



Bird & Bird & First for Disputes

Knowhow briefs
The Bribery Act 2010

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The Bribery Act 2010 (the “**Act**”) was enacted on 8 April 2010 and came into force on 1 July 2011. The implementation was delayed for consultation on the “adequate procedures” guidance (required under section 9) which was published on 30 March 2011.

The Act has received a significant amount of press coverage due to concerns about the Act’s effect on business. Whilst the Act appears to have a very broad scope and could include activities that have previously been considered legitimate (such as corporate hospitality), the adequate procedures guidance has gone some way to allay these concerns (including confirming that it should be appropriate to continue offering/accepting genuine and proportionate corporate hospitality).

General offences

The Act reforms the criminal law of bribery and corruption to provide for a new, consolidated scheme of bribery offences covering both the UK and abroad. The Act repeals the old offences at common law and statute, and replaces them with three general offences applicable to individuals and corporations:

- Section 1: offering, promising or giving a financial or other advantage (i.e. **bribing** another person);
- Section 2: requesting, agreeing to receive or accepting a financial or other advantage (i.e. **being bribed**); and
- Section 6: **bribing a foreign public official**, for which the only defence is if the briber can show that the recipient was permitted or required to receive the bribe under the **written law** applicable to the recipient.

If any one of these three offences is committed abroad, provided that it would have been an offence if it were committed in the UK and it is committed by a person with a “close connection” with the UK, liability will attach.

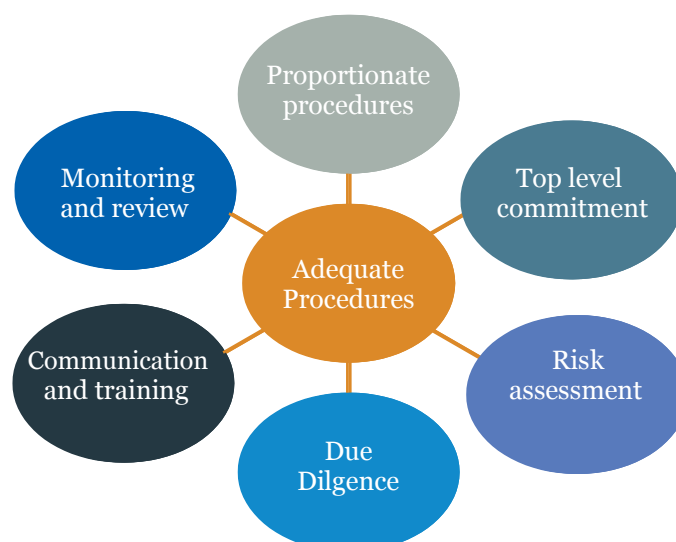
The draftsmen purposefully have not defined what “a financial or other advantage” is, but a bribe is no longer just cash passed under a table.

Corporate offence

In addition to the three general offences, section 7 of the Act imposes liability on corporates for **failing to prevent bribery by an associated person**, irrespective of where the offending acts have taken place. This applies to companies and partnerships incorporated or formed in the UK as well as “any other body corporate (wherever incorporated) **which carries on a business, or part of a business, in any part of the [UK]**”. Therefore, non-UK companies can be liable. An associated person is someone who performs services for or on behalf of the corporate.

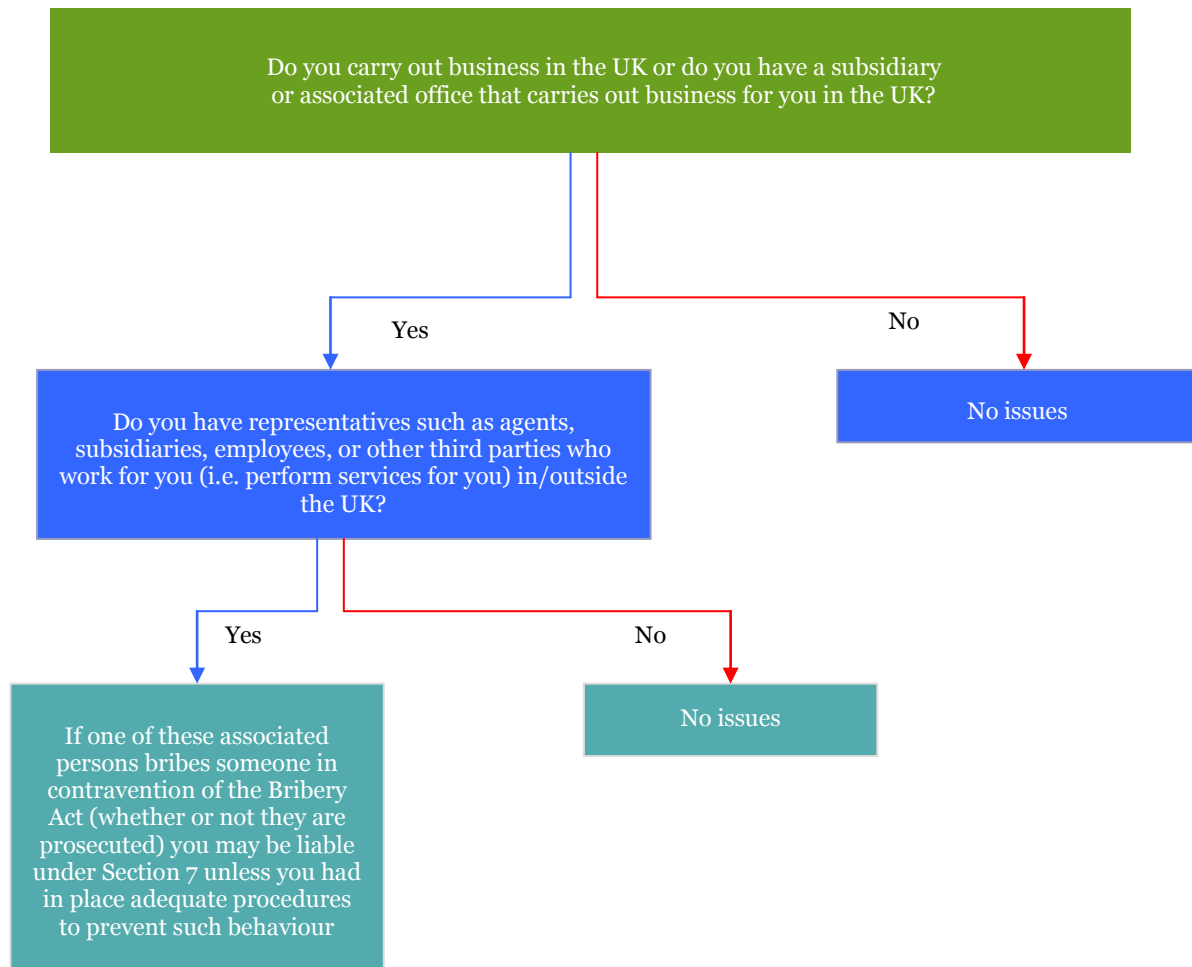
If the non-UK company does carry out a business or part of a business in the UK, and someone associated with the company bribes someone, the only defence that can be raised is if the corporate can show that it had in place adequate procedures “designed to prevent” bribery by the associated person.

Guidance on what these adequate procedures might be was published by the Ministry of Justice on 30 March 2011. This sets out six generic principles to assist commercial organisations in considering how best to respond to the Act in a risk-based and proportionate manner.



Does the Act Apply to you?

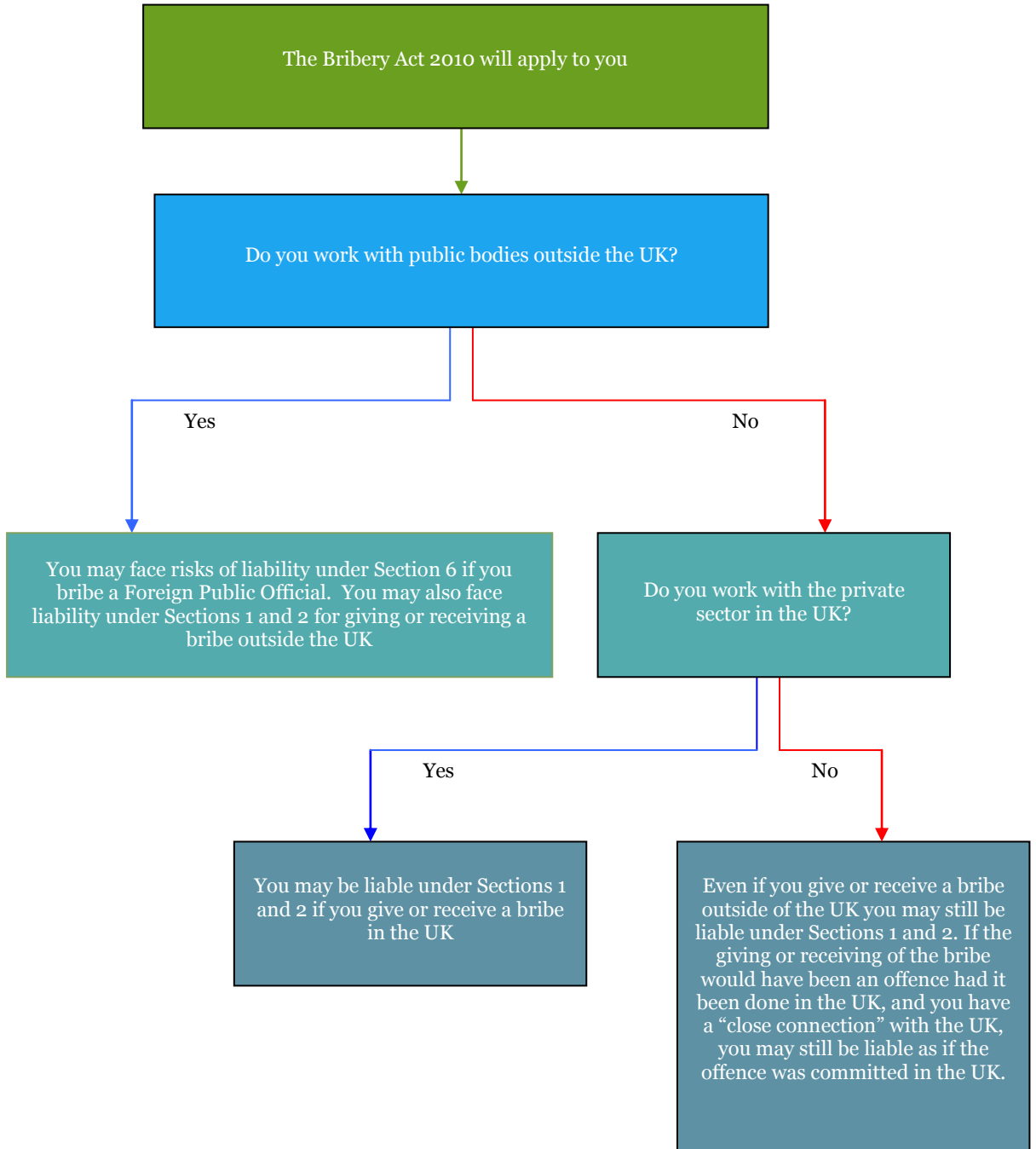
Your company is **NOT** incorporated under UK law



What does "carry out business in the UK" mean: This is not defined in the Act and has given companies much cause for concern. Whilst the courts will be the final arbiter of such questions, a common sense approach should be applied:

- the mere listing of the business's securities in the UK will not necessarily mean that you can carry out a business in the UK. Equally, a mere presence in the UK with no commercial activity in the UK is unlikely to be considered to be "carrying out business". It will all depend on the particular facts.
- a parent company will not necessarily carry out business in the UK by virtue of having a subsidiary in the UK – this will depend on the particular facts. It is therefore likely that the underlying question will be whether a company not incorporated in the UK has the necessary degree of control over its UK based entity.

Your company IS incorporated under UK law



Penalties

An individual found liable under the Act may face up to ten years imprisonment, or an unlimited fine.

A corporate found liable under the Act may face an unlimited fine. There will also be significant negative press issues and reputational damage and the risk of being debarred from tendering for public contracts under Reg. 23 of the Public Contracts Regulations 2006.

Prosecution Process

At the time the Act was implemented, the Serious Fraud Office and Director of Public Prosecutions (the two lead prosecutors under the Act) issued joint prosecution guidance addressing how they will respond to requests for prosecutions. This provides very useful insight into how a prosecution under the four main offences will be considered.

Prosecutors will need to consider the following two stages - in this order - when making a decision to try a case:

1. the evidential stage, and
2. the public interest stage

Therefore, a case may only be prosecuted if there is sufficient evidence and, if there is, it must then be determined if a prosecution is in the public interest. As part of the decision making process, the prosecutors will consider:

- the sentence: is the penalty likely to be significant or nominal?;
- whether the offence was premeditated and included an element of corruption on behalf of the person being bribed;
- whether the offence was committed to facilitate a more serious offending
- the position of the offender;
- the harm caused and whether the offence was a “one- off”; and
- the manner in which the offence was being dealt with after it has been discovered.

The SFO has now (October 2012) published revised guidance which: (i) restates the SFO’s primary role as an investigator and prosecutor; and (ii) seeks to ensure consistency with other prosecuting bodies. The new guidance signifies a shift in the SFO’s approach away from its previous stance (which sought to re-assure businesses that self-reported) towards a new stance of being a ‘tough’ criminal prosecutor.

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