

The Bribery Act 2010



The Bribery act 2010 comes into force on 1st July 2011

Section 7 of the Act introduces a new offence of 'Failure of commercial organisations to prevent bribery'. It also introduces a full defence: many large companies will have put their procedures and training in place in order to be ready and compliant. However, smaller companies without in-house resources may find it harder to reach compliance. Whereas 'reasonable and proportionate' corporate hospitality is allowed, there are still areas where companies may be at risk of falling foul of the Act – especially those who do business overseas.

There are steps to be taken to assess whether your company is exposed to any risks of bribery which are outlined below.

What is bribery?

The offering, promising, giving, accepting or soliciting of an advantage as an inducement for an action which is illegal, unethical or a breach of trust. Inducements can take the form of gifts, loans, fees, rewards or other advantages (services, donations etc). (*Transparency International*).

The Act also covers indirect bribery (by a third party).

What does the act prohibit?

- Offering (active bribery) or receiving bribes (passive bribery) (Section 1),
- Bribery of foreign public officials (Section 6)
- **New offence:** relates to commercial organisations which fail to prevent a bribe on their behalf by a person who performs services for them in business. (Section 7). Section 7 also provides a full defence to this.

Who is liable under the Act?

Sections 1 and 6: An act of bribery by a UK organisation, UK nationals or UK residents anywhere in the world breaks UK law. Companies and individuals can be liable.

Section 7: is a 'strict liability' offence for commercial organisations – 'bodies or partnerships incorporated or formed in the UK' (Section 7(5)).

What is a 'strict liability' offence?

An offence where to have committed the act is enough to make you liable to prosecution, no matter what was intended (similar to traffic offences).

It does not matter whether the owners/senior managers intend a bribe to take place – if a bribe is carried out on the company's behalf by an employee, agent, sub-contractor or subsidiary – then the company and its directors will be liable, unless they meet the requirements for the defence under Section 7.

What is the full defence?

Having **adequate procedures** in place. 'Procedures' include policies. You will not be liable to prosecution if you can show that despite a particular case of bribery you nevertheless have adequate procedures in place to prevent persons associated with you from bribing. (The standard of proof which applies here is 'the balance of probabilities'.)

The Ministry of Justice (MoJ) has, under Section 9 of the Act, drawn up guidance containing six principles to help with these procedures. (See below for more details).

Does every organisation need an Anti-bribery Policy?

No. Many organisations will face little or no risk of bribery, especially if their business is undertaken primarily in the UK. If there is very little risk of bribery being committed on behalf of your organisation then you may not feel the need for any procedures to prevent bribery.

Whether you need procedures will depend on your **risks** of bribery you face and these will need to be established by a **risk assessment** – covered in the MoJ Guidance (see more below).

The MoJ states: "There is no need for extensive written documentation or policies. You may already have proportionate procedures through existing controls over company expenditure, accounting and commercial or agent contracts for example".

An example of an Anti-Bribery Policy is provided by *Transparency International* "This company has a zero tolerance of bribery and corruption. This policy extends to all the company's business dealings and transactions in all countries in which it or its subsidiaries and associates operate. This policy is given force in a detailed anti-bribery programme which is regularly revised to capture changes in law, reputation demands and changes in the business. All directors and employees are required to comply with this policy."

Does bribery include hospitality and promotional activities?

No – provided it is genuine, reasonable and proportionate. However, if it is intended to influence an official in order to secure business or a business advantage then it may amount to a bribe.

E.g. providing tickets to a sporting event or taking clients to dinner is acceptable. A five-star holiday for a procurement manager is not!

What can happen?

Bribery and Corruption are serious criminal offences that can result in unlimited fines and terms of imprisonment of up to 10 years.

Sources of guidance

Ministry of Justice 'Quick Start' Guide to the Act:

<http://www.justice.gov.uk/downloads/guidance/making-reviewing-law/bribery-act-2010-quick-start-guide.pdf>

Ministry of Justice Guidance about procedures:

<http://www.justice.gov.uk/downloads/guidance/making-reviewing-law/bribery-act-2010-guidance.pdf>

Transparency International Adequate Procedures Checklist:

<http://www.transparency.org.uk/working-with-companies/adequate-procedures>

Transparency International Bribery Act – Supply Chain briefing note:

<http://www.transparency.org.uk/publications/2010-publications/126-bribery-act--supply-chain-briefing-note>

Summary Notes drawn from MoJ Guidance.

In order to encourage commercial organisations to put procedures in place to prevent bribery by persons associated with them the Act introduces a full defence against the Section 7 offence:

- **New offence:** failing to prevent a bribe being paid on an organisation's behalf.
- **Defence:** you will not have committed the offence if you can show that you have '**adequate procedures**' to mitigate the risk of bribery in place.

The Ministry of Justice (MoJ) have come up with six principles to help organisations decide what they need to do to rely on the defence of having adequate procedures in place.

NB: The term 'procedures' includes both bribery prevention policies and procedures which implement them.



Proportionate procedures:

- What you need to do will depend on the **risks** you face and the **size of your business**.
- Larger companies and those who deal with people who act on their behalf (agents and consultants) are more likely to require complex policies/procedures than small companies.

“The Act is not intended to bring the full force of criminal law to bear on well run organisations that experience an isolated incident of bribery on their behalf.”

➤ Top level commitment:

- Effective leadership in bribery prevention must come from the top.
- A clear message should come from senior management that bribery will not be tolerated.

➤ Risk Assessment:

- Like many organisations you may face little or no risk of bribery, especially if your business is mostly in the UK.
- You may already cover bribery in your general business risk assessment – if so, make sure it is updated to include Section 7.
- Look at the risks your employees are exposed to. You should also consider the people you deal with. An example could be a consultant who may help you find new business, including completing tenders, if they are spending money on your behalf.

Risk assessment procedures will usually reflect a few basic characteristics:	Commonly encountered internal risk factors may include:
Oversight of the risk assessment by top level management	deficiencies in employee training, skills and knowledge
Appropriate resourcing – this should reflect the scale of the organisation’s business and the need to identify and prioritise all relevant risks	bonus culture that rewards excessive risk taking
Identification of the internal and external information sources that will enable risk to be assessed and reviewed	lack of clarity in the organisation’s policies on, and procedures for, hospitality and promotional expenditure, and political or charitable contributions
Due diligence enquiries	lack of clear financial controls
Accurate and appropriate documentation of the risk assessment and its conclusions.	lack of a clear anti-bribery message from the top-level management

➤ Due Diligence:

- Checking that those you are dealing with are trustworthy.
- You may want to ask questions and do a few checks on people before they represent you in business dealings.
- If the risk is low, you will not need to do much in the way of due diligence.

➤ Communication:

- You must **communicate** your policies/procedures to your staff and others who perform services for you.
- You may think it a good idea to communicate your anti-bribery policy to other organisations that you work with including making it available for Buyers.
- **Training** is likely to be an effective way of establishing an anti-bribery culture in your organisation – especially for new employees at induction.

- The training needs to be proportionate to the size and type of your business. It should also be targeted at any members of your staff who are particularly at risk.
- In micro-businesses it may be enough to give key staff simple verbal reminders about your anti-bribery policy.



Monitoring and review:

- You should check on the effectiveness of your anti-bribery procedures.
- There may be changes in your business that affect the risk of bribery. You will need to review your procedures so that they keep pace with any changes.