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THE UNITED KINGDOM BRIBERY ACT 2010
AND THE SERIOUS FRAUD OFFICE

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Barrister

Why Legislate?

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Bribery is corruption:

- it undermines the rule of law;
- erodes democracy and weakens the electoral process;
- weakens property rights;
- weakens fairness and social justice
- hinders economic development;
- endangers moral foundations of society;
- undermines the proper allocation of resources and weakens economies.
 - It is bad for business.

Need for Reform

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British efforts to tackle bribery had fallen behind:

- OECD said UK bribery law '*complex and uncertain*'
- 2009, bribery of public officials:
 - USA, 10 % world exports, secured 60 convictions
 - UK, 4 % world exports, secured 2 convictions.

*The working group reiterates its previous 2003, 2005 and 2007 recommendations that the UK enact new foreign bribery legislation at the earliest possible date. The Group strongly regrets the uncertainty about the UK's commitment to establish an effective corporate liability regime...
OECD Working Group Report, 2008.*

UK Bribery Act 2010: Overview

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- What is a bribe?
 - Corporate Hospitality
- Offering and receiving Bribes
 - 'relevant function or activity'
 - 'improper performance'
- Bribing a Public Official
- Failing to Prevent Bribery
 - Adequate Procedures
- The jurisdictional reach.
- The penalties.

What is a Bribe?

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No definition in the 2010 Act, but a definition can be implied from the legislative provisions:

- A bribe is a financial or other advantage used to induce or reward improper performance of a business or public function or activity.
- If the bribe is offered to a foreign public official it must seek to influence the FPO and obtain a business benefit.

There has to be reciprocity and direct connection between the advantage and what has been improperly obtained.

Corporate Hospitality

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"Rest assured -no one wants to stop firms getting to know their clients by taking them to events such as Wimbledon or the Grand Prix" - Secretary of State for Justice

The distinction between genuine corporate hospitality and improper behaviour relates to both the intention behind the hospitality and the proportionality of the hospitality, given all the circumstances.

The Guidance states hospitality can be a bribe, but this must be seen against the fact the guidance accepts hospitality is an essential part of cementing good, genuine business relations.

Offering a Bribe

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It is an offence to offer a bribe:

a person (including a body corporate) is prohibited from offering, promising, or giving a financial or other advantage:

- in order to induce a person improperly to perform a relevant function or duty;
- in order to reward a person for such improper activity;
- where the person knows or believes that the acceptance would itself constitute an improper performance of a function or duty.

It is irrelevant if the advantage is offered by a third party.

Receiving a Bribe

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It is an offence to receive a bribe (including a body corporate).

A person is prohibited from requesting, agreeing to receive or accepting a financial or other advantage intending that the relevant function should be performed improperly:-

- P requests/agrees a bribe intending to act improperly;
- P has performed an act improperly for a bribe;
- P requests a bribe as a reward for improper conduct;
- P requests a bribe and that request constitutes improper conduct itself.

Relevant Function or Activity

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An offence is committed if - the bribe is related only to a relevant function or activity, which is defined as a function:

- of a public nature
- connected with business
- in the course of the person's employment
- by or on behalf of a body of persons (whether corporate or incorporate)

And the person performing function is

- expected to perform in good faith or impartially or the person is in a position of trust.

Irrelevant no UK connection.

Improper Performance

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'Improper performance' is defined as carrying out the relevant function in breach of a relevant expectation or the failure to perform the function is itself a breach of the relevant expectation.

Relevant expectation means the function will be performed in good faith or impartially or consistent with duties of trust.

The test is what a reasonable person in the UK would expect in relation to that type of performance.

A local law permitting the bribe may be taken into account.

Offences III – Bribing a Public Official

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It is an offence to:

offer, promise or give any financial or other advantage to a foreign public official, directly or through a third party, where the person's intention is to influence the official in his capacity as a foreign public official and the person intends to obtain or retain either business or an advantage in the conduct of the business.

Foreign Public Official is an individual who:-

- holds legislative, administrative or judicial position
- exercises a public function for/on behalf of a foreign country or enterprise of that company;
- official/agent of public international organisation.

Offences IV - Failure to Prevent Bribery I

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A relevant commercial organisation (for the offence of failing to prevent bribery) is a:

- UK incorporated company, whether it carries on business in the UK or elsewhere;
- any body corporate (wherever incorporated) which carries on business or part of a business in the UK
- the same applies to partnerships.

Any company or partnership with a business connection to the UK, because it was incorporated or formed there or because its business is wholly or partly conducted there may be liable to prosecution.

Failure to Prevent Bribery II

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A relevant commercial organisation is guilty of an offence if a person associated with it bribes another person ("failure to prevent bribery"):

- intending to obtain or retain business, or
- intending to obtain or retain an advantage in the conduct of business.
- A person is associated with a commercial organisation if they perform services for or on its behalf, irrespective of their capacity (employee, agent, subsidiary).
- For the purposes of this offence it is irrelevant whether the associated person has been prosecuted for other offences.
- This is a strict liability offence, i.e. there is no need to prove intention.

Failure to Prevent Bribery: Adequate Procedures

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There is a complete defence to the charge of failure to prevent bribery, which is that the organisation had in place "adequate procedures" designed to prevent bribery.

This is necessary because the company being prosecuted need not be aware of the bribe: it is a strict liability offence, doing the act amounts to an offence without more.

If the bribe is proven it is for the company to prove it had in place adequate procedures: the burden of proof shifts from the prosecution to the defence.

Failure to Prevent Bribery: Adequate Procedures

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- Procedures, policies or both?
- What is adequate? Determined by reference to:
 - proportionality;
 - top level commitment;
 - risk assessment;
 - due diligence;
 - communication (including training)
 - monitoring and review.

Jurisdictional Reach I

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The offences of bribing; being bribed; and bribing a FPO apply to:

- UK companies and partnerships;
- UK citizens;
- individuals ordinarily resident in the UK;
- by others if the act is committed in the UK.

Jurisdictional Reach II

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The Act however deems offences to have been committed in the UK if they are carried out by someone with a close connection to the UK, irrespective of where they are committed, and these are defined as amongst others:-

- a British citizen;
- a British overseas citizen;
- a British overseas territories citizen;
- an individual ordinarily resident in the UK;
- a body incorporated under any part of UK law.

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Jurisdiction Reach

British Overseas Territories include:-

- Anguilla
- Bermuda
- Cayman Islands
- Turks and Caicos
- Virgin Islands.

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Jurisdictional Reach III

In relation to the offence of failing to prevent bribery the offence is committed by a UK incorporated company or a non UK company that carries on business or part of its business in the UK:

- irrespective of where the acts or omissions were made or done;
- irrespective of where the body corporate carries on business;
- irrespective of whether any person has a 'close connection' with the UK.

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Jurisdictional Reach IV

Bribe in London.

Bribe in Belize received by a British Citizen

Bribe to an Australian in Kingstown, Jamaica by a Chilean national of a Panamanian law firm, with an office in London.

Bribe in Auckland by a Bolivian engineering company that was a sub-contractor on a project in Glasgow. ??

Bribe in Havana, between USA citizens.

Failing to prevent bribery by a Mexican incorporated bank with no UK business.

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Jurisdictional Reach V

The territorial effect of the corporate offence is that a commercial organisation may be found guilty of an offence based on actions of an associated person.... even though that person has no connection with the UK, has no formal contact with the organisation, has no degree of control over the organisation, and is no way controlled by the organisation.

Lissack and Horlick On Bribery

= Adequate procedures are essential.

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Liability of Corporate Officers

Where the offences of bribing/being bribed or bribing a FPO are carried out by a body corporate and it is proven that the offence is committed with the 'consent or connivance' of a senior officer, both the body corporate and the senior officer can be prosecuted.

'Consent or connivance' means more than negligence, it means active knowledge.

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Penalties

In relation to an individual convicted of bribing/being bribed and bribing a FPO the penalties are:

- on summary trial, 12 months imprisonment and/or a fine.
- on indictment, 10 years and/or a fine.

In relation to failing to prevent bribery and corporate liability for the other offences the penalty for a conviction is a statutorily unlimited fine.

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Likelihood of Prosecution?

- First prosecution was of a UK court clerk who accepted a £500 bribe to 'lose' a speeding ticket. He was sentenced to 3 years imprisonment under the Act.
- Prosecution requires consent of the DPP or Director of the SFO or director of Revenue and Customs: prosecutions will not take place 'at the drop of a hat'.
- Prosecution has attracted a large amount of publicity.
- Significant reputational risks.

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Gold Standard?

Compliance with UK Bribery Act standards is good business for the Caribbean, it:

- makes business attractive to UK business.
- encourages UK investment
- reduces risks/concerns about investing in the Caribbean
- provides the Caribbean with a competitive advantage over its rivals
- Bribery Act compliance is likely to meet the standards of any other anti-corruption regime, thereby avoiding the need for multiple procedures – cheaper?

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Serious Fraud Office

SFO has jurisdiction in England, Wales and Northern Ireland.

Created after the "Roskill" report, published in 1986 and led to the Criminal Justice Act 1987.

Intention of the reforms were to produce a unified agency responsible for investigating and prosecuting serious fraud.

Headed by a director who is directly responsible to the Attorney General (David Green QC).

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Serious Fraud Office

Does not deal with all financial crime:-

- Value in excess of £ 1 million.
- Contains an international dimension.
- Involves fraud which might lead to widespread public concern.
- Involves an investigation which requires specialist knowledge.
- Requires the SFO's investigative powers.
- Bribery and corruption.
- Public sector fraud/corruption.

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Serious Fraud Office

Works in partnership with:-

- Serious Organised Crime Agency
- Police and Special Branches
- HM Revenue and Customs
- Financial Services Authority
- Crown Prosecution Service
- National Fraud Authority
- Office of Fair Trading

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Serious Fraud Office

Has power to investigate and prosecute such as:

- search property
- compel people to answer questions
- compel people to produce documentation

SFO also has a 'International Assistance Team' to assist overseas public authorities, prosecutors and courts. They have helped in several Caribbean jurisdictions.

Contact

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