and would not be classified as facilitation payments.

In certain jurisdictions there may be a need to make a payment to protect life, limb or liberty. The Act accepts this case of duress as a legitimate defence for making payment though care should be taken to ensure that 'duress' is not invited, as a technique to disguise actual bribery. Where such payment is made the organisation should consider subsequently reporting the matter to the British Embassy or other relevant local regulatory authorities. This defence does not extend to making payments to ensure the protection of goods or business.

The US Foreign Corrupt Practices Act does not, however, classify facilitation payments as criminal. Nonetheless UK individuals or companies working in the US or for US companies or as part of a US group must still adhere to the principles of the UK Act. This will also be the case for UK individuals or companies working in any other jurisdiction that similarly does not classify facilitation payments as criminal.

Practical measures include:

- Review the relevant government department guidance on whether a payment is legal. If a fee is not codified in law, avoid making the payment;
- Seek legal advice on fees to differentiate between properly payable fees and disguised requests for facilitation payments; and
- Where it is not clear that payments are legally mandated, measures should be taken to ensure transparency. Matters should be escalated within the organisation and to local regulatory bodies active in the local country.

3 Geography

- Certain jurisdictions are more vulnerable to bribery. Consulting the Transparency International Corruption Perceptions Index (bribe payers and bribe givers indices) or other equivalent indices will help to focus anti-bribery procedures on the higher risk jurisdictions.
- Transactions involving tax havens or opaque jurisdictions can signal increased risk.
- Unusual differences between a company's country of domicile or origin and the transit or destination for goods can also indicate increased risk.

4 Treasury and accounts payable

Risk areas include cash payments generally, and in particular; unsubstantiated expense reimbursements, irregular payment procedures, out-of-country payments, payments to tax havens or opaque jurisdictions, one-off payments and payments in unusual or round amounts.

Also:

- Invoices with vague descriptions or sequentially numbered invoices received.
- No VAT number where one might be expected.
- A vendor being found immediately before finalising the business agreement.

5 Sales and pricing

Various outliers can signal bribery risk:

- Outliers in relation to pricing and discounts relative to similar products or similar sales within the same geographical location.
- Outliers in net margins or net profitability (free goods, returns, write-offs, and commission rates).

Also:

- Periodic or one-time transactions with a sales intermediary.
- Red flags in the bidding process (eg, related-party bidders, late winning bids, unusual bidders present or usual bidders missing, unusual bid criteria).
- Risks are increased when there is a long and expensive sales process (eg, large and expensive projects).
- Commission payments netted against sales.

6 High-risk transactions

- Hospitality and promotional expenditure are recognised aspects of doing business. However, although the expenditure must be proportionate, it is the purpose behind the expenditure that can lead to companies or individuals falling foul of the Act. A review of corporate policies would be needed to prevent such expenditure being used as a cover for bribery.
- Other payments to be wary of include: charitable contributions, travel expenses and payments to travel agents, conferences and seminars, contributions to political groups or lobbies, payments related to customer education, reimbursements of third-party expenses.

Also:

- Payments in relation to the transportation of goods, freight forwarding and customs clearance.

Further information

The Bribery Act 2010 www.legislation.gov.uk/ukpga/2010/23/contents

The Bribery Act 2010: Guidance about commercial organisations preventing bribery,
London: Ministry of Justice Publications www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf

The Bribery Act 2010: Quick start guide, London: Ministry of Justice Publications www.gov.uk/government/uploads/system/uploads/attachment_data/file/181764/bribery-act-2010-quick-start-guide.pdf

Transparency International www.transparency.org/

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