

The Bribery Act 2010

Frequently Asked Questions



WHAT IS THE BRIBERY ACT 2010?

The Bribery Act 2010 (“UKBA”) is the primary anti-corruption law in the United Kingdom. It came into force in July 2011 and applies to both public and private sector bribery. It outlaws the giving and receiving of bribes, includes a strict liability offence and has aggressive extraterritorial effect. Violations of the UKBA may expose companies and individuals to severe criminal penalties and other knock-on consequences.

WHO MUST COMPLY WITH THE UKBA?

Generally speaking, any individual or corporate person with a “close connection” to the UK must comply with the UKBA in all their dealings globally. A close connection will exist where an individual is a British citizen (including a citizen of a British overseas territory or protectorate) or is ordinarily resident in the UK. With regard to corporate persons, any company or partnership incorporated under the law of any part of the UK (including a Scottish partnership) has a close connection to the UK.

However, if a foreign (i.e., non-British) company or partnership carries on business, or part of a business, in the UK, then the company or partnership may be subject to prosecution for the Section 7 offence (see further below) in relation to any bribes offered or paid anywhere in the world.



In addition, any individual or corporate person (of whatever background or nationality) who commits any element of an offence in the territory of the UK is subject to prosecution.

Senior officers of companies can also be prosecuted personally for the Section 1, 2 and 6 offences (see further below) where it can be shown that the company committed one of those offences with the officer's "consent or connivance."

The concept of "consent" is straightforward, but "connivance" is broader and there is no official guidance on its meaning. It does not include negligence, but it will likely include encouragement or tolerance of a bribery offence (for example, "turning a blind eye" or "burying one's head in the sand").

"Senior officer" is defined broadly as a director, manager, corporate secretary or other similar officer of the organisation. The senior officer must be British or ordinarily resident in the UK. Prosecution of a senior officer in this way is contingent on a prior successful prosecution of the company itself under Sections 1, 2 or 6.

WHAT ARE THE UKBA OFFENCES?

There are four general offences under the UKBA:

- Bribing another person (the "Section 1 Offence");
- Being bribed (the "Section 2 Offence");
- Bribing a foreign public official (the "Section 6 Offence"); and
- A commercial organisation failing to prevent bribery by associated persons ("the Section 7 Offence").

The Sections 1, 2 and 6 offences are capable of being committed by both individuals and corporate entities.

The Section 7 Offence, however, can only be committed by a corporate and may only be pursued where an act of bribery has been carried out by an "associated person" of the corporate under either Section 1 or 6. A person is an "associated person" if they perform services for or on behalf of the corporate. Depending on the facts, this may include (without limitation) employees, agents, consultants, intermediaries, joint venture partners, subsidiaries, sister companies or outsourced service providers. There is no requirement for there to be a written or formal contractual relationship between the corporate and the associated person.

Senior officers of companies can also be prosecuted personally for the Section 1, 2 or 6 offences where it can be shown that the company committed one of those offences with the officer's "consent or connivance".

WHAT TYPES OF PAYMENTS DOES THE UKBA PROHIBIT?

The UKBA prohibits payments or any type of advantage (including offers or promises of payments or an advantage) that are made:

- with the intention to induce another person (not necessarily the recipient) to “perform improperly” a “relevant function or activity”;
- to reward a person for such improper performance; or
- in the knowledge or belief that the acceptance of the payment or advantage itself would constitute improper performance of a relevant function or activity.

A “function or activity” in this context includes those of a public nature (i.e., as performed by an elected or appointed government official) as well as private sector and business functions and activities, and those performed in the course of a person’s employment and/or by or on behalf of a corporate or other type of body. However, the function or activity is only “relevant” (and thus within the scope of the UKBA) if the person performing it (a) is expected to perform it in good faith; (b) is expected to perform it impartially; and/or (c) is in a position of trust by virtue of performing it.

Improper performance means performance in breach of the expectation of good faith, impartiality and/or trust.

The UKBA also prohibits payments or any type of advantage (including offers or promises of payments or an advantage) that are made, directly or indirectly, to a foreign public official or to another person at the official’s request or with his/her assent or acquiescence, if this is done with the intention to obtain or retain business or an advantage in the conduct of business.

The UKBA does not prohibit reasonable and proportionate hospitality and promotional or similar business expenditure where there is a bona fide reason for that expenditure.

WHO IS A FOREIGN PUBLIC OFFICIAL?

A foreign public official means an individual who:

- holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the UK;
- exercises a public function for such country or territory, or for any public agency or public enterprise of the country or territory; or
- is an official or agent of a public international organisation (like the United Nations, World Bank, etc.).

IS THE UKBA A STRICT LIABILITY LAW?

Yes, insofar as corporates are concerned. The Section 7 Offence is a strict liability offence that is committed the moment that any “associated person” offers or pays a bribe in order to obtain or retain business, or an advantage in the conduct of business, for the corporate. However, a corporate will have a complete defence to the charge if it can demonstrate at trial (to a civil burden of proof) that it has “adequate procedures” designed to prevent associated persons from paying bribes on its behalf.

Section 9 of the UKBA required the secretary of state to publish guidance about procedures that corporates can put in place to prevent associated persons from bribing on their behalf (“the Guidance”).

The Ministry of Justice has emphasised that the Guidance is not meant to be prescriptive, nor is this a “one size fits all” regime. If a corporate seeks to rely on the defence, the onus will remain on it to prove that its policies and procedures were adequate to prevent bribery.

Companies should follow a risk-based approach: procedures should be proportionate to the size and scope of the company, and the actual bribery risks faced by that company (as identified by a suitable risk assessment exercise).

The Guidance is formulated around six “guiding principles”, which are intended to be flexible but that the government hopes should, if applied properly, always result in “robust and effective” anti-bribery procedures.

The Guidance also recognises that organisations may wish to seek an independent “health check” of their anti-bribery procedures and their likely effectiveness. While certification is available from various commercial and other providers, the Guidance states that certification will not guarantee that an organisation's procedures will automatically be deemed “adequate” for the purposes of the Section 7 Offence.

Companies should follow a risk-based approach: procedures should be proportionate to the size and scope of the company, and the actual bribery risks faced by that company (as identified by a suitable risk assessment exercise).

AM I RESPONSIBLE FOR BRIBERY BY THIRD PARTIES?

As noted above, a company or other organisation can be held strictly liable for bribery carried out by “associated persons” of the company or organisation.

COULD A PARENT COMPANY BE LIABLE FOR MISCONDUCT AT A SUBSIDIARY?

Yes, if on the relevant facts the subsidiary was an “associated person” of the parent company and the misconduct was intended to obtain or retain business, or an advantage in the conduct of business, for the parent company.

WHAT ABOUT SITUATIONS IN WHICH A COMPANY IS ONLY A MINORITY SHAREHOLDER?

The investee company may still be an “associated person” of the minority shareholder if, on the facts, the investee company is performing services for or on behalf of the minority shareholder.

DOES THE UKBA EXEMPT FACILITATION PAYMENTS?

No, payments that would qualify for the facilitation payments exception to the Foreign Corrupt Practices Act 1977 (“FCPA”) may well constitute bribes under the UKBA.

ARE THERE ANY EXCEPTIONS OR SAFE HARBOURS IN THE UKBA?

The only express exception is that – for the purposes of the Section 6 Offence – an offer, promise or gift to a foreign public official will not be a bribe if the written law applicable to the foreign public official permits or requires him/her to be influenced in his/her official capacity by the offer, promise or gift.

ARE THERE UKBA RISKS IN MERGERS AND ACQUISITIONS?

While the law and practice on this subject is not as developed in the UK as it is in the U.S., the legal concept of successor liability exists in English law. Companies engaging in mergers and acquisitions may well incur successor liability for misconduct carried out by the acquired entity before closing.

The first deferred prosecution agreement under the UKBA was entered into by a successor entity in relation to an offence committed by the target company prior to the sale of a controlling stake in it.

WHAT SANCTIONS COULD BE IMPOSED FOR UKBA VIOLATIONS?

Like with the FCPA, the penalties for violating the UKBA are severe.

Companies may incur an unlimited fine, confiscation and/or compensation orders, and mandatory debarment from public procurement projects across the European Union, along with reputational damage and civil damages claims.

Individuals may be imprisoned for up to 10 years and also incur an unlimited fine. There may be other knock-on consequences, such as disqualification from being a company director and/or (if they work in the financial services sector) an order prohibiting them from working in UK financial services.

REPORTING OBLIGATIONS

The UKBA does not require a company to report instances of bribery to the Serious Fraud Office (“SFO”) or Crown Prosecution Service (“CPS”). It is not, therefore, a criminal offence under the UKBA to fail to notify the SFO or CPS of the discovery of suspected corrupt practices.

However, the company (and/or third parties) may have legal obligations to report suspected bribery to the National Crime Agency (“NCA”) under the Proceeds of Crime Act 2002 and/or to the Financial Conduct Authority (“FCA”) under the Financial Services and Markets Act 2000. Intelligence gathered via such reports will almost certainly be shared with the SFO and/or CPS (and/or other authorities) in due course. For this reason, any company that has filed a report with the NCA and/or FCA (or believes that other parties have done so) should seriously consider making a proactive self-report to the SFO with the assistance of counsel.

ARE DEFERRED PROSECUTION AGREEMENTS AVAILABLE IN THE UK?

The Crime and Courts Act 2013, which received Royal Assent on 25 April 2013, introduced deferred prosecution agreements (“DPAs”) into the UK for the first time.

DPAs are formal written agreements between a company and a prosecutor in which the prosecutor agrees to defer prosecution of the wrongdoing company in exchange for payment of a fine and/or compliance with other conditions. They can be used by specified prosecutors for fraud, bribery and other economic crimes.

OFFICES

Abu Dhabi

Atlanta

Austin

Charlotte

Chicago

Dubai

Denver

Frankfurt

Geneva

Houston

London

Los Angeles

Moscow

New York

Paris

Riyadh

Sacramento

San Francisco

Silicon Valley

Singapore

Tokyo

Washington, D.C.

DPA's are intended to prevent the prosecution from incurring the full cost of prosecuting companies, and also to incentivise companies to actively self-report misconduct and cooperate fully with official investigations in exchange for an outcome that is more favourable than conviction after trial. DPA's in the UK are subject to significant judicial oversight, and the judge must be convinced that the terms are "fair, reasonable and proportionate" and that the DPA is "in the public interest."

WHERE CAN I GET MORE ADVICE?

Anti-corruption investigations can be extremely difficult to navigate, and their consequences can be devastating. King & Spalding's Global Anti-Corruption and FCPA practice has extensive experience on both sides of the table and a strong network of relationships in the global enforcement community. This gives us the perspective and credibility to counsel you on multiple fronts and across borders – and help reduce your risks when you do business overseas.

Our anti-corruption practice is one of the most experienced and extensive in the world, and includes former senior government officials from both U.S. and UK authorities.

With decades of experience across dozens of practitioners, our team successfully leads numerous simultaneous investigations around the world with the skill to recognise where investigative lines should be appropriately drawn. Most important, our credibility with the enforcement authorities allows them to be confident regarding our findings and representations when considering the particular circumstances of each of our clients.

CONTACTS

Aaron Stephens
+44 20 7551 2179
astephens@kslaw.com

Gareth Rees, QC
+44 20 7551 2176
gdrees@kslaw.com

Hayley Ichilcik
+44 20 7551 7509
hichilcik@kslaw.com

Joanna Harris
+44 20 7551 2142
joharris@kslaw.com

Margaret Nettesheim
+44 20 7551 7592
mnettesheim@kslaw.com