

UK Bribery Act

Practical Implications for Internal Control

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Overview

- History
- Overview of the New Law
- Consequences of Breach
- What does it mean for everyday business?
- What should "adequate procedures" look like?
- How to ensure your firm is compliant

The New Law

Bribery Act 2010

- Expected to come into force in April 2011 (implementation date not yet confirmed)
- New general offences of bribing and being bribed
- Specific offence of bribing a foreign public official
- No exception for facilitation payments
- Personal liability for senior officers who consent or connive
- New corporate offence where organisations fail to prevent bribes being paid on their behalf
- Defence where company had "adequate procedures"



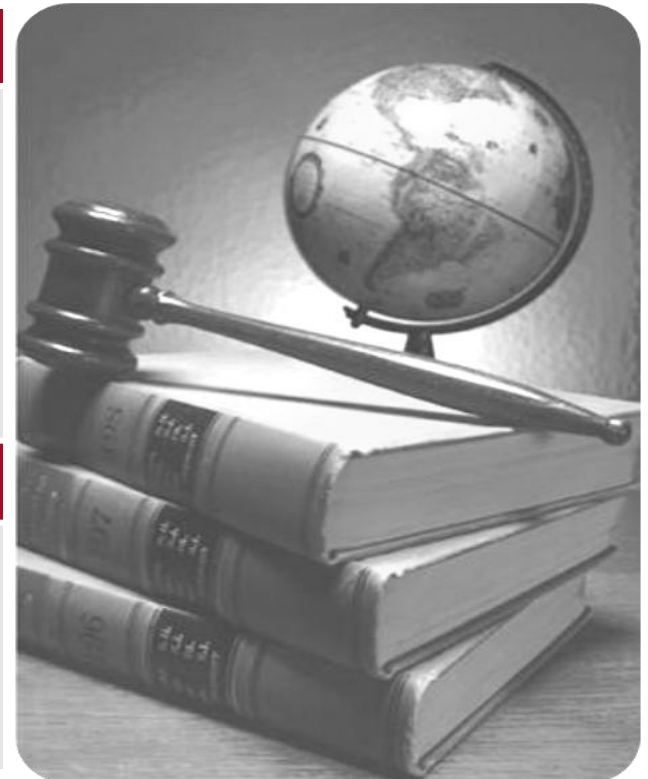
Bribery Act 2010: General Offences

Paying bribes

- offence to offer or give a financial or other advantage with intention of inducing a person to perform a "relevant function" or activity "improperly" or to reward that person for doing so, or where payer knows acceptance of bribe itself constitutes improper performance of a function or activity

Receiving bribes

- it is an offence to receive a financial or other advantage intending that a "relevant function or activity" should be performed "improperly" as a result, or where acceptance itself improper
-
- Does not matter whether recipient is person performing the function



Bribery of Foreign Public Official (FPO)

- Offence where a person offers or gives a financial or other advantage to a FPO with the intention of influencing the FPO and obtaining or retaining business where the FPO is neither permitted or required by written law to be so influenced.
- FPOs – include holders of legislative/judicial administrative functions. Also persons who exercise public functions for public agencies and public enterprises. Also international organisations
- Narrower test than the general offences given the "business nexus" element, although no "improper" intent required
- General offences could also apply



Corporate Offence (1)

- **Strict liability offence** where a person (A) is *associated with* an organisation (C) pays a bribe
- Intending to:
 - obtain or retain business for C; or
 - obtain or retain a business advantage for C
- Person A associated with C where *performs services for/on behalf of C*
- Defence to the offence where C can show it had "adequate procedures" in place to prevent bribery
- Secretary of State to publish guidance on adequate procedures

Corporate Offence (2)

- A person who "performs services" on behalf of the commercial organisation could be any employee (where performance of services is automatically presumed), any agent, a sub-contractor and even a subsidiary
- To be determined in overall context of relationship - capacity in which services performed irrelevant
- Under the new general offences and the old law, a company is only likely to be found guilty of a bribery offence if very senior management or the board are involved
- Under this offence, the company may be guilty even if no one in the company knew of the bribe
- No requirement that the individual who makes the bribe is subject to the Bribery Act, nor that any prosecution is brought against them individually

Territorial Scope: General Offences

- Where any relevant act or omission occurs in any part of the UK
- The general offences and the offence of bribing an FPO have extra-territorial application
- The offences may be prosecuted if committed by a British national or corporate or by a person who is ordinarily resident in the UK regardless of whether the act or omission which forms part of the offence took place outside of the UK



Territorial Scope: Corporate Offence

- Applies to any UK incorporated entity and any overseas entity that carries on a business or part of a business in the UK.
- Courts to interpret "part of business" – but on the face appears to be broad
- Associated individual or entity that carries out bribery on behalf of the organisation does not need to have any connection with the UK
- Proceedings against non-UK companies subject to SFO prosecutorial discretion and relationships with overseas authorities
- SFO has indicated that it may use its powers to ensure level playing field for UK corporations



Consequences of Breach

Penalties Under the Act

- The Act will raise the maximum imprisonment from 7 years to 10 years for an individual
- A company convicted of failing to prevent bribery could receive an unlimited fine
- Note also potential money laundering liability (14 years imprisonment or unlimited fine)
- Also possible civil/commercial liability (*e.g. contractual claims, economic parts, breach of fiduciary duty*)



Recent Enforcement Action

guardian.co.uk

Record US Fine Ends Siemens Bribery Scandal

- Cost of case to German firm totals €2.5bn
- Former board blamed for failing in duty

guardian.co.uk

Tues, 7 October 2008

Balfour Beatty agrees to pay £2.25m over allegations of bribery in Egypt

guardian.co.uk

25 March 2010

Daimler 'agrees \$185m fine' to settle US corruption investigation

TIMESONLINE

April 14, 2010

Businessman jailed for Greek bribery conspiracy

Robert Dougall is jailed for 12 months after £5 million conspiracy to secure contracts to supply orthopedic products

THE INDEPENDENT

Fri, 9 January 2009

FSA hits Aon with £5.25m fine

International edition
Monday 15, 01.07
guardian.co.uk

the guardian

Newspaper of the year

BAE's secret \$12m payout in African deal

Middleman reveals covert cash for 'unnecessary' Tanzanian radar sale

David Leigh
The UK's biggest arms supplier secretly paid a 10m commission into a bank account in a deal which led to Tanzania, one of the world's poorest countries, buying a controversial military radar system. A Tanzanian middleman, who has a long-standing relationship with military and government figures, has admitted that the sum was covering bribes to a former account by A&E Systems, which is under a second, more onerous agreement, BAE's security correspondent says.

He said BAE had made two parallel arrangements with the middleman. In the first, a conventional agency agreement was signed. Under this, its commission was to be paid of the sale-radar deal went through, via a Tanzania registered firm, Middle International Ltd.

Mr Victoria was the majority shareholder in Middle, Mr Somalia said, while he had a small stake. However, BAE paid \$400,000 down this year in stage payments, Mr Somalia said, as the deal agreement was delivered.

But under a second, more onerous agreement, BAE's security correspondent says.

What is Rocky doing at Everton?

Civil servant suspended over criminal files blunder

Alan Travis
Home affairs editor

A senior Home Office civil servant has been suspended after "misentering radar markers" to the internal inquiry investigating the department's failure to log 25,000 criminal records of Britons convicted abroad on to its police computers. A Home Office spokesman said yesterday the concerned official had provided information since Friday that warranted further investigations and raised the possibility of disciplinary action.

It came as an overhaul of all Britain's criminal databases, including airport Whitehall data covering travellers and those working with vulnerable adults. A spokesman for the First Division, Associated Union, which represents 10 civil servants, confirmed one of its members has resigned.

The minister responsible for the criminal

TIMESONLINE

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Where am I? > Home > News > UK News > Crime News

From The Times
September 26, 2009

Bribes firm ordered to pay £6m for breaching Iraq sanctions

Frances Gibb, Legal Editor

12 COMMENTS | RECOMMEND? (3)

A British company that admitted bribing ministers and officials in Ghana and Jamaica, and breaching sanctions in Iraq

CAR UN

TIMES RECOMMENDS

- > British artists make it in the movies
- > Celebrity watch: Pot-shots and AA Gill
- > Dangers of drug use aren't

Plea Bargaining

- Serious Fraud Office (SFO) trying to promote plea-bargain system for British companies using its self-reporting regime
- English courts are undecided on whether plea agreements are acceptable under English law
- SFO has yet to produce prosecution guidelines – recent deals have been criticised by judges (*Innospec, Dougall*)
- December 2010: BAE plea deal with the SFO resulted in a fine of only £500,000 (with an additional requirement to pay £30m to government of Tanzania) for corruption offences
- Is self-reporting the best strategy for your company (*Balfour Beatty*)?

Impact on Everyday Business

Gifts and Hospitality

- Act does not aim to criminalise normal and reasonable hospitality
- However, gifts and hospitality can be used for bribery
- Hospitality unlikely to breach Act if it is:
 - reasonable or proportionate
 - has a bona fide business purpose
 - is not intended to influence
- Unduly lavish hospitality could give rise to inference of impropriety
- Take care re: timing (e.g. is recipient handling or involved in a pending decision affecting your organisation?)
- Is acceptance of gift/hospitality permissible under internal codes of conduct applying to recipient?
- Mitigating steps: e.g. ethics letter from employer
- Approval limits

Facilitation Payments

- Small payments to expedite routine official action
- Permissible in certain circumstances under foreign legislation (e.g. US FCPA) but illegal under the Bribery Act
- Less likely to attract enforcement action unless systemic or combined with other unlawful conduct
- However, must be prohibited under codes of conduct
- Potential for escalation internally if employees are under duress

What should "adequate procedures" look like?

Adequate Procedures

- In September 2010 the Ministry of Justice issued a consultation paper which contains the first draft of the Government's guidance
- The Guidance contains high level principles and not prescriptive standards
- The Government has set out six general principles for organisations to consider when putting in force their procedures
- No "one size fits all" – Organisations should be free to tailor policies and procedures to be effective to their own business, taking account the nature, scale and complexity of their activities
- Finalised guidance due in early 2011

Principles

The 6 principles cover how a business is to assess its bribery risks (*Principle 1*) and consequent risk mitigation measures (*Principles 2 to 6*)

The 5 mitigation measures cover

- 1 Sponsorship of the programme at Board and senior management level
- 2 Due diligence of counterparties, agents and intermediaries
- 3 Drafting and implementation of effective policies and procedures
- 4 Effective embedding of compliance programmes; and
- 5 Monitoring and review of those programmes

Meaning of Adequate Procedures?

- Procedures will need to be tailored to reflect the individual risk profile of each business/product line
- Procedures must be "living" documents and reflect the evolution of a business' risk profile
- Ultimately the courts will need to decide whether procedures are adequate (and have been adequately rolled out) and it will be for the organisation to prove this
- Vitally important that both the procedures themselves and the rolling out of those procedures is documented (*e.g. employment contract, training records, contract terms with third parties*)

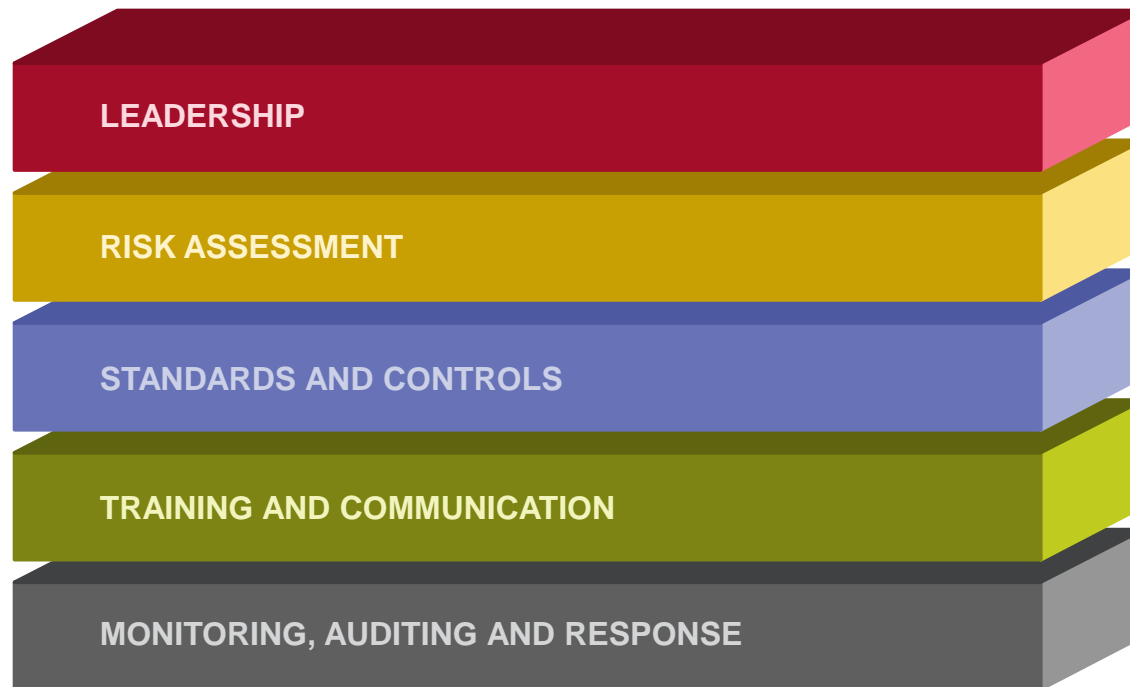
What should a firm's systems look like?

Adequate Procedures should include the following

- a clear statement of anti-corruption culture supported at the highest levels of management
- risk assessment
- a code of ethics
- processes for auditing the anti-bribery programme
- adequate training
- due diligence
- a system of reporting
- financial controls
- various behavioural policies, including for example gifts & hospitality, facilitation payments, dealings with third parties and political / charitable contributions
- extension to partners/third parties
- investigation and disciplinary processes

How to ensure your firm is
compliant

Key Elements of an Effective Compliance Program



1. Leadership (UK Government Guidance)

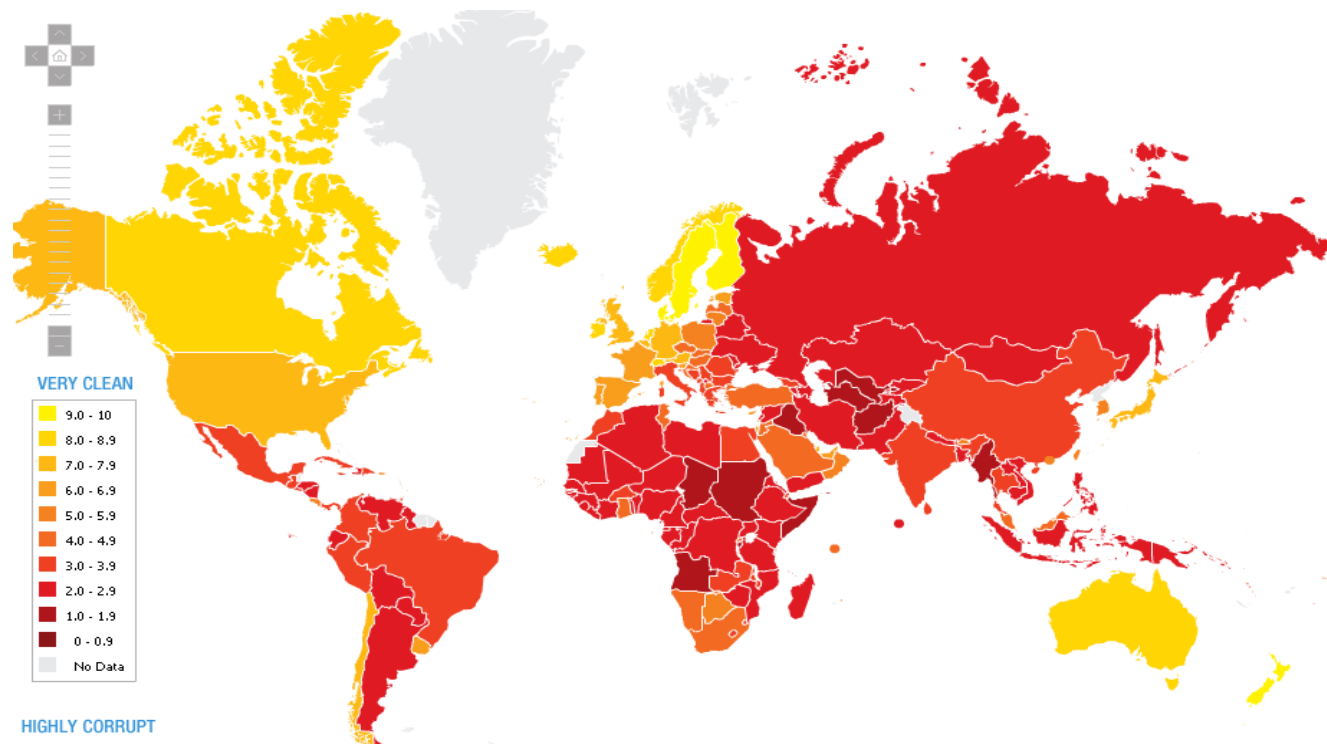
- Top level management commitment to prevention of bribery → "Culture of Compliance"
- Internal and external communication of commitment:
 - Public statement of anti-bribery commitment
 - Code of Conduct
 - Compliance Manual/Compliance Policies
 - Employment contracts
 - Agreements with third parties
 - Training
- Senior management oversight of anti-bribery programme

2. Risk Assessment (UK Government Guidance)

- Key external risk factors
 - Country risk: Perceived level of corruption
 - **TI Corruption Perceptions Index**
 - High risk money laundering jurisdictions
 - Industry risk: Political contributions, public procurement, high value projects
 - Partnership risk: Government relationships, distributors, JVs
- Internal risk factors include deficiencies in knowledge and procedures, as well as remuneration structures
- Assessment must be undertaken by appropriate personnel
- Use of internal resources (*e.g. internal audit reports*)

Jurisdiction Risks

CORRUPTION PERCEPTIONS INDEX 2010 RESULTS



Industry Risks: Insurance

- Use of sales agents – often remote
- Sales agents may handle cash
- Remuneration structures – commissions paid for pure introductions
- Commission rebates and side letters
- Personal policies in exchange for corporate policies

Risk Assessment: Methodology/Output

- Risk assessment questionnaires
- Interviews
- Review of existing systems and controls
- Responsibility for assessment
- Report to Senior Management/Board
- Individual assessment output to relevant business lines
- Grading of risks (*e.g. business lines, group companies, counterparties and third parties*) into risk categories
- Areas of uncertainty or that require further assessment
- Timetable for updating previous risk assessment

3. Standards and Controls (UK Government Guidance)

- Public statement of anti-bribery commitment
- Codes of Conduct/policies
 - Gifts and entertainment
 - Political/charitable contributions
- Compliance Manual
- Whistle-blowing/escalation procedures
- Investigation procedures (including "dawn raids")
- Support with existing controls and processes
 - Financial and auditing controls
 - Disciplinary procedures
 - Performance appraisals

Due Diligence (UK Government Guidance)

- Third party due diligence is key to mitigating risk
- Know who you are dealing with and understand the associated risks:

Jurisdiction

Are they operating in a high risk jurisdiction?

Role/Opportunity

What role are they undertaking on your behalf? What risks does the business opportunity raise?

Reputation

Prior investigations relating to bribery or other compliance failings?
Compliance policy?

Government/customer relationships

Any relationships with the Government or customers?

Possible Checklist for Third Parties (TP)

- **Necessity**
"Do we need the TP?"
- **Qualification**
"Is the TP competent?"
- **Legal**
"Does local and other applicable law permit our use of a TP generally and this TP specifically?"
- **Integrity**
"Who is the TP?"
"What has the TP done so far?"
"What does TP request?"

4. Training and Communication (UK Government Guidance)

- "Bringing high-level anti-bribery commitment to life"
- Allocating roles and responsibilities for implementation
- Timeline for implementation
- Internal reporting re implementation
- Training re risks and policies/procedures
(*including third party business partners?*)
- Internal and external communication

Extension to Counterparties and Third Parties

- Due diligence/screening – check third party policies and procedures
- Extension of your policies to third parties
- Impose obligations in agreements with third parties, e.g:
 - Compliance with applicable laws including bribery laws
 - More detailed description of prohibited forms of conduct
 - Annual certification of compliance
 - Audit rights of books and records of third party
 - Reporting obligations if issues uncovered
 - Termination rights

5. Monitoring and Review (UK Government Guidance)

- Financial monitoring
- Incident reporting
- Reporting into Audit Committee/Board of Directors
- Trigger events for more in-depth review (e.g. *Government reports, convictions of other corporates*)
- Review of implementation by overseas offices/business partners
- External verification
- External advisors
- Associations

Evaluating the Effectiveness of your Programme: Who? When?

Who is the audience?

- The internal legal and/or compliance function
- Senior management
- The Board of Directors or the Audit Committee
- Regulators
- TPs

How frequently?

- Routine, scheduled assessments
- Informal assessments on an “as-needed” basis (don’t feel compelled to wait for a scheduled review)

Evaluating the Effectiveness of your Programme: How?

- Routine internal audits
 - Procedural audits
 - Transactional audits
 - Risk-based priorities of review
- Re-evaluation in response to internal or external developments
 - Compliance mishaps
 - New enforcement cases
 - Announcements or press reports of investigations affecting your industry/competitors
- Consider the benefits of an external advisory review (*ranging from gap assessment to more robust analysis*)

Common Compliance Pitfalls

- Focus is on public corruption (government bribery), to the exclusion of commercial bribery: Commercial bribery is a crime under the UK Bribery Act and in virtually all other countries
- Lack of coordination and inconsistent application of standards to business partner reviews and evaluations, e.g., a business partner rejected for compliance reasons by one part of the business operation but approved by another business operation
- Compliance duties are housed entirely in one unit
- Failure to modify compliance programs to reflect lessons learned or deficiencies that have been discovered
- No training of TPs

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