

Overview of Bribery Act, 2010

The Bribery Act 2010

The Bribery Act 2010 (BA 2010) was passed to ensure the UK's compliance with the Organisation for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and came into force on 1 July 2011. It is designed to provide an effective legal framework to tackle corruption in both the public and private sectors, modernising the UK's anti-corruption legislation and replacing the Prevention of Corruption Acts 1889-1916.

References: OECD Bribery Convention (PDF)

It has major implications for any business that is incorporated or trades in the UK. It applies to bribery committed by it, or on its behalf, anywhere in the world.

Offences

BA 2010 introduces four new offences

- o bribing another person
- o soliciting or accepting a bribe
- o bribing a foreign public official, and
- o (for a business) failing to prevent bribery

Common to each of these offences is

- o a (financial or other) advantage is given, promised or requested, and
- o the improper performance of a function or activity

Bribing another person

This offence occurs when a person, A, offers, promises or gives a financial or other advantage to another person, B

- o intending that advantage to bring about, or reward, improper performance of a relevant function or activity, or
References: BA 2010, s 1(2)
- o where A knows or believes that acceptance of the advantage would itself constitute improper performance of a relevant function or activity
References: BA 2010, s 1(3)

In this respect

- o 'financial or other advantage' is not defined, but is likely to include cash or cash equivalent, gifts, hospitality and entertainment, preferential treatment in a tendering process, etc
- o it does not matter whether the advantage is offered or given to the person who is to perform the activity
References: BA 2010, ss 1(2), 1(4)
- o it does not matter whether the advantage is offered directly, or through a third party
References: BA 2010, ss 1(2)-1(3), 1(5)
- o a relevant function or activity
References: BA 2010, s 3
 - is a public function, business activity, activity performed in employment, or activity carried out for a company or unincorporated body, where the person performing is expected to perform in good faith or impartially, or is in a position of trust by virtue of performing it, and

- may have no connection with the UK and can be performed outside the UK
- o the improper performance of a relevant function or activity means that the person performing is in breach of a relevant expectation (meaning that of a reasonable person in the UK in relation to the performance of the particular function or activity, disregarding local custom and practice unless it is allowed or required by the written law of the country concerned), ie that they
References: BA 2010, ss 4-5
- will perform it in good faith or impartially, or
- are in a position of trust by virtue of performing it

Soliciting or accepting a bribe

This offence occurs when a person, C, requests, agrees to receive or accepts a financial or other advantage

- o intending that, as a result, a relevant function or activity is improperly performed
References: BA 2010, s 2(2)
- o where C doing so itself constitutes improper performance by them of a relevant function or activity
References: BA 2010, s 2(3)
- o as a reward for the improper performance (by C or another) of a relevant function or activity, or
References: BA 2010, s 2(4)
- o in anticipation of, or consequent on, C doing so, a relevant function or activity is improperly performed, either by C or by another person at C's request or with their assent or acquiescence
References: BA 2010, s 2(5)

In this respect

- o 'relevant function or activity' and 'improper performance' have the same meanings as under BA 2010, s 1
References: BA 2010, s 1
- o it does not matter whether C requests, agrees to receive or accepts the advantage directly or indirectly
References: BA 2010, s 2(6)
- o nor does it matter whether C or another person is to perform the activity
- o under BA 2010, ss 2(3)-2(5), it does not matter whether or not C thinks that performance is improper, nor
References: BA 2010, ss 2(3)-2(5), 2(7)
- o under BA 2010, s 2(5), does it matter whether another person performing the function or activity thinks that performance is improper
References: BA 2010, ss 2(5), 2(8)

Thus, in three of the four cases constituting this offence, C's state of mind does not matter. Improper performance is enough: there is no defence of innocent error.

Bribing a foreign public official

The offence of bribing a foreign public official (FPO) occurs under BA 2010 when a person, D, bribes an FPO, F, intending to
References: BA 2010, ss 6(1)-6(2)

- o influence F in the latter's capacity as a foreign public official, and
- o obtain business or an advantage in the conduct of business

In this respect

- o an FPO is an individual who
References: BA 2010, ss 6(5)-6(6)
 - holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the UK (or any subdivision of such a country or territory)
 - exercises a public function
 - for or on behalf of a country or territory outside the UK (or any subdivision of such a country or territory), or
 - for any public agency or public enterprise of that country or territory (or subdivision), or
 - is an official or agent of a public international organisation, ie an organisation whose members are any (including any mixture) of
 - countries or territories
 - governments of countries or territories, or
 - other public international organisations
- o bribery means offering, promising or giving a financial or other advantage, either to an FPO or another person at the FPO's request or with their assent, unless the FPO is allowed by written law to be influenced by the advantage (which is presumably unlikely)
References: BA 2010, ss 6(3), 6(7)

Failure to prevent bribery

The offence of failure to prevent bribery applies to commercial organisations only. It occurs when a person, F, associated with such an organisation, G, bribes another person with the intention of obtaining or retaining business, or business advantage, for G.

References: BA 2010, s 7

In this respect

- o a commercial organisation for these purposes is an incorporated body or partnership formed under the law of, or carrying on any business in, any part of the UK; it will thus include foreign businesses trading in the UK
- o F is an associated person if they perform services for G; the test is not one of control, so agents, distributors, joint venture partners etc, as well as employees and subsidiaries, will be associated persons under BA 2010
References: BA 2010, s 8
- o bribe has the meaning set out in BA 2010, ss 1 and 6
References: BA 2010, ss 1, 6, 7(3)
- o the bribery may occur anywhere in the world; it does not have to take place in the UK
References: BA 2010, s 12(5)
- o the bribe need not be paid by a UK-registered company or a person having a close connection (see below) with the UK
- o F's intention need not be dishonest; it is enough that a payment was made
- o G does not have to know of the bribery; it is enough that it failed to prevent it
- o however, it is a defence for G to prove it had adequate procedures in place designed to prevent bribery (see 'The adequate procedures defence' below)
References: BA 2010, s 7(2)

Senior officers

Where a company commits any of the first three offences set out above (ie bribing another person, soliciting or accepting a bribe, or bribing a foreign public official) senior officers may be jointly liable with it where they consented to or connived at the bribery. In this respect

References: BA 2010, s 14(2)

- o 'senior officers' means directors, company secretaries, managers and similar officers, and includes anyone who acts as one
References: BA 2010, s 14(4)(a)
- o senior officers cannot be prosecuted unless they have a close connection with the UK
References: BA 2010, s 14(3)

Senior officers are not jointly liable with a company for the latter's failure to prevent bribery.

The adequate procedures defence

As noted, it is a defence to a charge of failure to prevent bribery that a commercial organisation had adequate procedures in place to prevent it. The MoJ has published the document, Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (the MoJ guidance), which includes a non-prescriptive list of principles for organisations to follow.

References: BA 2010, s 9

Territorial application

The offences of bribing another person, soliciting or accepting a bribe, or bribing a foreign public official are committed if any act or omission forming part of an offence

- o takes place in the UK, or
References: BA 2010, s 12(1)
- o does not take place in the UK, but
References: BA 2010, s 12(2)
 - the act or omission would be an offence if it took place in the UK, and
 - the person concerned has a close connection with the UK, ie they are
References: BA 2010, s 12(4)
 - a British citizen
 - ordinarily resident in the UK
 - a body incorporated in the UK, or
 - a Scottish partnership

BA 2010, therefore, has extraterritorial effect. It applies to foreign businesses having a trading presence (however small) in the UK as well as to UK businesses trading abroad.

Facilitation payments, gifts and hospitality, and exceptions

BA 2010 contains no exception for facilitation payments. These are payments made to ensure that (normally) an official does what they are already bound to do. If made to foreign public officials, they will almost certainly constitute the offence of bribing a foreign public official; there is no need to show corrupt intent in making the payment. By way of comparison, the US Foreign Corrupt Practices Act does allow facilitation payments in limited circumstances.

Gifts and hospitality may be caught where they are lavish and/or non-routine, as that may induce the recipient to act improperly. Political donations and other payments may also be caught.

There are exceptions for the performance of intelligence and military operations.

In the policy document published by the SFO on 9 October 2012 it was emphasised that facilitation payments were illegal prior to the Bribery Act and continue to be regardless of their size or frequency. The policy makes it clear that a decision to prosecute for facilitation payments or business expenditure will be governed by the Full Code Test in the Code for Crown Prosecutors and the Joint Prosecution Guidance of the Director of the SFO and the Director of Public Prosecutions on the Bribery Act 2010. The policy states that the Joint Guidance on Corporate Prosecutions will also be considered where relevant.

Penalties

The following penalties apply for breach of BA 2010

- o individuals may be subject to unlimited fines, and/or up to ten years' imprisonment
- o companies may be subject to unlimited fines and (Public Contracts Regulations 2006, SI 2006/5) may be disbarred from public procurement in the UK
References: SI 2006/5, reg 23
- o directors may also be disqualified from acting as a director for between two and 15 years
References: CDDA 1986, s 2

Using anti-corruption policies

The risk of corruption to a business will vary according to its structure and governance, its operational methods, in what sectors and markets it operates, channels to market etc. The resources at its disposal to address corruption will also vary. Nonetheless, all businesses with a trading presence in the UK must put (or have) in place adequate procedures to prevent bribery. Suitable anti-corruption policies should thus be put in place where none exist and existing ones checked to make sure they address what BA 2010 requires.

The MoJ guidance is based around six principles, around which anti-corruption policies should in turn be based

References: MoJ guidance(PDF)

- o proportionate procedures--procedures should be proportionate to the risks an organisation faces, as well as the nature, scale and complexity of the organisation; they should also be clear, practical, accessible and effective, both in implementation and enforcement
- o top-level commitment--the top-level management of an organisation should be committed to preventing bribery by persons associated with it, fostering a culture within the organisation that bribery is never acceptable
- o risk assessment--an organisation should assess periodically, and document, the nature and extent of its exposure to possible external and internal bribery risks by persons associated with it
- o due diligence--due diligence procedures to mitigate potential bribery should be applied that take a proportional and risk-based approach, in respect of those who perform services for or on behalf of an organisation
- o communication (including training)--bribery prevention policies should be embedded and understood throughout an organisation, via internal and external communication
- o monitoring and review--there should be a system of monitoring, reviewing and (where necessary) improving anti-bribery procedures by persons associated with the policy

Special attention should be paid to offices in countries seen as prone to corruption. It is not unknown for local management to disregard instructions from head office and to take the view that they do what they have to do in that country to win business. For businesses registered or trading in the UK, that approach will almost certainly fall foul of BA 2010.

Indicators of corruption

Indicators of corruption may include the following

- o payments
 - are for abnormal amounts, or
 - have unusual structure or mechanics, eg are made to an account never previously used or what would normally be a single payment is made in stages
- o process or procedure is short-circuited or bypassed (eg approvals for terms of tender documentation, payments or other commercial matters)
- o individuals
 - have a more lavish lifestyle than expected
 - are never absent from meetings or decisions relating to particular matters
 - are secretive about certain relationships or insist on dealing with them themselves
 - frequently make trips at short notice without explanation
- o decisions are taken for which there is no clear rationale, or
- o records are incomplete or missing

The list is not exhaustive and other factors may apply in individual cases.

Consequences of corruption

Involvement in (and particularly being seen to be involved in) corruption can adversely affect a business in several ways. These include:

- o general adverse publicity
- o the business may be disbarred from participating in, or tendering for, various types of business (particularly public sector)
- o sales may drop
- o suppliers may no longer want to deal with the business or may do so only on certain terms
- o employees may leave
- o the share price of quoted companies may drop
- o insurance policies may be affected--the cost of cover may increase, and policies are unlikely to respond in respect of loss caused by corruption