



## 17. The UK Bribery Act 2010 and its implications for businesses

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There was a time in the not so distant past when the US Foreign Corrupt Practices Act was the only game in town for prosecuting those who bribed foreign government officials. Although many other countries had criminalised such conduct, many others had not — and most of the anti-bribery laws on the books of countries other than the US were not enforced.

One of the most striking developments of the past few years has been the extent to which countries other than the US have increased their investigation and prosecution of domestic and foreign bribery in both the public and private sectors. Although there was a debate in the UK more than a decade ago about the extent to which UK law prohibited bribery outside the UK, that debate was settled by the entry into force of the Anti-Terrorism, Crime and Security Act 2001 in that year. The patchwork of applicable laws and a number of other factors nevertheless discouraged prosecutions — in particular, prosecutions for bribery outside the UK.

The UK Bribery Act 2010, which came into force on July 1, 2011, is a powerful new tool for prosecuting bribery within and outside the UK in the public and private sectors. The Bribery Act reformed the criminal law of bribery in the UK, simplified the process for prosecuting bribery offences, and provided for increased penalties for those who are convicted of such offences. Although only one prosecution under the Bribery Act has been completed so far, it should be on the radar of all UK commercial organisations, as well as all commercial organisations that do business in the UK.

### Jurisdictional reach

The Bribery Act has broad extra-territorial effect. The offences of bribing another person, being

bribed and bribing a foreign public official can be committed by any individual or commercial organisation if an act or omission forming part of the offence takes place in the UK.

If that jurisdictional test is not satisfied, the Bribery Act nonetheless may be triggered if any of those involved in the bribery are found to have a 'close connection' to the UK. British citizens, British nationals, individuals 'ordinarily resident' in the UK, UK-incorporated companies and UK partnerships are all deemed to have that 'close connection' to the UK.

The offence of failing to prevent bribery, which applies only to commercial organisations, has an even broader jurisdictional reach. While that offence can obviously be committed by commercial organisations incorporated or formed in the UK, it also can be committed by commercial organisations incorporated or formed outside the UK if the commercial organisation is carrying on a business, or part of a business, in the UK.

The Adequate Procedures Guidance published by the Ministry of Justice recommends that non-UK companies and partnerships take a common-sense approach to deciding whether they are 'carrying on a business, or part of a business', in the UK. The guidance suggests that a non-UK organisation would need to have a demonstrable business presence in the UK to be covered by the Bribery Act.

There has been some debate about whether a listing on the London Stock Exchange would in itself mean that a company has a 'demonstrable business presence' in the UK. The Adequate Procedures Guidance states that the UK government does not expect a securities listing

alone to constitute carrying on a business or part of a business in the UK. But it notes that the "final arbiter, in any particular case, will be the [UK] courts", and Richard Alderman, the former director of the Serious Fraud Office (SFO), the UK's lead anti-bribery enforcement authority, declared that the SFO would not be impressed with "overly technical interpretations" of the Bribery Act.

The Adequate Procedures Guidance is not binding on either the SFO or the UK courts, and the SFO has discretion to decide which cases it wishes to prosecute. As the Adequate Procedures Guidance points out, the courts will be responsible for deciding whether a commercial organisation falls within the scope of the Bribery Act. For the time being, therefore, a prudent company with a listing on the London Stock Exchange would be well advised to assume that it is subject to the Bribery Act, at least until such time as the courts rule to the contrary.

### Offences

#### General offences

##### *Bribing another person*

A person commits an offence under Section 1 of the Bribery Act if he or she offers, promises or gives a financial or other advantage to another person and he or she:

- intends the advantage to induce a person to perform a relevant function or activity improperly;
- intends the advantage to reward a person for the improper performance of a relevant function or activity; or
- knows or believes that acceptance of the advantage would constitute improper performance of a relevant function or activity.

References in this chapter to 'persons' include both natural and legal persons.

In the first two circumstances, it does not matter whether the person to whom the advantage is offered, promised or given is the same as the person who is being induced to perform or rewarded for performing a relevant function or activity improperly. In each case, the advantage may also be offered, promised or given through a third party.

The term 'relevant function or activity' is defined broadly in Section 3 of the Bribery Act to include any function of a public nature, any activity connected with a business, any activity performed in the course of a person's employment, and any activity performed by or on behalf of a body of persons (whether corporate or incorporate).

The person performing the relevant function or activity must be expected to do so in good faith or impartially or be in a position of trust by virtue of performing it. A relevant function or activity may be performed outside the UK, however, and it is not necessary for it to have a connection to the UK.

A person will be deemed to have performed a relevant function or activity 'improperly' if he or she performed it in breach of a 'relevant expectation' — that is, an expectation that it would be performed in good faith or impartially — or if the person failed to perform the relevant function or activity, which in itself would constitute a breach of a relevant expectation.

The relevant expectation will be assessed by reference to what a reasonable person in the UK would expect in relation to the performance of the relevant function or activity. If performance of the function or activity is not subject to English, Scottish or Northern Irish law, local customs or practices must be disregarded unless they are expressly permitted or required by the written law of the country concerned.



### Being bribed

A person commits an offence under Section 2 of the Bribery Act if he requests, agrees to receive or accepts a financial or other advantage:

- intending as a consequence for a relevant function or activity to be performed improperly (whether or not by the same person who requested, agreed to receive or accepted the advantage);
- when the request, agreement or acceptance would constitute improper performance of a relevant function or activity; or
- as a reward for improper performance of a relevant function or activity.

It does not matter whether the person requests, agrees to receive or accepts the advantage directly or through a third party. Neither does it matter whether the advantage benefits the recipient (or intended recipient) or another person.

The terms 'relevant function or activity' and 'improper performance' have the same meaning with respect to Section 2 of the Bribery Act as they have with respect to Section 1. It does not matter whether the person who requests, agrees to receive or accepts an advantage knows or believes that the performance of a particular function or activity is improper.

### Bribery of foreign public officials

A person commits an offence under Section 6 of the Bribery Act if he bribes a foreign public official with the intention of:

- influencing the foreign public official in his or her capacity as a foreign public official; and
- obtaining or retaining business or an advantage in the conduct of business.

For purposes of this offence, a person bribes a foreign public official if:

- he or she, directly or through a third party, offers, promises or gives a financial or other advantage to a foreign public official or to another person at the request of, or with the assent or acquiescence of, the foreign public official; and
- the foreign public official is neither permitted nor required by the written law applicable to him or her to be influenced in his or her capacity as a foreign public official by the offer, promise or gift.

The term 'foreign public official' is defined broadly in the Bribery Act to include any individual who:

- holds a legislative, administrative or judicial position of any kind in a country or territory outside the UK;
- exercises a public function for or on behalf of a country or territory outside the UK, or for any public agency or public enterprise of that country or territory; or
- is an official or agent of a public international organisation — that is, an organisation whose members are countries or territories, governments or other public international organisations.

### Failure of commercial organisations to prevent bribery

A commercial organisation commits an offence under Section 7 of the Bribery Act if an associated person bribes another person with the intention of obtaining or retaining business or an advantage in the conduct of business for that commercial organisation. Although positioned in the Bribery Act as a separate offence, the SFO would not look at what a commercial organisation had done or not done to combat bribery unless it concluded that a bribe had been offered, promised or paid by or on behalf of the commercial organisation or for the organisation's benefit.

An 'associated person' is one who performs services for or on behalf of a commercial organisation that is subject to the Bribery Act. When assessing whether a person is performing services for or on behalf of a commercial organisation that is subject to the Bribery Act, prosecutors and the courts must take into account the circumstances informing the relationship between the person and the commercial organisation. They would consider, among other factors, the degree of control that the UK commercial organisation exercised over the non-UK person who actually offered, promised or paid the bribe.

It is a defence to Section 7 for a commercial organisation to prove that it had adequate procedures to prevent associated persons from bribing another person for or on behalf of the commercial organisation. The key aspects of the adequate procedures defence are summarised later in this chapter.

### Penalties

The maximum penalties for Bribery Act offences are severe. An individual convicted of bribing another person, being bribed or bribing a foreign public official is liable to imprisonment for a term not exceeding 10 years, an unlimited fine or both. Commercial organisations convicted of bribing another person, being bribed, bribing a foreign public official and failing to prevent bribery are liable to an unlimited fine.

### Implications for senior officers

If a commercial organisation commits an offence under Sections 1, 2 or 6 of the Bribery Act with the consent or connivance of a senior officer of the commercial organisation or a person purporting to act in such a capacity, that senior officer or person could face personal criminal liability. The term 'senior officer' is defined broadly to include a director, manager, secretary or similar officer.

Increasingly, the UK courts are taking a hard line against senior officers who are complicit in corruption. In sentencing three former executives of a company that had engaged in bribery, one judge said in 2011: "When a director of a major company plays even a small part [in a bribery scheme], he can expect to receive a custodial sentence."

### Implications for public procurement

The Public Contracts Regulations 2006 (the Regulations) prevent public authorities from selecting as a contractor any commercial organisation that has been convicted of bribing another person in violation of Section 1 or bribing a foreign public official in violation of Section 6 of the Bribery Act. This mandatory debarment rule applies in all other EU states under Article 45 of the EU Public Procurement Directive (2004/18/EC).

The Regulations also give contracting authorities discretion to exclude from selection any commercial organisation that has been convicted of having violated Section 7 of the Bribery Act, which — unlike Sections 1 and 6 — does not require actual knowledge by the commercial organisation that a bribe has been paid on its behalf or for its benefit. The UK government confirmed in March 2011 that a conviction under Section 7 will attract discretionary rather than mandatory exclusion from public procurement under the Regulations.

### Implications for insurance coverage

In the absence of specific agreements with underwriters, directors' and officers' (D&O) liability insurance does not typically cover liability for bribery-related offences. Those within a commercial organisation having responsibility for its insurance arrangements should therefore speak with the organisation's underwriters to ensure that those arrangements address the risk that senior officers may be found personally liable under the



Bribery Act. Similarly, they should consider whether the organisation's insurance arrangements need to provide protection against the risk of civil claims being brought by shareholders and others against senior officers in the event that the commercial organisation is convicted of having failed to prevent bribery by 'associated persons'.

Underwriters are unlikely to extend D&O insurance coverage to Bribery Act liabilities unless commercial organisations have already implemented adequate anti-bribery procedures. In the absence of such procedures, underwriters may decide to restrict the scope of the coverage or, at the very least, increase the premiums for that coverage. We therefore consider in the next section the steps that commercial organisations should consider taking to prevent the commission of bribery offences by 'associated persons'.

#### **Adequate Procedures Guidance**

The guidance focuses on six principles that, in the UK government's view, should be reflected in a commercial organisation's anti-bribery procedures. The practical implementation of these principles will vary depending on the risk profile of a particular commercial organisation. Non-governmental organisations such as Transparency International, as well as trade bodies and industry groups, have provided further helpful guidance.

#### **Proportionate procedures**

"A commercial organisation's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities. They are also clear, practical, accessibly, effectively implemented and enforced."

A multinational commercial organisation with operations in countries presenting a high risk of bribery is likely to require more extensive anti-

bribery procedures than a commercial organisation whose operations are limited to countries presenting a low bribery risk. Similarly, the nature of a commercial organisation's operations can affect its bribery risk profile. Other things being equal, a commercial organisation that depends on government authorisations of one sort or another, or that sells extensively to government entities, would generally require more extensive anti-bribery procedures than a commercial organisation selling only within the private sector.

The Adequate Procedures Guidance provides a non-prescriptive and non-exhaustive list of subjects that commercial organisations should consider addressing in their anti-bribery procedures, including: due diligence for existing and prospective 'associated persons'; the imposition of limits on gifts, hospitality and other related promotional expenditures, as well as charitable and political donations; the development and implementation of financial and commercial controls; the implementation of appropriate employee disciplinary processes; the utilisation of contractual anti-bribery provisions; and the provision of anti-bribery training.

The manner in which a commercial organisation addresses the foregoing issues should be dictated by the specific risks that the organisation faces. For example, an organisation that routinely invites customers or others to major sporting events should consider adopting detailed hospitality procedures that: explain when current and potential customers or others can be invited to such events; restrict the cost of the hospitality that is provided; specify who within the organisation must approve any hospitality that has been proposed; and establish a register that records, among other things, the cost of the hospitality provided and the identity of the recipients. In contrast, an organisation that does not routinely offer corporate hospitality may be able to control any risks with less burdensome procedures.

#### **Top-level commitment**

"The top-level management (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable."

According to the Adequate Procedures Guidance, top-level management commitment is likely to involve selecting and training senior managers to lead the organisation's anti-bribery efforts; leading key initiatives such as the preparation of an appropriate code of conduct; giving instructions for undertaking bribery-related risk assessments; reviewing the results of such assessments; monitoring breaches of the organisation's anti-bribery policy and procedures; and playing an active role in making key decisions relating to the bribery risks affecting the organisation. The Adequate Procedures Guidance also encourages the periodic issuance by top-level management of statements confirming the organisation's zero-tolerance policy on bribery.

#### **Risk assessment**

"The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented."

An effective risk assessment should consider both internal and external risks. Internal risks include deficiencies in employee training; a lack of clarity regarding an organisation's anti-bribery procedures; an approach to remuneration that encourages excessive risk-taking; and deficiencies in an organisation's financial controls. External risks can stem from a range of factors, including the countries in which an organisation operates, the people with which it does business and the types of transaction in which it engages.

A helpful starting point for any assessment of external risk is the corruption perceptions index published by Transparency International, which ranks countries from least corrupt to most corrupt, based on the perceptions of a reasonably broad-based sample of those having knowledge of the particular country. The index is updated annually, so it can be used by a commercial organisation to assess how the risks that the organisation encounters in a particular country have changed over time.

With regard to the assessment of internal risks, an organisation ought to consider the possible anti-bribery implications of any significant changes in the nature of its business. For example, if an organisation decides to start selling products or services to public sector organisations or to implement a commission-based remuneration programme for its employees, those changes are likely to affect the organisation's bribery-related risk profile.

#### **Due diligence**

"The commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks."

The greater the bribery risk posed by a person who is performing or will perform services on behalf of or for the benefit of a commercial organisation, the more extensive the due diligence that will be required. In low-risk situations, it may be sufficient to rely on public sources such as company registrar filings or media articles. In higher-risk situations, however, a more resource-intensive process will generally be required, perhaps including interviews with prospective intermediaries. It is advisable to conduct due diligence at the outset of a relationship and intermittently during the course of the relationship.



### Communication and training

“The commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks it faces.”

Commercial organisations should seek to provide anti-bribery training to all new and existing employees who are or will be engaged in activities that may present bribery risks. Effective training should be continuous, regularly monitored and evaluated. Commercial organisations should also consider providing anti-bribery training to ‘associated persons’, particularly if the ‘associated persons’ are operating in high-risk countries or engaging in high-risk activities such as interacting with public officials.

For instance, if an organisation engages an agent to obtain government licences or permits in a country that presents a high risk of corruption, the organisation should consider providing face-to-face training to the agent to ensure that he or she fully understands the organisation’s legal and ethical requirements.

### Monitoring and review

“The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.”

As noted in the Adequate Procedures Guidance: “The bribery risks that a commercial organisation faces may change over time, as may the nature and scale of its activities, so the procedures required to mitigate those risks are also likely to change.” That means, among other things, that periodic risk assessments should be built into a commercial organisation’s anti-bribery procedures.

### Additional rules for regulated commercial organisations in the financial services industry

Additional rules apply to organisations that are regulated by the Financial Services Authority (FSA). Although the FSA does not enforce or provide guidance on the Bribery Act, organisations regulated by the FSA have separate obligations to establish and maintain effective systems and controls to mitigate the risks of financial crime, including bribery and other forms of corruption such as money laundering.

A March 2012 FSA thematic review into the investment banking sector suggested that many regulated organisations have inadequate anti-bribery systems and controls. Of the 15 regulated firms that the FSA visited for its review, including eight major global investment banks, ‘most’, according to the FSA, “had not properly taken account of [the FSA] rules covering bribery and corruption”. As the then FSA acting director of enforcement and financial crime said: “The investment banking sector has been too slow and too reactive in managing bribery and corruption risks.”

The FSA has broad powers over organisations in the financial services sector. That includes power to impose significant, multi-million-pound financial penalties on firms that are found to have deficient systems and controls, even if such deficiencies have not led to actual corrupt conduct. Several recent cases illustrate that risk.

In 2009 and 2011, the FSA fined two insurance brokers that it deemed to have defective systems and controls. The first was fined £5.25 million and the other was fined £6.89 million. The FSA did not prove that the firms had actually engaged in corrupt conduct. Neither did it prove recklessness on the part of the firms. Similarly, in August 2012, the FSA fined Turkish Bank £294,000 for breaching the Money Laundering Regulations 2007, which impose anti-money laundering due diligence

obligations on regulated financial institutions. As with the earlier cases against the insurance brokers, the FSA did not find evidence of deliberate or reckless wrongdoing.

To assist regulated commercial organisations in developing robust systems and controls, the FSA has published ‘Financial crime: a guide for firms’, which includes a section on bribery-related risks. The guide addresses many of the same compliance programme features as the Adequate Procedures Guidance, including top-level engagement in managing financial crime risks, continuous risk assessment and monitoring, and proportionate due diligence focusing on agents and other intermediaries.

### The Proceeds of Crime Act 2002 and the prosecution of bribery offences

The full implications for UK commercial organisations, and organisations carrying on a business, or part of a business, in the UK, cannot be understood without taking into account the requirements of the UK Proceeds of Crime Act 2002 (POCA). Although the Bribery Act does not require commercial organisations to report to law-enforcement authorities bribes that have been or may have been paid by or on behalf of the organisation, the organisation may have a mandatory reporting obligation under POCA.

Most bribery that occurs is intended to generate, and does generate, revenue for the organisation on whose behalf the bribe has been paid. If such revenue is transferred to the UK and some additional conditions are satisfied, the organisation possessing the revenue may be deemed to be in possession of ‘criminal property’ under POCA. The receipt, possession or disposition of criminal property in or from the UK may be prosecuted in the UK if the organisation has not filed a suspicious activity report (SAR) with the Serious Organised Crime Agency (SOCA) and SOCA’s consent to the

receipt, possession or disposition of the criminal property is not obtained.

Even if SOCA does grant consent, that does not prevent the SFO or the Crown Prosecution Service from prosecuting the underlying bribery. The SFO encourages commercial organisations to self-report bribery or suspected bribery to the SFO simultaneously with the submission of a SAR to SOCA. The SFO has also encouraged organisations to disclose bribery or suspected bribery voluntarily in appropriate cases, even if the filing of a SAR is not required.

An SFO guidance document, ‘The Serious Fraud Office’s Approach to Dealing with Overseas Corruption’, states that: “The benefit to the corporate [of voluntarily disclosing bribery or suspected bribery to the SFO] will be the prospect (in appropriate cases) of a civil rather than a criminal outcome as well as the opportunity to manage, with us, the issues and any publicity proactively.” Whether a commercial organisation will avoid prosecution under the Bribery Act by self-reporting will depend, of course, on a range of factors, including the seriousness of the alleged conduct, the extent of the organisation’s co-operation with the SFO, and the organisation’s commitment to effective remediation.

POCA contains broad powers allowing enforcement authorities, including the SFO, to confiscate or recover criminal property. Part 5 of POCA, for example, allows enforcement authorities to recover in civil proceedings property that is or represents property obtained through ‘unlawful conduct’. That includes conduct that (a) occurred in the UK and is unlawful under UK criminal law, or (b) occurred in a country outside the UK and is unlawful under that country’s criminal law and would be unlawful in the UK if it occurred in the UK. The SFO has used its civil recovery powers periodically in cases involving bribery and other forms of corruption — in the

most prominent cases, recovering several million pounds from the defendant companies. In July 2012, for example, the SFO recovered more than £1.8 million from Oxford Publishing Limited by means of a civil recovery order.

### **Conclusion**

Commercial organisations that have not already done so should review their existing policies and procedures to take into account their potential exposure under the Bribery Act and other relevant legislation such as POCA. The consequences of non-compliance — both financial and reputational — can be devastating.