DENTONS

# The Bribery Act

## Has it made a difference?

Update: September 2013

Bribery and corruption risk repeatedly appears at or near the top of compliance risks faced by businesses today. This is particularly the case for those businesses which are investing in, or transacting with, parties overseas. In this Article, we give an overview of the Bribery Act 2010 (UBKA), which came into force on 1 July 2011, look at recent developments and what steps organisations should take to minimise the risk of possible prosecution .

### What's it all about? Key definitions

*Relevant function or activity*

The UKBA focuses on a "relevant function or activity" (which we refer to as a Function), which is key to understanding the breadth of the offences. This is any:

- function of a public nature;
- activity connected with a business;
- activity performed in the course of a person's employment; or
- activity performed by or on behalf of a body of persons,

in circumstances where any of the following conditions apply to the person performing it:

- he is expected to perform it in good faith and/or impartially; or
- he is in a position of trust by virtue of performing it.

Critically, the UKBA catches Functions performed outside the UK.

*Improper performance*

Many of the offences refer to "improper performance" of a Function. The UKBA sets out guidance on what constitutes improper performance and sets a test of "expectation". This is what a reasonable person in the UK would expect, ignoring any local custom or practice (unless the law of the relevant country allows or requires the practice).

### What's it all about? The offences

*The general bribery offences*

The UKBA creates two general bribery offences, which apply to all businesses, whether private or public:

Bribing another person: a person commits an offence by offering, promising or giving a financial or other advantage to another person, directly or through an intermediary:

- intending that advantage to induce a person to perform improperly a Function or to reward a person for so doing (whether or not it is the same person to whom the advantage is offered); or
- knowing or believing that accepting the advantage would in itself constitute improper performance of that Function.

Being bribed: a person commits this offence by requesting, agreeing to receive or accepting a financial or other advantage, directly or through a third party, for his own or someone else's benefit:

- intending that a Function should be performed improperly (by anyone) as a result;
- where the request, agreement or acceptance in itself constitutes improper performance by that person of a Function;

- as a reward for the improper performance by any person of a Function; or

- where that person, or anyone at his request or with his agreement, performs a Function improperly in anticipation or because of agreement to accept the advantage.

Usually, it does not matter whether any relevant person knows the performance is improper.

*Bribing foreign public officials*

It is an offence to bribe a "foreign public official". Broadly, this means a person outside the UK who holds any legislative, administrative or judicial position, exercises a public function for any country or public agency or enterprise or is an official or agent of a public international organisation. The scope of "foreign public official" is very wide, from Government Ministers and judges to State employees of all kinds. This includes employees of State Owned Enterprises - of particular concern to those seeking to invest in those countries where bribery and corruption is a particular risk.

The offence bites if a person:

- intends to influence the official in his relevant capacity;

- intends to get or keep business or a business advantage; and

- offers or promises, directly or indirectly, a bribe to the official (or another person at the official's request or with his agreement) and the written law that applies to the official does not allow or require him to be influenced.

Clearly, in some cases, this offence may be committed alongside one or both of the two general bribery offences.

## Failure of commercial organisations to prevent bribery

Any organisation (a partnership or incorporated body), formed or carrying on business, or part of a business, in the UK (the UKBA calls this a "relevant commercial organisation"), commits an offence if it allows anyone connected with it (the UKBA calls this an "associated person") to bribe another person thereby intending to get or keep business or a business advantage for the organisation. An "associated person" is a person who performs services by or on behalf of the relevant commercial organisation. It includes not only employees, but also contractors, agents, distributors and many other providers of services to the organisation. We discuss the scope of "associated person" further below.

It is a defence for an organisation to prove it had in place adequate procedures to prevent persons associated with it from engaging in this conduct. The UKBA requires the Secretary of State (the Ministry of Justice or MoJ) to publish guidance (Guidance) on the procedures organisations should put in place.

It should also be noted that the offence may apply even in circumstances where the organisation has no knowledge of the improper acts of the "associate".

## If you get it wrong? Penalties for breach

The maximum penalty for the offences is 10 years' imprisonment and/or an unlimited fine. For the "failure to prevent" offence, the fine alone applies.

Where the bribery, being bribed, or bribing a foreign public official offences are committed by a body corporate, a senior officer (or person purporting to act in that capacity) will also be guilty of an offence if the offence was committed with his consent or connivance. Where the act of bribery took place outside the UK (and the underlying offence exists only because the person committing it is a UK body corporate), the senior officer or person also needs a "close connection" with the UK to be caught by the UKBA.

## Who does it apply to? Extraterritorial effect

The UKBA catches conduct outside the UK if the person engaging in it has a close connection with the UK (including being a British citizen, an individual usually resident in the UK or a body incorporated in any part of the UK). There are limited defences only, mainly for the security services.

Critically, the "failure to prevent" offence applies to make organisations caught by it liable for the acts of "associates" even where the associate has no connection with the UK and does not commit an offence under the laws of any other country

## What are "adequate procedures"?

*Purpose of the Guidance*

Whilst the MoJ's Guidance is the determinative guidance for the purposes of the UKBA, the MoJ points out it should be complementary to other existing guidance rather than replace it. The Guidance is short and high level. It addresses some concerns expressed in the run up to the UKBA and sets out six principles, which organisations should assess how best to apply to their businesses. The principles are as follows:

- Proportionate: Procedures that are clear, practical, accessible, effectively implemented and enforced.

- Top-level commitment: A corporate culture that does not accept bribery.

- Risk assessment: Risk assessment that takes account of the nature and extent of exposure – it should be periodic, informed and documented.

- Due diligence: Businesses should take a proportionate and risk-based approach to carrying out due diligence on those they do business with in order to mitigate the risks.

- Communication: Procedures must be embedded and understood throughout organisation – and communication should be proportionate to risks.

- Monitoring and review: The Guidance suggests actions that organisations might take. Bearing in mind each principle, organisations should devise a practical, proportionate and appropriate action plan, having regard to the risks associated with its business and the countries in which it operates.. While the UKBA applies to all businesses, the guidance below focuses on the likely practical impact for financially regulated institutions in the UK.

## What should businesses do?

*Review of procedures*

All businesses caught by the UKBA should regularly review their procedures, systems and controls, paying particular attention to how they deal, directly or through agents, with overseas officials or entities. Regulated businesses should remember that these requirements are different to any imposed by the Financial Conduct Authority (FCA) or any other sectoral regulator. FCA requirements must be complied with (in particular, FCA's Financial Crime Guide which contains a section on bribery), but compliance with the UKBA and the Guidance is a separate requirement. Businesses that fall under the US Foreign Corrupt Practices Act (FCPA) must also be aware there are significant differences between UK and US legislation, so compliance with one will not mean compliance with the other.

*Senior management buy-in*

Senior management must devote sufficient resources at the right level and the board must commit to the programme. Senior management must push through the message that compliance is critical and that staff must take the firm's policies and their own responsibilities seriously. It must stand behind any disciplinary actions taken if staff do not comply, and support investigations into business relationships where there is a risk of bribery. For FCA-regulated firms this is essential to assure the FCA that firms are complying with its principles.

*ABC team organisation*

Anti-Bribery and Corruption programmes should not be left solely to one department. An organisation should have an appropriately constituted project team comprising representatives from all relevant parts of the business. It should identify all areas of the organisation that may be susceptible to bribery. It should look the following areas:

- products;

- services;

- customers;

- distributors;

- joint venture or similar partners;

- local agents and introducers; and

- jurisdictions of operation.

The project team should also analyse areas of HR, customer service and other functions that may entail bribery risks.

Project team output

Outputs, both initial and ongoing, should include:

- a statement of corporate values;

- general and specific procedures and guidance tailored to the business;

- clear statements of the consequences of attempted bribery making clear the firm will not tolerate such behaviour;

- a monitoring programme committed to changing policies and procedures when necessary;

- a reporting programme allowing safe whistleblowing;

- identification of agreements the organisation may enter into that may benefit from anti-bribery clauses; and

- a training programme ensuring the right staff are trained in matters relevant to them.

Regulators envisage a clear link between the various financial crime prevention limbs of a firm's business. The relevant teams should ensure they share information and concerns promptly.

## Who will be prosecuted?

On the same day the MoJ issued its Guidance, the two UK prosecuting authorities, the Director of Public Prosecutions (DPP) and the Serious Fraud Office (SFO), issued guidance (Prosecutors' Guidance) on the factors that would tend towards prosecution for bribery, or against prosecution.

*The basic principles for prosecution*

Prosecutions will not be brought unless there is enough evidence for a realistic prospect of conviction and it is in the public interest to prosecute. The prosecutors have given some indication of when there may or may not be a public interest in prosecuting.

It is likely to be in the public interest to prosecute where:

- there is likely to be a significant sentence on conviction;
- there is premeditation with an element of corruption;
- the offence would facilitate more serious offending; or
- those involved took advantage of position of authority or trust.
- On the other hand, there is unlikely to be any public interest, so prosecution would be less likely where:
- the likely penalty would be nominal;
- minor harm was caused, in a single incident; or
- the business took a proactive approach to self-reporting and remediation.

For the offence of bribing foreign public officials, the factors change slightly, favouring prosecution where:

- there are large or repeated payments;
- facilitation payments are made as a planned or accepted way of doing business;
- there is an element of active corruption of an official; or
- the organisation has a clear policy which has not been followed.

Against prosecution would be:

- the payment was a small single payment;
- the organisation took a genuine proactive approach to self-reporting and remedial action;
- clear and appropriate policies were in place and were followed; or
- the payer was in vulnerable position.

It is worth noting that there is no automatic reporting defence to bribery offences (unlike money laundering offences). However, in principle the authorities encourage open dialogue and, of course, bribery may involve the proceeds of crime and so be reportable to the Serious Organised Crime Agency (soon to be replaced by the National Crime Agency) under money laundering laws.

It is also important to note that the authorities are likely to take a dim view of organisations that are aware their employees face high bribery risks – for example where they frequently travel to countries where it is common for officials to try to extort grease payments – and are aware that their staff sometimes make payments, yet put in place procedures that claim a zero tolerance of bribery while failing to take any action against those who bribe. The SFO originally said it would rather hold constructive dialogue with firms that are trying gradually to eradicate bribery and discuss problems with them. However, following a change of personnel at Director level within the SFO, the SFO made it clear in October 2012 that self-reporting will not guarantee there will be no prosecution, and that the SFO is an investigatory and enforcement agency rather than an advisory one. Nevertheless, it still says it encourages corporate self-reporting. The fact that a corporate body has reported itself will be a relevant consideration to the extent set out in the Guidance on Corporate Prosecutions. That Guidance explains that, for a self-report to be taken into consideration as a public interest factor tending against prosecution, it must form part of a "genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice". So the benefits of self-reporting arguably remain. The change in stance was likely, though, to discourage rather than encourage..

The SFO's final decision on whether to prosecute will be based on what it refers to as the "Full Code Test", set out in the Code for Crown Prosecutors, on which the factors discussed above are based.

## Introduction of Deferred Prosecution Agreements

In May 2012, the MoJ consulted on Deferred Prosecution Agreements (DPAs) as a new tool to tackle economic crime.. Although respondents to the consultation raised several concerns over how DPAs would work, the Government legislated to introduce them in the Crime and Courts Act 2013. DPAs will be available for various financial crimes, including offences committed under the UKBA by a corporate. At the time of writing, no formal commencement date for DPAs had been set, but it is understood to be in early 2014. Before the relevant provisions of the Crime and Courts Act can take effect, though, the code that prosecutors must follow when considering a DPA must be approved. The SFO and DPP have published a consultation on the code, open for comments until 20 September 2013.

## The appetite for prosecution

So far, there are no instances of any prosecution for the corporate offence of failing to prevent bribery. Indeed, there have only been three successful UKBA prosecutions to date (all of which have been at a relatively low level (involving a Court Clerk in a Magistrates Court taking bribes, a taxi driver candidate offering a bribe, and a university student also offering a bribe). These successful prosecutions were not brought by the SFO and do not provide businesses with any real any intelligence on how the various factors involved in the Full Code Test are likely to be used. The bribes involved in these cases ranged from £300 to £5,000, which would seem to indicate a willingness to prosecute, notwithstanding the relatively small amounts involved.

Given that the UKBA came into force on 1 July 2011, and the length of time required to investigate more complex cases, it is perhaps hardly surprising that we have not as yet seen a more high profile prosecution. That said, in June 2013 the SFO announced that it was actively investigating two cases under the UKBA and a further six cases were being considered which may lead to prosecutions. Indeed, the SFO has very recently brought its first charges under the UKBA against four individuals in connection with a £23m fraud, although the details of the charges were not available at the date of preparation of this article. In addition, in July 2013, the City of London police revealed that it was in the course of investigating 25 bribery cases (although it is not known whether any of these investigations relate to conduct prior to the implementation of the UKBA).

## Common concerns

The Guidance and the Prosecutors' Guidance went some way to addressing a number of the big questions that concern businesses, without giving complete comfort on many.

*Hospitality*

"Bona fide hospitality and promotional or other business expenditure which seeks to improve the image of a commercial organisation better to present products and services or establish cordial relations is recognised as an established and important part of doing business and it is not the intention of the Act to criminalise such behaviour."

The SFO's October 2012 guidance confirms that bona fide hospitality or promotional or other legitimate business expenditure is recognised as an established and important part of doing business.

The question is whether the hospitality is provided with any criminal intention. The "lavishness" of any hospitality is one (but only one) of the circumstances which will be taken into account in determining this.

However, there are some helpful examples in the Guidance: e.g. "an invitation to foreign clients to attend a Six Nations match at Twickenham as part of a public relations exercise designed to cement good relations or enhance knowledge in the organisation's field is extremely unlikely to engage section 1 as there is unlikely to be evidence of an intention to induce improper performance of a relevant function". (The answer might be different if the invitation was to a foreign public official, as the required intention is different.)

The SFO's October 2012 guidance says it will prosecute offenders who disguise bribes as business expenditure (such as hospitality), but only if (a) the case is a serious or complex one that falls within the SFO's remit and (b) the SFO concludes, applying the Full Code Test, that there is an alleged offender that should be prosecuted.

If the requirements of the Full Code Test are not established, the SFO may consider civil recovery as an alternative to a prosecution.

What should firms do? Establish policies and procedures controlling the provision of hospitality. Consider the demonstrable purpose of any hospitality. Consider imposing limits on the value and type of hospitality to be provided. Ensure recipients clearly understand hospitality is provided on a no-obligation/no-expectation basis. Ensure your firm makes payment for hospitality directly to the provider (rather than making cash reimbursements to the client). Consider any hospitality to foreign public officials very carefully.

*Facilitation payments*

Despite the MoJ's assurances that the Guidance would be proportionate and practical, a hard line has been retained on facilitation payments. Firms and individuals seeking comfort must rely on the mercy of the DPP or SFO, which will look to the "public interest" in initiating prosecutions.

"As was the case under the old law, the Bribery Act does not … provide any exemption for such payments … exemptions in this context create artificial distinctions that are difficult to enforce, undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees, … perpetuate an existing 'culture of bribery' and have the potential to be abused."

It is recognised that "individuals may be left with no alternative but to make payments … to protect against loss of life, limb or liberty". This may provide a defence of duress (or discourage prosecution), but other forms of

duress or extortion are not recognised.

The SFO's October 2012 guidance confirms that bribes such as facilitation payments are illegal and were illegal before the UKBA. It repeats that any decision to prosecute will be taken on the basis of the Full Code Test.

What should firms do? Individuals are placed in a difficult position. A firm whose associate bribes a foreign public official is liable to prosecution for "failure to prevent". Its defence to that charge is to prove – to the satisfaction of a jury – that its procedures are "adequate to prevent" bribery. For its protection, it must have clear procedures that unambiguously prohibit facilitation payments (this is common even in the US despite the more flexible approach under the FCPA. Firms with a "genuinely proactive approach, involving self-reporting and remedial action" are less likely to be charged.

*Associates*

There has been significant concern over what is an "associated person", and whether a business is responsible for the contractors its joint venture associate uses. It will be responsible where the contractor provides a service to the business. A firm is responsible for its "associates". An associate is a person who performs services for or on behalf of an organisation. The capacity in which the associate does this or the legal relationship with that organisation is not determinative. One must consider "all the relevant circumstances". A joint venture (JV) in itself will not give rise to association unless the JV company performs services for a principal (or unless a contractual JV gives the principal sufficient control).

The Guidance recognizes that the "broad scope means that contractors could be associated persons to the extent that they are performing services for or on behalf of a commercial organisation. Also, where a supplier can properly be said to be performing services for a commercial organisation rather than simply acting as a seller of goods, it may also be an 'associated person'.

What should firms do? Identify associates and undertake proportionate due diligence on them having regard to the risk, taking account of such factors as who they are, what services they are supplying and the jurisdiction in which they operate. Consider suppliers – proportionately. Presumably a utility supplier would be outside the scope, although the Guidance is unhelpful on this point. Manage the "supply chain" by imposing restrictions on the primary supplier.

*Territorial scope*

Businesses whose only UK connection is a London listing had been concerned whether they would be deemed a "relevant commercial organisation" to whom the failure to prevent bribery offence would apply. The Guidance clarifies that listing alone is not enough. The Government would not expect, for example, "the mere fact that a company's securities had been admitted to the UK Listing Authority's Official List … in itself to qualify that company as carrying on a business or part of a business in the UK, and therefore falling within the definition of a relevant commercial organisation". (This is in contrast to the position under the FCPA.)

What should firms do? Consider whether there is any other connection to the UK.

Where there is a UK branch of an overseas entity – is the whole of that entity a relevant commercial organisation needing to comply with the UKBA? Yes, the UKBA will apply to the entity as a whole. But, unlike a branch, a UK subsidiary of an overseas parent will not by virtue of that legal relationship alone make the overseas parent a relevant commercial organisation. "Having a UK subsidiary will not in itself mean that a parent company is carrying on a business in the UK, since a subsidiary may act independently."

What should firms do? Develop procedures at least covering the whole legal entity, but also consider associates.

## So remember

It is essential that all businesses covered by the UKBA understand that:

- it is an offence to bribe, or receive a bribe from, anyone, not just foreign public officials;
- a bribe includes even the smallest facilitation payment, regardless of whether it is commonplace to make the payment in the circumstances or location where it occurs;
- disproportionate corporate marketing or hospitality may constitute a bribe;
- the scope of the UKBA catches not only acts that take place in the UK, but also any acts by British nationals or overseas branches of British companies that take place anywhere in the world;
- the failure to prevent bribery offence applies to any body corporate that carries on even part only of a business in the UK;
- the failure to prevent bribery offence applies where a person associated with the

relevant company (for example as an agent) gives a bribe intending to give the company a business advantage;

- adequate procedures is a corporate defence to the offence of failing to prevent bribery; and
- a business's best protection is a thorough and documented risk assessment, backed up by strong policies and procedures, supported by senior management, implemented and monitored regularly.

## We can help you

Only you know your business. But we can help you to minimise your risks. We can work with you to help you assess high-risk areas. We can work with you to draft clearly written, precise policies and procedures and help to devise a training programme and controls that will demonstrate to any prosecuting authority that your procedures are being implemented and monitored on an ongoing basis.

We regularly write articles on anti-corruption and the prevention of financial crime. Check our website www.dentons.com.

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