

## The Bribery Act 2010

Regulatory

### News

In January 2016 the first UK company to be prosecuted for corruption was sentenced to a fine of just over £1.3m, had over £800k confiscated and was ordered to pay £25k in prosecution costs; with two directors being convicted and sentenced (in 2015):

- Christopher Smith was sentenced to 18 months' imprisonment (suspended for two years) for two counts of corruptly agreeing to make payments, contrary to section 1(1) of the Prevention of Corruption Act 1906, to run concurrently. He was also ordered to carry out 250 hours of unpaid work and was given a three month curfew.
- Nicholas Smith, the company's sales and marketing director, was sentenced to three years' imprisonment for three counts of corruptly agreeing to make payments, to run concurrently.

Both men were disqualified from acting as company directors for six years.

In his sentencing, the Judge stated "*Corruption of foreign officials is damaging to the country in which the corruption occurs, is damaging to the reputation of UK business and, of course, in the market in which a business operates. It is anti-competitive.*"

The conviction follows an SFO investigation into corrupt payments made to the company in return for the award of contracts.

The company was convicted under the old legislation as the offences pre-dated the Bribery Act 2010 (**2010 Act**).

### Our brief

To outline the offences introduced by the 2010 Act and the penalties for committing them. To highlight the practical steps a business can take to avoid breaching the legislation.

#### What is bribery?

Anti-corruption organisation [Transparency International](#) defines bribery as "*the offering, promising, giving, accepting or soliciting of an advantage as an inducement for an action which is illegal or a breach of trust.*"

#### Who can be bribed?

It is a common misconception that the 2010 Act only outlaws the bribery of public officials. In fact, the 2010 Act is much wider, and applies to all entities that carry on business or parts of it business in the UK.

#### Why was the 2010 Act introduced?

The 2010 Act was introduced to strengthen the existing bribery and corruption laws in the UK. The Organisation of Economic Co-operation and Development ([OECD](#)) had repeatedly criticised the UK system for being weak and ineffective compared with the more robust regimes in other countries, such as the US Foreign and Corrupt Practices Act.

#### What are the offences under the 2010 Act?

##### Bribing another person

A person is guilty of this offence if they offer, promise or give a financial advantage or other advantage, to another person.

In other words:

- to bring about improper performance of a relevant function or activity; or
- to reward a person for the improper performance of a relevant function or activity.

The types of function or activity that can be improperly performed include:

- all functions of a public nature;
- all activities connected with a business;
- any activity performed in the course of a person's employment; and
- any activity performed by or on behalf of a body of persons.

There must be an expectation that the functions are carried out in good faith or impartially, or the person performing them must be in a position of trust.

It may not matter whether the person who offered the bribe is the same person that actually performs, or performed, the function or activity concerned.

The advantage can be offered, promised or given by the person themselves or by a third party.

### Being bribed

The recipient or potential recipient of a bribe is guilty of this offence if they request, agree to receive or accept a financial or other advantage to perform a relevant function or activity improperly.

It does not matter whether it is the recipient, or someone else through whom the recipient, who requests, agrees to receive or accepts the advantage. In addition, the advantage can be for the benefit of the recipient or another person.

### Bribing a foreign public official

A person is guilty of this offence if they intend to influence an official in their capacity as a foreign public official.

The offence does not cover accepting bribes, only offering, promising or giving bribes.

It does not matter whether the offer, promise or gift is made directly to the official or by a third party.

### Failing to prevent bribery

A commercial organisation is guilty of this offence if a person associated with it bribes another person, with the intention of obtaining or retaining business, or a business

advantage, for the commercial organisation. The offence can be committed in the UK or overseas.

A business can avoid conviction if it can demonstrate that it had adequate procedures in place designed to prevent bribery.

### What are the penalties for committing an offence?

The offences of bribing another person, being bribed and bribing a foreign public official are punishable on indictment either by an unlimited fine, imprisonment of up to ten years or both.

**Note:** Both a company and its directors could be subject to criminal penalties.

The offence of failure to prevent bribery is punishable on indictment by an unlimited fine.

Businesses convicted of corruption could find themselves permanently debarred from tendering for public sector contracts.

A business may also be damaged by adverse publicity if it is prosecuted for an offence.

### Practical steps to help avoid liability under the 2010 Act

#### Top level commitment

All senior managers and directors must understand they could be personally liable under the 2010 Act for offences committed by the business.

It is important that senior management lead the anti-bribery culture of a business, especially if the business wants to take advantage of the "adequate procedures" defence to the offence of failing to prevent bribery.

#### Risk assessment

Consider all of the potential risks the business could be exposed to. For example, certain industry sectors (such as construction, energy, oil and gas, defence and aerospace, mining and financial services) and countries are associated with a greater risk of bribery. Think about:

- What types of transactions the business engages in
- Who transactions are with
- How transactions are conducted

High-risk transactions include:

- procurement and supply chain management;
- involvement with regulatory relationships (e.g. licences or permits); and

- charitable and political contributions.

Review how the business entertains potential customers, especially those from government agencies, state-owned enterprises or charitable organisations.

Routine or inexpensive corporate hospitality is unlikely to be a problem, but clear guidelines should be put in place.

If the business operates in foreign jurisdictions, always check local laws.

### **Implementing and communicating an anti-corruption code of conduct**

Implement a code of conduct setting out clear, practical and accessible policies and procedures that apply to the entire business. Make sure the code is communicated effectively to all parts of the organisation.

### **Carry out background checks when dealing with third parties**

A business will be liable if a person associated with it commits an offence on its behalf. Businesses should therefore review all of their relationships with any partners, suppliers and customers. For example, if an agent or distributor uses a bribe to win a contract for a business, that business could be liable.

Ensure that background checks are carried out on any agents or distributors before they are engaged by the business.

### **Policies and procedures**

Review any existing policies and procedures. Do they need to be updated? If the business does not have any policies or procedures in place, consider preparing them as a matter of urgency.

### **Effective implementation and monitoring**

Consider introducing a compulsory training programme for all staff. If only a few employees operate in a high-risk area, consider targeting training at those employees.

Ensure anti-corruption policies and procedures are continually monitored for compliance and effectiveness, both internally and externally.

### **Prevention is far better than cure**

This is particularly so with the 2010 Act. Introducing and implementing effective policies, procedures and training is the best way to avoid problems in this area, and the best defence if the SFO come knocking at the door.

**If you would like further advice or assistance on any of the matters raised in this note, please feel free to contact us.**

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