



UK Bribery Act 2010: Understanding and Meeting the Challenge

13 October 2010

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Key Offences

- Offences of bribing another person (s.1)
- Offences of being bribed (s.2)
- Bribery of Foreign Public Officials (s.6)
- Corporate offence of failing to prevent bribery (s.7)
- Individual offence by a senior officer in a company of conniving in or consenting to the company bribing or receiving a bribe (s.14)

Bribing another person (s.1)

It is an offence to **offer, promise or give** a **financial or other advantage** to another person with the intention of:

- Inducing a person **to perform improperly** a **relevant function or activity**; or
- Rewarding a person for the **improper performance** of a **relevant function or activity**.

Being bribed (s.2)

It is an offence to **request, agree to accept or to accept** a **financial or other advantage** in return for the **improper performance** of a **relevant function or activity**.

Bribing or being bribed – key points

- Offences apply to both the **private and public** sectors.
- Offences can be committed either **directly or indirectly** (i.e. through a third party).
- Bribery Act applies even if the relevant function or activity is **performed outside the UK**.

Bribing a Foreign Public Official (s.6)

A Foreign Public Official (“FPO”) is an individual who:

- holds a legislative, administrative or judicial position of any kind outside the UK; or who
- exercises a public function for a foreign country or for any public agency or public enterprise of that country; or who
- is an official agent of a public international organisation.

Bribing an FPO (s.6)

It is an offence for a person to intend to influence an FPO by **offering, promising or giving** any **financial or other advantage**:

- to an FPO; or
- to another person at an FPO's request or with an FPO's assent or acquiescence, in order **to obtain or retain business or an advantage in the conduct of business.**

Failing to prevent bribery (s.7)

A **relevant commercial organisation** is guilty of an offence if **a person associated** with the organisation bribes another person with the intention of either:

- Obtaining or retaining business for the organisation; or
- Obtaining or retaining an advantage in the conduct of business for the organisation

Relevant commercial organisation

A **relevant commercial organisation** is defined as either:

- A body corporate or partnership **incorporated or formed in the UK** and which **carries on a business**; or
- A body corporate or partnership **incorporated or formed outside the UK** which **carries on a business**, or part of a business, in any part of the UK.

Associated person

A person is associated with an organisation if that person **performs services for or on behalf of** the organisation, e.g. employee, agent, subsidiary, joint venture partner.

Adequate procedures (s.7(2))

It is a defence if the relevant commercial organisation can show that it has put in place **adequate procedures** designed to prevent persons associated with the organisation from undertaking corrupt activities.

Liability of senior officers (s.14)

Where an offence is committed under ss.1, 2 or 6 **by a company**, then:

➤ A **senior officer** of the company will be **personally liable** for the offence under ss.1, 2 or 6 if they are found to have **connived in or consented to** the offence and they have a **close connection with the UK**.

Penalties

- Individual – an unlimited fine and/or imprisonment for up to 10 years.
- Other “person” (e.g. a company) – an unlimited fine.
- Public Procurement Directive, Art. 45 – exclusion from participation in a public contract.

Extraterritoriality (ss.1,2 and 6)

Offences under sections 1, 2 and 6 are committed if:

- any element of the offence has been **committed in the UK**; or
- no element of the offence has been committed in the UK, but **the offender has a close connection with the UK**, for instance they are a British citizen, an individual ordinarily resident in the UK, a body incorporated under the laws of the UK.

Extraterritoriality (s.7)

Offences under s.7 are committed if:

- the organisation **is incorporated or formed in the UK**; or
- the organisation **carries out some of its business in the UK**; and
- The offence is committed by an **associated person**, irrespective of whether the relevant acts or omissions are committed in or outside the UK.

Who could be prosecuted?

- A German national (Mr. X) is resident in London and is employed by a German company, Company GmbH.
- Company GmbH has a representative office in London, but no subsidiary is incorporated in the UK.
- Mr. X arranges for a bribe to be paid by a foreign agent to secure a contract in the foreign country.

The End

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US Perspective: Drawing on the FCPA Experience to Build an Effective Approach to the Bribery Act 2010

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Presented by Patrick Rowan, Partner, McGuireWoods LLP – Washington, D.C.

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FCPA Enforcement Trends

More Cases, Larger Penalties

- Sharp rise in prosecutions – 26 cases in 2009
- Corporate Penalties Increasing
 - Siemens AG, 2008 (\$1.6 billion)
 - KBR-Halliburton, 2009 (\$579 million)
 - Daimler AG, 2010 (\$185 million)
- DOJ: 150 open FCPA investigations
- Increase in resources at DOJ, SEC, and FBI

FCPA Enforcement Trends (cont'd)

- Increased Focus on Individual Violators
 - DOJ pursuing prosecutions and prison sentences for executives in order to produce greater deterrence
 - In April, 2010, Charles Jument received 87 months in prison for bribing Panamanian officials to secure maritime contracts
 - Government Employing Aggressive Theories
 - In July, 2009, Frederic Bourke convicted of violating FCPA and lying to FBI; prosecution theory was that Bourke, an investor, knew or consciously avoided knowing about a scheme to bribe Azerbaijani officials
 - In July, 2009, current and former CEO of Nature's Sunshine Products agreed to pay \$25,000 civil penalty to SEC because they failed to properly supervise Brazilian subsidiary that made improper payments

FCPA Enforcement Trends (cont'd)

- More Proactive Enforcement Efforts
 - DOJ officials have touted “new chapter in white collar criminal enforcement”
 - January, 2010 sting operation involving fictitious minister of defense of foreign country nabbed 22 defendants
- Focusing on Industries with a History of Problems
 - Oil for Food; Oil and Gas; Pharmaceuticals; Military and Law Enforcement Equipment

FCPA Enforcement Trends (cont'd)

- Greater International Coordination and Cooperation
 - Siemens case started in Germany
 - BAE and Innospec recently pursued by DOJ and SFO
 - January 2010 sting case involved simultaneous execution of seven search warrants by City of London police
 - DOJ officials have commented on their close relationship with SFO

DOJ Compliance Guidance

- In addition to lessons learned from prosecutions and settlement agreements, DOJ issues advisory opinions that provide a presumption of compliance
- DOJ's Principles of Federal Prosecution of Business Organizations require prosecutors to consider "existence and effectiveness of corporation's pre-existing compliance program"
- US Sentencing Guidelines (USSG) for corporations list the actions that are "minimally required" for an effective compliance program

USSG Core Elements of FCPA Compliance Program

- Written policies and procedures
- Oversight by responsible personnel with direct access to top management
- Internal controls designed to prevent and detect improper payments
- Personnel training
- Measures to reward good conduct and punish bad conduct
- Reasonable steps to ensure program is being followed

US FCPA vs. UK Bribery Act

- FCPA focuses exclusively on foreign government officials; Bribery Act includes commercial bribery
- FCPA requires business nexus; Bribery Act's general offences require attempt to induce improper action betraying position of trust
- FCPA permits facilitation or grease payments; Bribery Act does not

US FCPA vs. UK Bribery Act (cont'd)

- FCPA accounting provisions carry risk of criminal liability for failure to maintain adequate internal controls; Bribery Act's "failing to prevent bribery" offence (s.7) is potentially much broader
- FCPA provides an affirmative defense for payments that are bona fide business expenditures; Bribery Act does not

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Bribery Act 2010

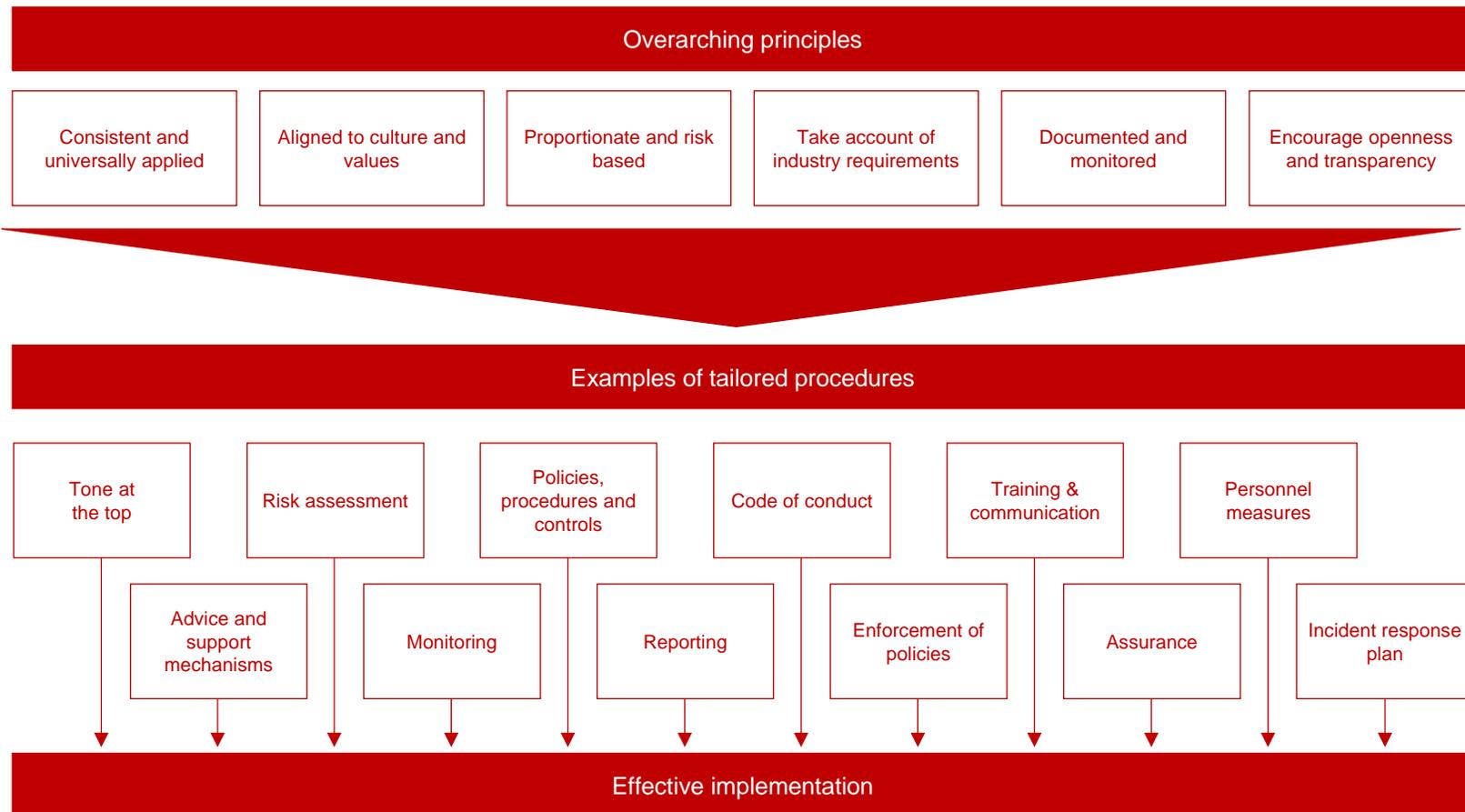
The challenges of
implementation
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Don't wait for the guidance!

The UK Government is committed to publishing “guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing ...” [s.9(1) Bribery Act 2010]

- The guidance will not be a checklist, nor will it provide a “safe harbour”
- It will of necessity be generic and principles-driven
- For procedures to be adequate, they must be working in practice
- Key areas of focus include:
 - Risk assessment
 - Top level commitment
 - Due diligence
 - Policies and procedures
 - Effective implementation
 - Monitoring and review

Key elements – Adequate Procedures



A ten-step plan

Specify

1. Assess risk

2. Evaluate existing controls

3. Target operating model

4. Remediation planning

Build

5. Design enhancements

Implement

6. Roll-out

7. Implement

Business takes ownership

8. Test

9. Follow-up

Embed

10. Business as usual; ongoing monitoring; continuous improvement

Risk analysis is the foundation of successful risk management

- Guiding principles:
 - Focus on inherent risk
 - Ignore controls until you have completed the risk inventory
 - Avoid preconceptions about control effectiveness or personal integrity

Risk analysis is the foundation of successful risk management

- Risk elements will include, *inter alia*:
 - Nature of business activities
 - Geographical and cultural issues, local business practices, etc
 - Business processes (front and back office)
 - Customer base
 - Use of third parties, relationships with business partners, corporate structures
 - Government interactions, regulatory landscape
 - Other specific risk factors

Typical risk areas

- Sales
- Movement of goods
- Obtaining licences, permits, regulatory clearances, etc
- Negotiation of tax, duties, etc
- Other dealings with government
- Gifts, entertainment, travel expenses
- Sponsorship, certain other marketing
- Donations, charitable or political
- Certain kinds of CSR activity
- Lobbying
- Use of intermediaries
- Joint ventures, consortia, acquisitions
- Use of company assets by third parties

Effective review and monitoring are a key element of adequate procedures

- Areas of focus:
 - Quality of risk assessment
 - Roll-out of codes of conduct, policies, guidance, training, etc
 - Local implementation
 - Appropriate processes and controls in place
 - Policies followed in practice
 - Responses to policy violations

Effective review and monitoring are a key element of adequate procedures

- Challenges:
 - Scope – how deep do you dive?
 - Resources/skills
 - Consistency v local tailoring
 - Ask WHY? not just WHAT?
 - IA culture: consultants or police?

The time to act is now.

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