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## The Bribery Act 2010 and its application to US businesses operating in the UK

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## The Bribery Act 2010

The Bribery Act 2010 (the **Act**) came into force on 1 July 2011 and introduced four key offences:

- 1 Bribing another (section 1)
- 2 Accepting a bribe (section 2)
- 3 Bribery of a foreign public official (section 6)
- 4 Failure of a commercial organisation to prevent bribery (section 7).

### Extra-territorial reach

The Act has a very wide territorial scope which means that any business trading in the UK or having a close connection here can be subject to it. Apart from section 7 (Bribery of a Foreign Public Official), the Act applies if:

- Any part of the offence was committed in the UK; or
- The acts were committed *outside the UK* by a person with a close connection to the UK - including a British national or resident of the UK - or a UK-incorporated company.

The UK courts also have jurisdiction over any other organisations which conduct part of their business in the UK.

A foreign subsidiary of a UK company can create criminal liability for its parent if the subsidiary commits an offence while performing services for its UK parent.

Essentially a company can be guilty even if a bribe was paid by a foreign agent or subsidiary in a foreign jurisdiction - the only key element required under the Act is that the organisation is a UK commercial organisation or an organisation carrying out part of its business in the UK. In this respect the Bribery Act is one of the most far-reaching examples of anti-bribery legislation in the world today with a reach which extends even beyond the US Foreign Corrupt Practices Act 1977.

### THE BRIBERY ACT OFFENCES

The key offences cover the activities of offering, promising or giving a financial or other advantage (a bribe) or requesting, agreeing to receive or accepting a bribe where it is intended that the advantage should bring about or reward the **improper performance** of a **relevant function** or activity by another person. It does not matter that the person accepting the bribe is not the one who ultimately performs the relevant function.

A bribe does not have to be directly financial - the Act covers any activity that is intended to influence the performance of the individual's functions. Bona fide hospitality and promotional/other business expenditure is acceptable provided it is reasonable/ proportionate and commensurate with 'norms' of industry practice. However, hospitality that is considered unduly 'lavish', especially where this takes place in conjunction with an important bid or tender process, may constitute a bribe.

**"Improper performance"** means performance which amounts to a breach of an expectation that a person will act in good faith, impartially or in accordance with a position of trust.

The test for this is what a reasonable person in the UK would expect in relation to the performance of that function. This test applies even where the conduct in question occurred outside the UK, unless it is permitted by that country's 'written law'.

**"Relevant function" is:**

- Any activity connected with a business
- Any activity performed in the course of a person's employment
- Any activity performed by or on behalf of a body of persons (whether incorporated or not)
- A function of a public nature

and the person performing the function/activity is:

- Expected to perform it in good faith
- Expected to do so impartially
- In a position of trust by virtue of performing it

This would effectively cover anything done in a person's day-to-day job.

Bribery of a Foreign Public Official (**FPO**) constitutes offering, promising or giving an FPO a financial/other advantage with the intention of influencing the FPO and of obtaining or retaining business or an advantage in the conduct of the business. This bribery offence can be committed directly or via a third party.

An **FPO** includes officials who hold a legislative, administrative or judicial position in a country outside the UK. It would cover government officials and those working for international organisations, including professionals working for public health agencies and public international organisations, such as the UN or the World Bank.



Facilitation payments (payments requested by an official to secure or speed along the performance of their role) are common practice in certain parts of the world. However, they could trigger an offence under the Act. This would also apply to gifts and entertainment (non-monetary advantages) where the requisite intention is present.

## THE CORPORATE OFFENCE

This is one of the most controversial elements of the Act as it makes companies criminally liable for failing to prevent bribery. This offence is committed by a commercial organisation where a person who is associated with it bribes another person, intending:

- To obtain or retain business for that organisation; or
- To obtain or retain an advantage in the conduct of business for that organisation.

The offence can be committed in the UK or overseas.

**"Business advantage"** covers anything which puts the business in a better position - including awarding a contract or even an opportunity to tender for a contract, or any information which provides an advantage

The corporate offence is one of strict liability - this means that the prosecution is not required to prove that a company intended the consequences of its actions or even foresaw them. In this case, the company is liable for the acts of associated persons and would be guilty of the offence whether or not the company knew or approved of the bribe.

This provision is designed to ensure companies take their responsibilities seriously and are not able to simply turn a blind eye to the acts that others are undertaking in course of the company's business.

**"Associated persons"** - The Act defines an associated person as someone who performs services for or on behalf of an organisation.

This would include employees/workers, joint venture partners and, in a supply chain situation it is possible that third parties - including contractors, subcontractors and even agents - could implicate an organisation.

In a supply chain situation, a company may not know the identity of others further down the chain. In order for a company to protect itself against the actions of associated persons, it should impose anti-bribery procedures in its relations with contractors, and request that those contractors adopt the same anti-bribery terms in their subsequent contracts with the next party down the chain, and so on.

It is important to note that in order for an organisation to be found guilty of a bribery offence under the Act, any associated person must have intended to obtain or retain an advantage for that organisation itself.

## DEFENCE

It is a defence to a charge of failing to prevent bribery if the relevant organisation can show that it had implemented adequate procedures to prevent persons associated with it committing bribery.

A company needs to prove, on the balance of probabilities, that it has robust anti-bribery systems in place to discourage this kind of behaviour by associated persons. This places a significant burden on businesses trading in and from the UK to design and embed robust anti-bribery policies and procedures, including monitoring and training programmes for staff. In addition, detailed due diligence on trading partners and other associates must be undertaken prior to and during the course of any commercial arrangements.

## PERSONAL LIABILITY

Where a bribery offence is committed by a company and it is proved to have been committed with the 'consent or connivance' of a director, manager or other senior person who is closely connected with the UK (or someone 'purporting to act in such a capacity'), that person is also guilty of the offence.

The maximum sentence that can be imposed on such an individual is 10 years' imprisonment and/or an unlimited fine. Directors can also be disqualified under the Company Directors Disqualification Act 1986 for up to 15 years.

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## PROSECUTION AND PENALTIES

Investigations under the Act are primarily undertaken by the Serious Fraud Office (**SFO**).

For individuals who break the law the maximum penalty is 10 years imprisonment and/or an unlimited fine. Corporate defendants face an unlimited fine.

The Sentencing Council is currently considering levels of fines to be imposed and it has been proposed that a calculation of 400% of the "harm factor" - the gross amount obtained/loss avoided by the offender through the course of the offence - may be appropriate.

The magnitude of these sanctions and the wide reach of the legislation require all business subject to the Act to digest the guidance issued by the UK Ministry of Justice (<http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>) and to ensure that tailored compliance systems and procedures are entrenched in all aspects of the business model.