

1. Introduction

The Bribery Act 2010, in force from July 2011, has been created with the principal aim of preventing acts of bribery and cleaning up and clarifying business practices both in the UK and abroad.

The guidance presented here is not a strict set of rules. As stated in the introduction, it is not a “one size fits all solution”; however by following the guidance and applying it to their own particular contexts and circumstances, businesses will be well on the way to complying with the Bribery Act.

The Act does not mean that a business will result in an offence. Rather, the implementation of appropriate measures (effective 100% of the time; not 99%) will accept this fact. Defences under the Act will be judged in the context of the business.

The first step for any business is to conduct a risk assessment both internally and with respect to external agents, subsidiaries, partners etc. The risk that any bribery or other offence will occur. Based upon the outcome of that assessment, appropriate measures should be taken in line with the guidance provided in this guidance. For example, large businesses will be far less likely to be affected by the Act than small businesses. Context is always important.

The Act applies throughout the United Kingdom (England, Wales, Scotland and Northern Ireland).

2. The Offences

The principal offences under the Act are:

- Offering or giving a bribe
- Bribing a foreign public official
- Failing to prevent a bribe

2.1 One: Bribing another person

A person (“P1”) commits an offence if he or she offers, promises or gives a financial or other advantage to another person (“P2”):

- where P1 intends or knows that the advantage will result in the improper performance of a relevant function or activity by P2 or to reward such performance if it has already been so performed;
- where P1 knows that the advantage will result in the improper performance of a relevant function or activity by P2 or to reward such performance if it has already been so performed;

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on an organisation's behalf.

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2's acceptance of the financial or other advantage will result in the improper performance of a relevant function or activity by P2 or to reward such performance if it has already been so performed;

What is “improper”

Improper performance is a concept of good faith, impartiality and integrity. In this context applies to both the public and private sector. The offence may thus be committed by a body of persons or a person.

The viewpoint of a reasonable person or not performance is particularly useful in the context of hospitality practices. If, for example, a reasonable person would not expect a business to provide certain forms of enhancing good relations, such as providing networking opportunities between businesses, there would be no offence.

2.2 Two: Bribing a Foreign Public Official

A person (“P1”) commits an offence if they offer, promise or give a financial or other advantage to a foreign public official with the intention of influencing the official to perform or not perform an official function. P1 must intend to obtain or secure for themselves or another person an advantage in the conduct of business as a result of the official’s actions.

There is an important exception to this rule. If the FPO is permitted or required by law to be influenced in this way, there is no offence.

Who is a Foreign Public Official

- a) An official, whether or not elected, appointed, who holds a legislative, administrative, judicial or other public function in any kind in any country or territory outside of the United Kingdom;
- b) Any person acting in a branch of the national, local or municipal government of any country or territory outside of the UK or one who is employed by or working for public health agencies or state-owned enterprises); or
- c) Officials or agents of international organisations such as the UN.

What is the rationale for the offence?

The policy behind the Bribery Act is to ensure that decision making within the realm of public administration is not influenced by the prospect of (unjust) personal enrichment of the officials).

The Importance of the Written Law

If the written law applies and requires the advantage to be given for a government contract. This will, of course, be the case where the specific policy of the government is to award contracts to the lowest bidder.

expectation that a person will act in a position of trust. Bribery in this context applies to both the public and private sector. The offence may thus be committed by a body of persons or a person.

adopted when determining whether a person is a public official. This again is contextual and is particularly useful in the context of hospitality practices. If, for example, a reasonable person would not expect a business to provide certain forms of enhancing good relations, such as providing networking opportunities between businesses, there would be no offence.

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Who is an “Associate”

A person will be an associated person if they provide services for or on behalf of a commercial organisation. This can be an individual but can also be a body. The Act also encompasses agents and subsidiaries. Companies that provide services for a commercial organisation will be an associated person. Assessments to be made of the key role in determining

In situations where a person, in turn, use the services of a commercial organisation, often not have commercial organisation procedures, to make sure contractors apply the same of subcontractors

Joint ventures do not have a presumption of association; however if one member of a joint venture is performing services for another member (“M1”), liability may fall on the joint venture. Individual members of a joint venture putting other members of the joint venture at risk of liability.

In cases where a joint venture is conducted through a contractual arrangement, control is a significant factor. When determining whether a person is an associated person, the law will examine the conduct of the joint venture’s business is performed on behalf of a participant in the venture, the law will examine the conduct of the joint venture’s business over the arrangement.

Nevertheless, even if a person is performing services for a commercial organisation, there must still be an intention to obtain or retain business or an advantage in business from PSA’s actions.

Outside the UK, the law will again apply to the termination. Generally speaking, if a person is in the UK, the provisions of the Bribery Act also notes that even the existence of a UK parent is sufficient to impose liability on a person. Additionally,

A commercial organisation if they perform services for or on behalf of a commercial organisation. The associated person can be an individual or an unincorporated body. Far from applying only to companies, the Act also encompasses agents and subsidiaries. Companies that provide services for a commercial organisation will be an associated person. Assessments to be made of the key role in determining a person and who is not.

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Nevertheless, even if a person is performing services for a commercial organisation (“CO”), there must still be an intention to obtain or retain business or an advantage in business from PSA’s actions.

3. Other Important Issues

3.1 Facilitation Payments

A facilitation payment is a payment made to a public official to obtain or retain business or an advantage in business from PSA’s actions. The making of such a payment is a criminal offence under the Bribery Act 2010.

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3.2 Duress

In the event that a defendant is acting under duress will most likely be a defence. It is important to note, however, that the defence is only available if the defendant reasonably believed that they would suffer serious physical injury or death if they did not comply with the threatening person's wishes. Furthermore, the defendant must have done the same in the past.

duress, the common law defence of duress will generally apply only if the defendant reasonably believed that they would succumb to death or serious physical injury if they did not comply with the threatening person's wishes. A 'reasonable person' would have

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3.3 Discretion

When a matter of bribery is brought before the authorities will take into account (in addition to those described above):

When a matter of bribery is brought before the authorities under the Bribery Act, the authorities will take into account (in addition to those described above):

- a) The sufficiency of the evidence;
- b) The public interest;
- c) The seriousness of the offence (in relation to the public interest).

When a matter of bribery is brought before the authorities, the authorities will often with respect to the public interest.

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4. The Principles of the Bribery Act

4.1 One: Proportionate

Commercial organisations are required to have in place procedures to guard against bribery. Such procedures must be proportionate to the risks the organisation faces. Moreover, the measures must be practical and accessible.

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How should my business address bribery?

The content of company's compliance policies will be implemented to reduce the risk of bribery. The policies will be implemented to reduce the risk of bribery.

Commercial organisations are required to have in place procedures to guard against bribery. Such procedures must be proportionate to the risks the organisation faces. Moreover, the measures must be practical and accessible.

What should my policies cover?

Examples provided in the guidance suggest that the following elements should be included in the policies:

Commercial organisations are required to have in place procedures to guard against bribery. Such procedures must be proportionate to the risks the organisation faces. Moreover, the measures must be practical and accessible.

- a) The degree of risk of bribery;
- b) Procedures to prevent bribery;
- c) Due diligence procedures (see definition above), both for the organisation and for associated persons;
- d) Gifts, hospitality and facilitation payments;
- e) Matters relating to recruitment, terms and conditions, employment and pay;
- f) All aspects of the organisation's relationship with associated persons;

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- g) Appropriate measures, including auditing and expenses;
- h) The transparency of the measures;
- i) Disclosure of the measures;
- j) Decision making, including delegation of authority, and separation of duties and of interest;
- k) The enforcement of the measures;
- l) Procedures for monitoring and evaluation;
- m) The way(s) in which the organisation intends to implement anti-bribery measures;
- n) The communication of the measures and training therein;
- o) The ways in which the measures are to be monitored, reviewed and evaluated.

4.2 Two: Top-Level Commitment

Top level management should state a commitment to preventing bribery within an organisation and should be the responsible for the culture within the organisation. It should, at a minimum, entail the communication of the organisation's position to all levels of the organisation and the development of suitable anti-bribery measures.

What is my commitment?

Depending upon the size of the organisation, more or less direct involvement may be required. In larger organisations, the more likely it is that top-level management will be responsible for the measures which are then implemented by other levels of management. In smaller organisations, top-level management should ensure that the organisation of any size, top-level responsibility is placed upon suitable individuals, provide guidance and support with respect to anti-bribery measures, take appropriate action in the event of compliance or breach and should seek to involve the organisation in the development of anti-bribery campaigns to prevent bribery (though it is argued that this is considerably less relevant for smaller businesses).

How should I communicate my commitment?

Many organisations will issue a statement of commitment issued by top-level management. A straightforward written policy (or the inclusion of anti-bribery measures in relevant policies) may also strengthen the organisation's commitment.

What should my statement demonstrate?

Government guidance on an organisation's commitment should demonstrate the following key factors which any statement of commitment and procedures should address and demonstrate:

- a) A commitment to prevent bribery in business practices;

- b) A zero-tolerance approach to bribery;
- c) Details of controls over directors, managers, employees and associated persons for bribery; policies and procedures;
- d) An explanation of the benefits of preventing bribery;
- e) Details of measures that have been or are being or have been implemented to prevent bribery;
- f) Details of the persons or positions within the organisation who are responsible for the development and implementation of the procedures;
- g) Details of any arrangements with persons outside of the organisation with which the organisation has dealings, for example, an industry association or programme.

4.3 Three: Risk Assessment

Businesses should assess the bribery risks to which they may be exposed to internal and external factors and ensure that such assessment is documented.

How can I assess risk?

This will depend upon the nature of your business. In certain cases, a general assessment of the bribery risks will yield the required information; in other cases, more detailed risk assessments may be required. As with all aspects of the Bribery Act, it is important.

What factors should I consider when assessing risk?

- a) Your Own Business: Structures and procedures within your business may increase or reduce the risk of bribery. Those structures may increase or reduce the risk of bribery. Ensure, for example, that your financial controls are robust and controlled.
- b) Your Sector: Bribery or opportunities therefor are particularly high in certain sectors.
- c) The Transaction: Transactions may lend themselves more readily to bribery. Examples provided by government guidance include: large scale projects; donations; licences and permits; and public procurement.
- d) Your Business Partners: In certain cases, particularly those involving public officials, partners or other intermediaries in a transaction may be particularly vulnerable to bribery, particularly in the form of facilitation payments.
- e) Business Opportunities: High value projects, particularly those involving contractors and other intermediaries, may present greater bribery risks.
- f) The Country: If you are operating in a foreign country, consider the nature of business, the prevailing attitude to bribery and corruption, and the government's attitude to bribery. This should be taken into account.

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4.4 **Four: Due Diligence**

Good governance is a key element of due diligence requires that risks are identified and managed. For small-scale local transactions, anti-bribery due diligence may involve intermediaries to liaise with the relevant parties.

e. Related to Principle Three, due diligence measures are implemented to ensure that risks are, as always, important. A small-scale transaction will require considerably less due diligence than an international transaction using intermediaries.

How should I exercise due diligence?

Following the other principles, due diligence is a significant role. Each transaction should be assessed on its own merits and always be sufficient to ensure that all transactions and understandings demonstrate appropriate due diligence.

Due diligence (particularly the third) plays a significant role and each transaction should be assessed on its own merits. Internal procedures in place will not ensure the absence of potential risks in all transactions. Due diligence will go a long way towards ensuring due diligence.

Whenever possible, an organisation should have a clear picture of the parties with whom it will be transacting and indirect research or references should be sought.

Due diligence should be sought to ensure that a business transaction is undertaken and of any other parties involved. Information may come in the form of references and even direct references.

4.5 **Five: Communication**

Implementing policies and procedures communicated to the staff (training) ensures a clear understanding of procedures. Effective communication demonstrates an organisation's commitment to maintain high standards both a reassurance to those who might have concerns about the organisation's involvement in bribery.

It is not good if they are not effectively communicated. Effective internal communication (and training) ensures a clear understanding of procedures with anti-bribery policies and procedures. Effective communication demonstrates an organisation's commitment to maintain high standards of business practices and can act as a reassurance to those who might have concerns about the organisation's involvement in bribery.

How can I communicate?

Internal communication and training associated with policies be clearly communicated and implement them should be upon the size of the organisation. Staff to specific training should be provided to the organisation.

Communication?

Internal communication and training associated with those policies. Not only should policies be clearly communicated, but the means to effectively communicate them should be clearly to all concerned. Depending on the size of the organisation, the range from a simple email to all staff to specific training for departments and levels within the organisation.

How can I best communicate externally?

Statements of policy and the organisation's culture should be communicated to the business, not merely to the staff. Particularly those involved in communication of the organisation's involvement in bribery.

Organisation's anti-bribery stance

Starting point in demonstrating an organisation's anti-bribery stance can be said for any aspect of a business. In certain situations, more explicit communication may be required. In situations where it is reasonable for an organisation to demonstrate its anti-bribery stance.

require those persons to receive such training to their satisfaction.

in anti-bribery practices or provide such training as may be.

4.6 **Six: Monitoring and**

Business is scarce and change over time. The organisation operates and procedures and

structure of an organisation may change over time. The sector and market within which the organisation operates may be able merely to implement policies and procedures to remain.

How should I monitor

Periodic reviews should be carried out as may be appropriate. Policies and procedures are subject to evaluation of measures where those measures are in place. Furthermore, certain measures, such as certification or verification following scrutiny of methods of verification, can act as a valuable tool for partners, associates

and procedures?

business policies from time to time. The organisation and anti-bribery policies are subject to designated reviews, on-going monitoring of bribery, particularly in situations where measures into play can be beneficial. Industry associations which provide organisations which may be awarded certification procedures. Not only do such measures ensure compliance with the Act, but can also be a form of providing assurance to stakeholders.

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