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1. Introduction

The Bribery Act 2010, in force from July 2011, has been created with the principal aim of preventing acts of bribery and promoting best practices both in the UK and internationally.

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 provided 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 emphasis is on the implementation of appropriate measures. It is not effective 100% of the time; however, businesses should accept this fact. Defences exist, but not everything will be judged in favour 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 under the Act 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 multinational businesses will be far less likely to be affected 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:

- a) Offering or promising a bribe
- b) Bribing a foreign public official
- c) 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”):

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

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

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What is “improper

Improper performance is a failure to perform in 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

The viewpoint of a reasonable person is a key factor in determining whether or not performance is improper. This is particularly useful in determining whether a reasonable person would expect a person to provide hospitality to a foreign official in providing networking opportunities between businesses, there will be no offence.

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

adopted when determining whether or not performance is improper. This again is contextual and is particularly useful in determining whether a reasonable person would expect a person to provide hospitality to a foreign official in providing networking opportunities between businesses, there will 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 (“FPO”) with the intention of influencing the FPO 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 their business as a result of the FPO’s actions.

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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.

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Who is a Foreign Public Official?

- a) An official, whether or not appointed, who holds a legislative, administrative or judicial function in any kind in any country or territory outside of the UK;
- b) Any person holding a position in a branch of the national, regional or local 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.

appointed, who holds a legislative, administrative or judicial function in any kind in any country or territory outside of the UK;

functions in a branch of the national, regional or local 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

international organisations such as the UN.

What is the rationale for this offence?

The policy behind this offence 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).

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 applicable to a public official concerned permits or requires the advantage to be given, there will be no offence under the Bribery Act. Such “advantages” can come in the form of an investment or a government contract. This will, of course, be the case where the advantage is given in conformity with a specific policy of the public official concerned.

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2.3 **Three: Failing to P**

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What is “Carrying

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the prevailing public interest.

does not prohibit normal, genuine
expenditure which purports to
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must still be present an intention to
business advantage as a result. To
such as, for example, travel and
financial advantage.

Advantage and influence

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there may be direct evidence to
of evidence, combined with more
s will be required. Needless to
re likely a finding of bribery. That
particular sector will also be taken
– put simply – common sense.
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able if a person associated with it
intention of obtaining or retaining
business for CO.

had in place adequate procedures

vant commercial organisation” is a
in the UK, irrespective of where it
body or partnership which carries on
UK, irrespective of the place of its

he UK the law applies a common
not it carries on business. It is
ose aims are primarily charitable
made, it is immaterial as to how

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If a body or partners a common sense approach there is no demonstration Bribery Act will not existence of a UK foreign parent if that

de the UK, the law will again apply termination. Generally speaking, if e in the UK, the provisions of the guidance also notes that even the sufficient to impose liability on a idently.

Who is an “Associate”

A person will be a services for or on behalf an individual but can from applying only to and subsidiaries. Companies provide services for services for a commercial assessments to be key role in determining

commercial organisation if they perform n. The associated person can be ted or unincorporated body. Far the Act also encompasses agents under the definition insofar as they on. Equally, if a supplier performs ay also qualify. As with so many text and circumstances will play a person and who is not.

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

ved (for example contractors who, s) a commercial organisation will olved. In such cases, therefore, implement their own anti-bribery them and to request that those edures and, in turn, request the

Joint ventures do not however if one member another member (“M1”) liability may fall on the individual members putting other members at risk of liability.

atic presumption of “association”; venture is performing services for with the intention of benefitting M1, y. It is important to be aware that ll engage in acts of bribery without m themselves) of the joint venture

In cases where arrangement, contract whether a person business is performed the law will examine over the arrangement

nducted through a contractual tant factor. When determining he conduct of the joint venture’s half of a participant in the venture, r which a particular participant has

Nevertheless, even performing services must still be an intended advantage in business from PSA’s actions

subsidiary (“PSA”) is found to be mmercial organisation (“CO”), there to obtain or retain business or an direct or incidental benefit by CO t to impose liability.

3. Other Important Issues

3.1 Facilitation Payments

A facilitation payment routine government the making of such above or a combination

bribe paid to facilitate otherwise organisations should be aware that any of the three offences outlined

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3.2 Duress

In the event that a duress will most likely be important to note, the defendant reasonably believes that serious physical injury will be done to him or her or to a person close to him or her if he or she does not comply with the threatening person's wishes. Furthermore, the defendant has no other way of avoiding the consequences of not doing the same in the circumstances.

...duress, the common law defence of duress will generally apply only if the defendant believes that he would succumb to death or serious physical injury if he does 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):

...executed under the Bribery Act, the authorities will take into account (in addition to those described above):

- a) The sufficiency of the public interest;
- b) The public interest in the particular case;
- c) The seriousness of the offence.

...often with respect to the public interest).

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4. The Principles of the Bribery Act

4.1 One: Proportionate

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

...by the Act to implement suitable measures to guard against bribery. The key point with respect to proportionate to the risks the organisation faces and complexity of its activities. Moreover, the measures should be practical and accessible.

How should my business address bribery?

The content of company policies should address the company's commitment to reduce the risk of bribery. Policies will be implemented to the appropriate extent.

...address (to the appropriate extent) the company's commitment to reduce the risk of bribery. Policies will be implemented to the appropriate extent, an overview of steps taken and details of how bribery prevention

What should my policies include?

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

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

- a) The degree of senior management involvement in the prevention of bribery;
- b) Procedures for identifying and assessing bribery risks;
- c) Due diligence procedures for associated persons (see definition above), both before and after the transaction;
- d) Gifts, hospitality and facilitation payments;
- e) Matters relating to recruitment, terms and conditions, employment and pay;
- f) All aspects of the relationship with associated persons;

...management is involved in the prevention of bribery;

...associated persons (see definition above);

...charitable and political donations,

...including recruitment, terms and conditions, employment and pay;

...with associated persons;

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- g) Appropriate ... , auditing and expenses;
- h) The transpa
- i) Disclosure o
- j) Decision m ... including delegation of authority, separation o ... of interest;
- k) The enforce ... sures;
- l) Procedures ... y;
- m) The way(s) i ... intends to implement anti-bribery measures;
- n) The commu ... procedures and training therein;
- o) The ways i ... to be monitored, reviewed and evaluated.

4.2 Two: Top-Level Co

Top level manage bribery within an or should be the resp culture within the b the communication organisation and t suitable anti-bribery

ate a commitment to preventing associated with that organisation. It agement to foster an anti-bribery ment should, at a minimum, entail -bribery position to all levels of the agement in the development of

What is my comm

Depending upon the may be required. level management v other levels of man management shou individuals, provide measures, take an seek to involve th (though it is argua smaller businesses)

n, more or less direct involvement ion, the more likely it is that top- es which are then implemented by organisation of any size, top-level sibility is placed upon suitable ip with respect to anti-bribery compliance or breach and should er campaigns to prevent bribery is considerably less relevant for

How should I com

Many organisations top-level managem (or the inclusion o strengthen the orga

ent?

statement of commitment issued by rt. A straightforward written policy s in relevant policies) may also

What should my s

Government guidar on an organisation? demonstrate:

- a) A commitme

of key factors which any statement d procedures should address and

en business practices;

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- b) A zero-tolerance policy;
- c) Details of controls for directors, managers, employees and associated persons for bribery policies and procedures;
- d) An explanation of the benefits of preventing bribery;
- e) Details of any training which has or is being or have been implemented to prevent bribery;
- f) Details of the individuals within the organisation who are responsible for the development and implementation of the procedures;
- g) Details of any arrangements with third parties 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 stakeholders 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 bribery risks will yield the required information; in other cases, more detailed risk assessments may be required. As with all aspects of the Act, it is important.

What factors should I consider when assessing risk?

- a) Your Own Business: Structures and procedures within your business. In some cases, those structures may increase or reduce the risk of bribery taking place. 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 Transactions: Transactions may lend themselves more readily to bribery. Examples provided by government guidance include: large scale public donations; licences and permits; and public procurement.
- d) Your Business Relationships: Cases, particularly those involving public officials, partners or other intermediaries in a transaction may be more susceptible to bribery, particularly in the form of kickbacks.
- e) Business Context: High value projects, particularly those involving bid-rigging and those involving contractors and other intermediaries, present greater bribery risks.
- f) The Country: If you are operating in a foreign country, consider the nature of business, the culture and the prevailing attitude to bribery and corruption. Consideration should be taken into account along with its government's attitude to bribery, which may be evidenced perhaps by the presence of a bribery offence. This should be taken into account.

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4.4 **Four: Due Diligence**

Good governance is essential. Due diligence requires that risks are identified and managed. For small-scale local transactions, anti-bribery due diligence may involve intermediaries to liaise with

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

How should I exercise due diligence?

Following the other principles, due diligence (particularly the third) plays a significant role. Each transaction should be assessed on its own merits and internal procedures in place will not always be sufficient. Due diligence for all transactions and undertakings will go a long way towards demonstrating appropriate due diligence.

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4.5 **Five: Communication**

Implementing policies and procedures, and communicating them (and 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

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How can I communicate internally?

Internal communication and training associated with those policies be clearly defined and implemented them should be upon the size of the organisation, from staff to specific transactions within the organisation.

How can I communicate externally?

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How can I best communicate externally?

Statements of policy and an organisation's culture can be said for any aspect of a business, not merely those relating to preventing bribery. In certain situations, more explicit communication of those policies may be required. In situations involving associate

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require those persons to receive such training to their satisfaction.

in anti-bribery practices or provide such training to their satisfaction may be.

4.6 **Six: Monitoring and Review**

Business is scarce and change over time. The structure of an organisation operating in a particular sector and market within which the organisation operates may be able merely to implement policies and procedures and to maintain them.

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How should I monitor and review my policies and procedures?

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Periodic reviews should be carried out as may be appropriate. Policies and procedures are not static and an evaluation of measures should be carried out where those measures are found to be ineffective. Furthermore, certain measures such as certification or verification following scrutiny of records and methods of verification can act as a valuable tool for partners, associates and suppliers.

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