

The UK Bribery Act 2010: The International Compliance Challenge

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Corruption – Related Terms

- **bribery** - giving or receiving something of value to influence a transaction
- **illegal gratuity** - giving or receiving something of value after a transaction is completed, in acknowledgment of some influence over the transaction
- **extortion** - demanding a sum of money (or goods) with a threat of harm (physical or business) if demands are not met
- **conflict of interest** - where an employee has an economic or personal interest in a transaction
- **kickback** - a portion of the value of the contract demanded as a bribe by an official for securing the contract
- **corporate espionage** - theft of trade secrets, theft of intellectual property, or copyright piracy
- **commission/fee** - used by a UK company or individual to obtain the services of an agent/agency for assistance in securing a commercial contract

* Source: UK Serious Fraud Office website

UK Bribery Act

- When did it *finally* come into force?
- What are the main/new offences?
- Jurisdiction?
- UK Govt. Guidance?

UK Bribery Act 2010

- Government issued its Guidance on “*adequate procedures*” in April 2011
- UK Serious Fraud Office issued revised policies on 9 November 2012
- 1 July 2011 – Act came into full force
- Who does the Act apply to?
 - UK citizens and the “close connection” test
 - “Operations” in the UK

UK Bribery Act 2010

- Main offences:
 - **Bribing another** (s.1)
 - **Being bribed** (s.2)
 - **Bribing a foreign public official (“FPO”)** (s.6)
 - *“intention to influence”*
 - **Corporate offence: failing to prevent bribery** (s.7)
 - *“...a relevant commercial organisation will be guilty of an offence if a person associated with the company bribes another, intending ...to obtain or retain business...”*
 - **Consent or connivance** (s.14)
 - *“If the offence [s.1,2 of 6] is proved to have been committed with the consent or connivance of:
 - (a) a senior officer of the body corporate or Scottish partnership, or
 - (b) a person purporting to act in such a capacity”*

UK Bribery Act 2010

- Jurisdiction:
 - s.1, 2 or 6
 - Offence in the UK?
 - If outside the UK – a “*close connection*” to the UK is required.
 - The following are all said to have a “close connection” to the UK:
 - (a) a British Citizen;
 - (b) a British overseas territories citizen;
 - (c) a British National (overseas);
 - (d) a British Overseas citizen;
 - (e) a person who under the British Nationality Act 1981 was a British subject;
 - (f) an individual ordinarily resident in the UK;
 - (g) a body incorporated under the law of any part of the UK; and
 - (h) a Scottish partnership.

UK Bribery Act 2010

- Jurisdiction:
 - s.7
 - No “*close connection*” requirement – but there does need to be proximity to the UK. Where a company is not registered in the UK, the UK authorities will only have jurisdiction where the company conducts all or part of its business in the UK.
 - This means that a company registered in the US (or anywhere outside of the UK) could be held liable under section 7, where it had some or all of its operations in the UK, and where an associate of the company pays a bribe in another jurisdiction (e.g. China).
 - Strict liability applies unless you can show adequate procedures were in place.

UK Bribery Act 2010

Action Points

- Establish which of your staff, agents, joint venture partners and clients (if any) are caught by the “close connection” test.
- Establish which of your clients, agents and joint venture partners are caught by the UK “operations test”.
- Incorporate your findings into a revised anti-corruption risk assessment and update your “adequate procedures” if needed.
- Consider the findings having regard to the prevailing money laundering regulations in the jurisdictions in which you operate and amend your anti-money laundering policies, procedures and training to address the new risk identified.

UK Bribery Act 2010 - Enforcement

- Lead UK regulator for UK Bribery Act is the UK Serious Fraud Office.
- Co-operation between Regulators in various jurisdictions
- Extradition or Prosecution in home country?
- Interaction of UK Bribery Act with Anti-Money Laundering Legislation.
- Duties to report to UK Serious Organised Crime Agency (SOCA) under the Proceeds of Crime Act 2002.

UK Bribery Act 2010

- Adequate Procedures

- MoJ – “*The Bribery Act 2010 – Quick Start Guide*” (10 pages)

[Ministry of Justice website](#)

- MoJ - “*The Bribery Act 2010 – Guidance*” (44 pages)

- Case studies

[Ministry of Justice website](#)

- *Transparency International Guidance*

[Transparency International website](#)

UK Bribery Act 2010

- Adequate Procedures
 - **Principles based not prescriptive**
 - **Six principles:**
 1. Proportionate Procedure
 2. Top Level Commitment
 3. Risk Assessment
 4. Due Diligence
 5. Communication
 6. Monitoring and Review

UK Bribery Act 2010

- Adequate Procedures – *what should companies be doing now?*
 - **1. Proportionate procedure**
 - *“A commercial organisation’s procedures to prevent bribery by persons associated with it are proportionate to the bribery risk it faces and to the nature, scale and complexity of the commercial organisation’s activities. They are also clear, practical, accessible, effectively implemented and enforced”.*
 - Procedures should reflect ‘commitment to bribery prevention’.
 - A general approach to mitigate bribery risk (e.g. risk assessment).
 - Clearly set out how organisation aims to prevent bribery.
 - Size of organisation and where it operates relevant to proportionality assessment.

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- Adequate Procedures

- **2. Top-level commitment**

- *“The top level management of a commercial organisation (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”.*
- Active and transparent board level involvement.
- Zero tolerance – clearly communicated internally and externally.
- Consequences made clear.
- Selection and training of key senior managers.

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- Adequate Procedures

- **3. 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”.*
- Risk assessment by top level manager
- Country risk?

Country Risk?

- The Transparency International Corruption Perception Index scores 176 countries and territories on a scale from 0 (highly corrupt) to 100 (highly clean).
- The current CPI was launched 5 December 2012.

2012 Rankings	Country	Score	2011 Rankings
1	New Zealand	90	1
5	Singapore	87	5
7	Australia	85	8
14	Hong Kong	77	12
17	Japan	74	14
17	UK	74	16
19	United States	73	24
27	Qatar	68	22
27	United Arab Emirates	68	28
Not Included in this year's ranking	Macau		46
54	Malaysia	49	60
80	China	39	75
88	Thailand	37	80
94	India	36	95
105	Philippines	34	129
118	Indonesia	32	100
123	Vietnam	31	112
133	Iran	28	120
133	Russia	28	143
139	Nigeria	27	143
157	Cambodia	22	164
160	Laos	21	154
165	Venezuela	19	172
172	Myanmar	15	180
174	Korea (North)	8	182
174	Somalia	8	182

Country Risk?

- The Transparency International Bribe Payers Index scores 28 leading economies where a maximum score of 10 corresponds with the view that companies from that country never bribe abroad and a 0 corresponds with the view that they always do.

Rank	Country	Score
1	Switzerland	8.8
4	Japan	8.6
6	Australia	8.5
8	Singapore	8.3
8	United Kingdom	8.3
10	United States	8.1
15	Hong Kong	7.6
15	Malaysia	7.6
19	India	7.5
25	Indonesia	7.1
27	China	6.5
28	Russia	6.1

Sector Risk?

- The Bribe Payers Index also includes ratings by industry sector.

Rank	Country	Score
1	Agriculture	7.1
1	Light manufacturing	7.1
5	Banking and finance	6.9
10	Arms, defence and military	6.6
13	Pharmaceutical and healthcare	6.4
15	Mining	6.3
16	Oil and Gas	6.2
19	Public, Works contracts and construction	5.3

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- Adequate Procedures
 - **3. Risk Assessment (continued)**
 - Transactional risk?
 - Business opportunity risk?
 - Business partnership risk?

UK Bribery Act 2010

- Adequate Procedures

- **4. 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.”*
- Who are you dealing with? Do they have anti-bribery procedures?
- Who will represent the organisation?
- Enhanced DD in high risk jurisdictions.

UK Bribery Act 2010

- Adequate Procedures

- **5. Communication (including 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.”*
- Clear policies and procedures – ‘message from the top’
- Circulated widely and easily accessible
- Enhanced training for those assessed to be high risk
- Clear reporting lines
- Documentary record of all training
- Training for associated persons/companies

UK Bribery Act 2010

- Adequate Procedures

- **6. Monitoring and review**

- *“The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.”*
- Ongoing review and risk assessment
- Evaluation of effectiveness of procedures (staff surveys)
- Refresher training (for those most at risk)
- Formal external review
- Review of trade body and other third party guidance
- Implementation of changes when appropriate

Inherent Risks

- Local practices may violate both UK Bribery Act and US Foreign Corrupt Practices Act (FCPA) prohibitions
 - Excessive promotional events
 - Travel/resort locations
 - Expensive gifts / gratuities
 - Excessive meals / entertainment
- Use of distributors/agents/consultants

Corruption Indicators

- **Risk Factors = Red Flags:**
 - abnormal cash payments
 - pressure exerted for payments to be made urgently or ahead of schedule
 - payments being made through a third party country - for example, goods or services supplied to country 'A' but payment is being made, usually to a shell company in country 'B'
 - an abnormally high commission percentage being paid to a particular agency. This may be split into two accounts for the same agent, often in different jurisdictions
 - private meetings with public contractors or companies hoping to tender for contracts
 - lavish gifts being received
 - an individual who never takes time off even if ill, or holidays, or insists on dealing with specific contractors himself or herself
 - making unexpected or illogical decisions accepting projects or contracts
 - the unusually smooth process of cases where an individual does not have the expected level of knowledge or expertise

Corruption Indicators

- **Risk Factors = Red Flags:**
 - abuse of the decision process or delegated powers in specific cases
 - agreeing contracts not favourable to the organisation either because of the terms or the time period
 - unexplained preference for certain contractors during tendering period
 - avoidance of independent checks on the tendering or contracting processes
 - raising barriers around specific roles or departments which are key in the tendering or contracting processes
 - bypassing normal tendering or contracting procedures
 - invoices being agreed in excess of the contract without reasonable cause
 - missing documents or records regarding meetings or decisions
 - company procedures or guidelines not being followed
 - the payment of, or making funds available for, high value expenses or school fees (or similar) on behalf of others.

* Source: UK Serious Fraud Office website

UK Bribery Act 2010

- Bribery Act 2010 v Foreign Corrupt Practices Act (US)
 - Private/public sector
 - Strict liability offence (unique to UK law)
 - No corrupt intent required for s.6 or s.7 offences
 - No exception for facilitation payments:
 - A payment made to a government official to facilitate approval of some type of business transaction or activity. In some countries, small facilitation payments are considered unofficial fees rather than bribes, but most countries do not make this distinction.

UK Bribery Act 2010

No exception for promotional/hospitality expenditure (proportionality test)

No civil penalties under UK Bribery Act

NB Civil penalties under Proceeds of Crime Act – interaction with Money laundering legislation

Criminal penalties:

US – individuals – up to 5 years and/or \$250,000 fine

US – company – up to \$2,000,000 per violation

UK – individual – up to 10 years and/or unlimited fine

UK – company – unlimited fine

First prosecution under the UK Bribery Act: Regina v Munir Patel

Munir Patel. a Court clerk. sentenced to three years for bribery and six years for misconduct in a public office -
18th November 2011

UK Serious Fraud Office, Whistleblowing line

Questions?

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