

# Bird & Bird

## Bribery Act for SMEs March 2016

### Introduction

As its name suggests, [the Bribery Act 2010](#) (the "Act") (and [its explanatory guidance](#)) is concerned with preventing bribery. Bribery is the provision of a financial or other advantage to induce the person receiving the bribe to perform their functions or activities improperly or to reward that person for having already done so. This briefing explains the main provisions of the Act, its impact on SMEs and the importance of businesses putting in place effective anti-bribery procedures that are proportionate to their risk profile.

The penalties for committing a bribery offence can include unlimited fines and imprisonment for individuals involved. Despite these significant risks, a recent report commissioned by the Department for Business Innovation and Skills (BIS) and the Ministry of Justice (MoJ) highlighted a considerable lack of awareness of the Act among SMEs. Only 56% of SMEs had heard of the Act, and of those who had heard of it a mere 26% were aware of the accompanying guidance issued by the MoJ. More worryingly, only 33% of SMEs had carried out bribery risk assessments and only 42% had taken preventative measures to prevent bribery in their business.

### Awareness and impact of the Bribery Act in the SME sector

Businesses must be mindful of the dangers of falling foul of the provisions of the Act and the potentially severe consequences arising from this. In particular, SMEs which conduct business abroad should be aware of the broad extra jurisdictional reach of the Act which could result in potential liability for bribery offences committed both within the UK and around the world. This poses a particular risk when conducting business in unfamiliar parts of the world where paying officials for approvals, or making payments to individuals involved in transactions, is commonplace and often an expected part of doing business. If an offence is committed and any part of the company's business takes place in the UK, regardless of where it is incorporated and where the bribe was given, the company will be guilty under the Act unless it can rely on the 'adequate procedures' defence (see below).

Moreover, businesses need to bear in mind that under the Section 7 offence (failure to prevent bribery), they would be implicated in a bribery offence where it is committed by an "associated person", regardless of where in the world the associated person is located or where the bribe takes place. A person is an associated person if they perform services on behalf of the organisation. This wide definition means that bribery offences perpetrated by employees, agents, subsidiaries, contractors, joint venture partners and third party suppliers could all give rise to vicarious liability for the business with which the person is associated. Ensuring compliance with the Act across the supply chain (especially in an international context) can be challenging if your organisation has not sought appropriate advice and lacks the necessary knowhow and controls to minimise such risks.

The corporate offence under section 7 is a strict liability offence, meaning that even where a bribe is paid without the company's knowledge, authorisation, or collusion the company would still be liable and, if it does not have in place adequate procedures to prevent bribery, could incur significant penalties.

## Bribery Act offences

The Act establishes four statutory offences:

- s.1- making bribes
- s.2- receiving bribes
- s.6- bribing a foreign public official
- s.7- a commercial organisation failing to prevent bribery

## The offences in detail

### The offence of bribing another person- s.1:

This offence involves the offering, promising or giving of a financial or other advantage to a person, AND either:

(i) an intention:

- that the advantage will induce another to perform improperly a relevant function or activity; or
- to reward another for the improper function of a relevant function or activity;

OR

(ii) knowledge or belief that the acceptance of the advantage will constitute the improper performance of a relevant function or activity.

### The offence of being bribed- s.2:

- This offence is committed where a person requests, agrees to receive or accepts a financial or other advantage;
- if they intend that the function or activity will be performed improperly;
- if the request, agreement or acceptance itself constitutes the improper performance of the function or activity;
- if they request, agree to receive or accept an advantage as a reward for the improper performance of the function or activity;
- where in anticipation or in consequence of requesting, agreeing or receiving of a financial or other advantage, a function or activity is performed improperly.

### The offence of bribing a Foreign Public Official- s.6:

This offence involves:

- the making of a bribe to a foreign public official with the intention to influence the official in the official's capacity as a foreign public official with a view to obtaining or retaining business or an advantage in the conduct of business;

AND

- the relevant official is not permitted by law to be so influenced.

### The offence of failure of a commercial organisation to prevent bribery- s.7:

- A commercial organisation is guilty of an offence under s.7 if a person associated with it bribes (as defined in the previous general bribery offences) another intending to obtain or retain a business

advantage or to obtain or retain a business advantage in the conduct of business for a commercial organisation.

It is important to note that this offence is one of omission and so poses a particular danger to those SMEs who remain unaware of the Act and/or have not put in place adequate procedures in order to comply with it. Ignorance of the law is not an excuse and the consequences of non-compliance can be severe.

BUT

- There is a **defence** if the commercial organisation can demonstrate it had in place adequate procedures designed to prevent persons associated with the company from bribing others.

Offences under sections 1, 2 and 6 by a body corporate- s.14:

- S.14 applies if a body corporate has committed an offence under s.1, 2 and/or 6 and a senior officer or person purporting to act in that role has connived or consented to the offence.
- The senior officer or person purporting to act in that role will be treated as being guilty of the offence in their personal capacity and will be personally responsible.

## What are the consequences of non-compliance?

Penalties for individuals:

Individuals found guilty of offences under:

- section 1 (bribing);
- section 2 (being bribed); and/or
- section 6 (bribing a foreign public official);

are liable:

- on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum (£5,000), or to both;
- on conviction on indictment, to imprisonment for a term not exceeding 10 years, or to an unlimited fine, or to both under Section 11 of the Act.

Penalties for companies:

Section 11 similarly imposes an unlimited fine for any company or partnership that is convicted of an offence under Section 7 (failing to prevent bribery).

Where a company has been convicted of a bribery offence in a criminal court, this can also trigger powers to impose:

- Confiscation Orders under Part 2 of the Proceeds of Crime Act 2002 (POCA) or Civil Recovery Orders under Part 5 of POCA;
- Serious Crime Prevention Orders, which can be used to impose prohibitions designed to protect the public by preventing, restricting or disrupting activities that might involve serious criminal activity;
- Financial Reporting Orders, compelling regular financial reporting; and
- Debarment from competing for public contracts under the Public Contracts Regulations 2006.

The consequences of failing to comply with the Act or committing an offence under it are potentially devastating for SMEs and their directors. If an SME is subjected to a sizeable fine it could be pushed into liquidation and its directors may be imprisoned.

On 8<sup>th</sup> January 2016, British company Smith & Ouzman Ltd, was convicted of three counts of corruptly agreeing to make payments, contrary to section 1(1) of the Prevention of Corruption Act 1906 and ordered to pay total fines of £2.2 million. The company's chairman Christopher Smith was sentenced to 18 months in prison, suspended for two years, put under a three month evening curfew and ordered to carry out 250 hours of unpaid work; whilst director Nicholas Smith was sentenced to three years' imprisonment. While the case was brought under the Act's predecessor legislation, it may have implications for future cases, as all bribery cases brought after 1 October 2014 are subject to the Sentencing Council's [Fraud, Bribery and Money Laundering Offences sentencing guidelines](#). In another recent case, Sweett Group PLC pleaded guilty to an offence under Section 7 of the Act regarding its conduct in the Middle East. The company was sentenced on 19 February 2016 with the court imposing a total penalty of £2.25 million- comprising a fine of £1.4 million, a confiscation order of £850,000 and £95,000 towards the SFO's costs.

Beyond the legal consequences already mentioned, the reputational damage caused by a corruption scandal can often damage if not terminate relationships with existing customers and partner businesses, discourage new business ventures, and have a disastrous effect on the long-term profitability and viability of a business. Large corporations, public bodies and governmental departments will often have policies in place that prevent them from dealing with suppliers who are perceived to be a corruption risk or have already been found guilty of a bribery offence. Therefore, SMEs could find they are effectively excluded from entering into contracts with these organisations by the latter's anti-bribery policies. In the worst case, a company that has been convicted of bribery may be subject to debarment from public contracts under the Public Contracts Regulations 2006.

#### The importance of the section 7 defence:

If a bribery offence is committed by someone in or associated with your company, relying on the section 7 adequate procedures defence could help avoid liability, whilst crucially preventing potential financial and reputational damage to the company. The best way for SMEs to ensure that they can avail themselves of this important defence is by implementing appropriate anti-bribery policies and training, and reviewing the provisions of their standard contracts to promote high standards of ethical conduct and facilitate compliance with the Act.

#### An alternative to prosecution: Deferred Prosecution Agreements (DPAs):

DPAs were introduced on 24 February 2014, under the provisions of Schedule 17 of the Crime and Courts Act 2013. Earlier that month, the Serious Fraud Office (SFO) published the [Deferred Prosecution Agreements Code of Practice](#) (Code). In cases where certain evidentiary conditions are met (see s.1.2 (i) (a) & (b) of the [Code](#)), and there is a public interest in refraining from prosecuting a company, due to the potential economic collateral damage to employees, shareholders or the public, the prosecuting authorities have discretion to enter into a DPA with the company in question.

A DPA is an agreement between the prosecuting authorities and a company, under which the prosecution of the company allegedly guilty of a bribery offence is suspended, conditional upon it agreeing to a number of conditions, which may include:

- confiscation of any profits made as a result of the alleged offence;
- payment of a sizeable fine;
- cooperation with future prosecutions of individuals involved with the offence;
- consent to external monitoring of the company; and
- implementation of anti-bribery policies, procedures and staff training.

Crucially, there is a substantial contrast between the ability of the prosecutor and accused company to decide on the term of the deferment, amount of compensation, monitoring regime or the appropriate penalty in the UK and in the US, since UK DPAs are subject to far greater oversight from the courts and will always require judicial approval. Approved DPAs will always be made public, meaning companies will be unable to rely on them to conceal their alleged misdeeds and will still be forced to deal with the reputational damage of a bribery scandal.

On 30<sup>th</sup> November 2015, the first DPA agreed in the UK was approved. It was also the first time a company was sanctioned under Section 7 of the Bribery Act. Standard Bank plc, (now known as ICBC Standard Bank plc), was indicted and accepted responsibility for failing to prevent bribery. As a result of the DPA, Standard Bank will pay fines of US\$25.2 million and will be required to pay the Government of Tanzania a further US\$7 million in compensation. The bank also agreed to pay the SFO's reasonable costs of £330,000 in relation to the investigation and subsequent resolution of the DPA.

## How SMEs can prevent bribery

Six principles for assisting commercial organisations to prevent bribery:

In its accompanying [guidance](#) to the Act, the MoJ stated that the anti-bribery procedures commercial organisations implement should be underpinned by the following 6 key principles:

- 1 Proportionality**- the actions the commercial organisation takes should be proportionate to the risks it faces and to the size of its business. For example, if a business operates in a sector (such as defence) or territories where corruption is perceived as common or a high risk, the actions the business takes to prevent bribery and corruption should be comprehensive enough to appropriately counter this risk.
- 2 Top Level Commitment**- the top level management of the commercial organisation needs to be committed to preventing bribery. A zero tolerance culture to bribery should be instilled and steps taken to ensure that the organisation's anti-bribery policy is clearly communicated to the business.
- 3 Risk Assessment**- the commercial organisation needs to regularly and comprehensively assess the nature and extent of the risks relating to bribery which it is exposed to.
- 4 Due Diligence**- the commercial organisation needs to adopt due diligence policies and procedures to cover all parties to business relationships where a degree of control exists or the relationship is close enough to qualify as "an associated person".
- 5 Communication** (including training)- the commercial organisation needs to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, that is proportionate to the risks it faces.
- 6 Monitoring and Review**- the commercial organisation needs to institute monitoring and review mechanisms to ensure compliance with its policies and procedures and to identify issues as they arise.

There is no single formula for the elements in a compliance programme but depending on the risk, size and structure of the organization the following subjects may need to be addressed (see table on next page):

Risk assessment	Policies, Processes and Procedures
<ul style="list-style-type: none"> <li>• The nature of the company's markets, products and services.</li> <li>• Country risk by reference to the locations in which the company operates and the territories to which it markets.</li> <li>• Routes to market and extent of collaboration or dependence on third parties.</li> <li>• Government interaction: whether as a customer or regulator, at the point of supplier selection, implementation or delivery.</li> <li>• Risk throughout the programme cycle: pre-tender, bidding, selection, negotiation, amendment and variation, implementation, delivery and in-service support.</li> </ul>	<ul style="list-style-type: none"> <li>• Gifts, hospitality and entertainment.</li> <li>• Agents, intermediaries, advisers, distributors and other sales intermediaries.</li> <li>• Risks associated with joint ventures and collaborations (whether separately incorporated or not) and mitigation techniques: due diligence, limitations on scope of activity, ethical undertakings, governance and control mechanisms.</li> <li>• Mergers and acquisitions: risk associated with acquisition of other businesses, including assessment of country, market, product and contract risk. Processes associated with disposals and vendor due diligence.</li> <li>• Conflict of interest policies and procedures.</li> <li>• Commercial and charitable sponsorships, charitable donations and political contributions.</li> <li>• Competitor intelligence.</li> <li>• Bribery risk associated with major sales contracts and large or complex projects.</li> <li>• Logistics, customs and transport issues.</li> </ul>
Control mechanisms	Contracts
<ul style="list-style-type: none"> <li>• Financial controls.</li> <li>• Monitoring the ABC programme and control environment, review and revision.</li> <li>• Establishment and operation of a whistleblower or 'speaking up' programme, including use of internal and external hotlines. Review and analysis of issues arising.</li> <li>• Human resources procedures: ensuring that recruitment, review and promotion processes are transparent and not susceptible to abuse; incorporation of incentive mechanisms which discourage unethical conduct.</li> <li>• Crisis management, public relations and internal communications in the event of a dawn raid, adverse publicity or investigation.</li> </ul>	<ul style="list-style-type: none"> <li>• Relationships with intermediaries, consultants and agents, and appropriate remuneration mechanisms.</li> <li>• Contracts with appropriate representations, warranties and ethical conduct undertakings.</li> </ul>

It is crucial for SMEs to adapt to the legal landscape brought about by the Bribery Act to ensure their long-term success and to guard against the severe consequences of committing a bribery offence. From designing and implementing appropriate bribery monitoring and prevention strategies tailored to your business, to dealing with the consequences and fallout of a bribery incident, Bird & Bird is ideally placed to advise on all aspects of the Bribery Act.

For any queries or to see how we can help your business please contact:

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