

UK anti-bribery legislation is among the strictest in the world and imposes serious sanctions upon those who fall foul of its wide-ranging powers. This guide provides an overview of the legislation for those who are new to the subject.

INTRO

AN INTRODUCTION TO UK LEGISLATION | MAY 2016



Bribery and corruption

3RD EDITION

WHAT IS BRIBERY AND CORRUPTION?

Definitions of 'bribery' and 'corruption' vary. Some of the most commonly used international definitions are provided by Transparency International in **The Anti-Corruption Plain Language Guide** (July 2009).

Bribery

'The offering, promising, giving, accepting or soliciting of an advantage as an inducement for an action which is illegal, unethical or a breach of trust. Inducements can take the form of gifts, loans, fees, rewards or other advantages (taxes, services, donations, etc).'

Corruption

'The misuse of entrusted power for personal gain. Corruption can be classified as grand, petty and political, depending on the amounts of money lost and the sector where it occurs.'

OVERVIEW OF THE LAW

The **Bribery Act 2010** is the UK's main anti-bribery and corruption legislation. It creates four criminal offences:

- ◆ offering a bribe;
- ◆ accepting a bribe;
- ◆ bribing a foreign public official; and
- ◆ failure by a commercial organisation to prevent bribery being carried out by a person associated with it (a corporate offence).

The Act applies to England and Wales, Northern Ireland and Scotland, and covers bribes given or received in the UK and abroad.

The Act came into force on 1 July 2011 and is not retrospective. This means that any misconduct committed before this date is governed by the old regime comprising the common law offence of bribery, the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Acts 1906 - 1916, and the Anti-Terrorism Crime and Security Act 2001.

WHO DOES IT APPLY TO?

The legislation applies to individuals, namely UK nationals and those with a close connection to the UK, and companies which are incorporated in the UK. The 'failure to prevent bribery' offence only applies to organisations including those incorporated elsewhere if they 'carry on business or part of a business' in the UK.

WHEN IS AN OFFENCE COMMITTED?

A bribery offence is committed in the following circumstances.

- ◆ When a person gives, promises or offers a bribe to another person in the UK or abroad, with the intention to induce a person to perform a relevant function improperly (s1, BA 2010).
- ◆ When a person requests, agrees to receive or accepts a bribe from another person in the UK and abroad, with the intention that a relevant function should be performed improperly (s2, BA 2010).

The improper performance referred to in the s1 and s2 offence means any performance which amounts to a breach of an expectation that a person will act impartially and in good faith. The performance standard is commonly referred to as what a reasonable person in the UK would expect in relation to a performance, activity or function.

- ◆ When a person bribes a foreign public official, with the intention to influence that person in their capacity as a foreign public official, and with the intention to obtain or retain business, or an advantage in the conduct of business. The official can hold a legislative, executive or judicial function, exercise a public function on behalf of the state or territory, or be an official or agent of an international public organisation (s6, BA 2010).

The s6 offence does not require an intention of improper performance, merely an intention to influence the public official in order to obtain a business advantage. It is a stricter offence than s1 and s2.

- ◆ When a commercial organisation fails to prevent bribery by 'associated persons', namely persons performing services for or on behalf of the organisation (s7, BA 2010). The Act does provide a defence for organisations that can prove that they had adequate procedures in place to prevent such conduct (s9, BA 2010).

The Act also provides that if an offence is committed under s1, 2 or 6 of the Act by a body corporate, and it is proved that the offence was committed with the consent or connivance of senior officers, those officers will also be liable for individual prosecution under the Act.

If you are ever in doubt about whether conduct falls within the scope of the legislation, always seek appropriate legal advice.

ADEQUATE PROCEDURES TO PREVENT BRIBERY

The UK Ministry of Justice has published **guidance on the Bribery Act 2010** to help organisations understand the legislation and design their 'adequate procedures' to prevent bribery.

It is based around six principles to allow for flexible and proportionate procedures to be put in place, depending on the size of the company and its exposure to situations where bribery or the expectation of financial incentive or reward are recognised as high risks.

INTERNATIONAL CONSIDERATIONS

Companies can be liable under s7 for the actions of overseas-based employees, agents, joint venture partners or suppliers to overseas operations, and these associated persons can be individuals or legal persons (such as an incorporated or unincorporated body). The associated person must either bribe a person or bribe a foreign public official but does

not need to have been prosecuted for the offence.

The associated person does not need to have a close connection with the UK (s7(3)(b) and 12(2)(c) and (4)) and the offence can be committed irrespective of the location where the actions took place. Therefore, anti-bribery codes need to incorporate careful monitoring of overseas partners' activities, the dissemination of training and materials to them, and contractual obligations ensuring the overseas partners do not bribe on behalf of the home organisation.

Companies with links to the US should also be aware of the **US Foreign Corrupt Practices Act 1977** (FCPA). This Act has very wide extraterritorial reach which can impact on UK companies if, for example, they:

- ◆ have any securities listed in the US;
- ◆ are doing business there (including making payments in dollars and sending emails); or
- ◆ have US subsidiaries.

In appropriate circumstances, the US may seek extradition of UK nationals and a company's third-party representatives to stand trial in the US.

REPORTING CONCERNS

Allegations of bribery, or if you have been offered or received a bribe, should be reported to **Action Fraud** (the UK's national fraud and cybercrime reporting centre) by calling 0300 123 2040 or using the online reporting tool.

Allegations of bribery of foreign public officials by British nationals or UK companies should be reported to the **Serious Fraud Office** (SFO). It has published guidance for businesses on self-reporting cases of overseas corruption.

The receipt, or likely receipt, of a bribe (amounting to knowledge or suspicion of money laundering) in the regulated sector should also be reported to the **National Crime Agency** (NCA). Failure to make an appropriate disclosure and tipping off the suspected launderer are both criminal offences under the Proceeds of Crime Act 2002. If not in the regulated sector, a voluntary disclosure can also be made to the NCA.

DEFERRED PROSECUTION AGREEMENTS

A deferred prosecution agreement (DPA) is an agreement reached between a prosecutor and an organisation that could be prosecuted for a specified economic crime offence (including bribery offences under ss1, 2, 6 and 7, BA 2010) that has been approved by the court. Under a DPA, the prosecution for an alleged offence is deferred (or suspended) on the condition that the organisation complies with a number of specified terms within a defined time limit. An individual cannot enter a DPA.

A DPA must contain:

- ◆ a statement of facts relating to the alleged offence;
- ◆ an expiry date; and
- ◆ a statement of the requirements imposed on the organisation, which may include (but are not limited to) payment of a financial penalty and costs, disgorgement of profits, compensation to victims, and implementation or variation of a compliance programme.

The amount of any financial penalty agreed **must be broadly comparable** to the fine that a court would have imposed on conviction following a guilty plea.

If a DPA is breached then the prosecutor can apply to court for it to be terminated and a criminal prosecution can proceed.

Once a DPA has expired, criminal prosecutions are discontinued and fresh criminal proceedings cannot be instituted for that offence.

The first UK DPA was agreed between the **SFO and Standard Bank Plc** and approved by the Crown Court on 30 November 2015.

THE RISKS OF NON-COMPLIANCE

The key risks arising from non-compliance with the legislation may include the following.

- ◆ Investigation by law enforcement agencies and regulatory or disciplinary bodies, such as the NCA, SFO, Financial Conduct Authority, Ministry of Defence Police, NHS, and HMRC.
- ◆ Reputational and business damage from the publicity surrounding any investigation.
- ◆ Prosecution of individuals and commercial organisations, deferred prosecution agreements, regulatory or disciplinary proceedings.
- ◆ Conviction and the imposition of a custodial sentence of up to 10 years or an unlimited fine.
- ◆ Disgorgement of monies deemed unjust enrichment.
- ◆ Possible debarment from tendering for public contracts.

FURTHER INFORMATION

Available from the **resources** section of our website:

- ◆ Adequate procedures to prevent bribery and corruption
- ◆ Money laundering and the proceeds of crime.

Other resources

- ◆ **Legislation.gov.uk**
- ◆ **Ministry of Justice** (Bribery Act 2010 guidance to help commercial organisations prevent bribery)
- ◆ **National Crime Agency**
- ◆ **Organisation for Economic Co-operation and Development** (OECD convention on combatting bribery of foreign public officials in international business transactions)
- ◆ **Serious Fraud Office**
- ◆ **Transparency International**
- ◆ **United States Department of Justice** (US Foreign Corrupt Practices Act)
- ◆ **United Nations Office on Drugs and Crime** (UN convention against corruption)

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