

The Complete Compliance and Ethics Manual 2023

The UK Bribery Act 2010

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Introduction

The United Kingdom's improved wide-ranging anti-bribery legislation, the Bribery Act 2010, ^[2] came into force on July 1, 2011. It is important to stress that the UK legislation is largely evolutionary rather than revolutionary. The Bribery Act 2010 was passed at a time of political change, as the outgoing Labour government sought to get the legislation through Parliament before the 2010 election. As a result, the then-government decided that, in addition to the legislation, the Ministry of Justice (MoJ) would produce detailed guidance to assist companies in their efforts to comply with the act. The MoJ's guidance^[3] stretches to 43 pages, with the joint prosecution guidance^[4] a further 12 pages. The UK's anti-bribery enforcement efforts have featured heavily in the news over the last few years, with the groundbreaking investigation into bribery at Airbus^[5], the joint investigation into Rolls-Royce^[6], and the long-running investigation into Unaoil^[7]. It has not all been plain sailing for the Serious Fraud Office (SFO), however. In February 2021, the UK Supreme Court limited the SFO's use of the so-called s.2 notice procedure (named after Section 2 of the Criminal Justice Act 1987) in a case involving the US corporation KBR.^[8] Despite this setback, enforcement of the Bribery Act 2010 remains a key priority in the UK—even after Brexit.^[9] Fines can be significant. For example, Airbus agreed to pay a €991 million fine in the UK in 2020, making it the largest bribery fine in UK history.^[10] In addition, Airbus agreed to pay France €2.1 billion and the US \$527 million.

What Does the Act Cover?

The UK Bribery Act 2010 is markedly different from the US Foreign Corrupt Practices Act^[11] (FCPA), which was formerly regarded by many as the high-water mark. The 2010 legislation replaced UK legislation stretching back to 1889. It has been called the toughest enforcement standard in the world, and the UK government has said "The Bribery Act reforms the criminal law to provide a new, modern and comprehensive scheme of bribery offences that will enable courts and prosecutors to respond more effectively to bribery at home or abroad."^[12]

It has a number of stringent features, including:

- Increased penalties of up to 10 years in jail and unlimited fines for individuals, companies, and partnerships (contrasted with five years maximum jail term under the main provision of the FCPA);
- The banning of bribes to both public and private officials;
- An offense of failure to prevent bribery that has made it easier for corporations to be prosecuted when bribery occurs;
- Reinforcement of the UK's ban on facilitation payments; and
- The criminalization of both the giving and acceptance of bribes.

The UK legislation applies to UK corporate entities (even if they are foreign owned), individuals who ordinarily reside in the UK, and non-UK nationals and entities, if an act or omission forming part of the offense takes place within the UK.

Perhaps the most significant way in which the act alters the international anti-corruption landscape is with the offense of failure to prevent bribery.^[13] This—at least in theory—should be an easier offense for prosecutors, although corporations may be able to fall back on an “adequate procedures” defense. We are seeing more failure to prevent offenses coming through the system.

Bribery Offenses

The Bribery Act 2010 includes four offenses:^[14]

- A general offense covering offering, promising, or giving a bribe (in Section 1 of the act).
- A general offense covering requesting, agreeing to receive, or accepting a bribe (Section 2).
- A distinct offense of bribing a foreign public official to obtain or retain business (Section 6).
- A new strict liability offense for commercial organizations where they fail to prevent bribery by those acting on their behalf (Section 7).

The Offense of Failure to Prevent Bribery

The offense of failure to prevent bribery has received the most attention by far, featuring for example in the Airbus deferred prosecution agreement (DPA). A company commits an offense if a person associated with it bribes another person for its benefit. Under the act, a person is “associated” with the company if they perform services for or on its behalf, regardless of the capacity in which the person does so. This could cover agents, employees, subsidiaries, intermediaries, joint venture partners, and suppliers. All of them could make the company guilty of the Section 7 offense.

This functions like a strict liability offense. It means that there is no need to prove negligence or the involvement and guilt of the “directing mind and will” of the company. This makes the offense easier to prove and, over time, will probably lead to more corporate prosecutions and convictions.

In one of the first cases under the failure to prevent bribery offense, *R v Skansen Interiors Ltd.* in 2018,^[15] Judge Deborah Taylor said, “[T]here is a public utility of the public good in prosecuting cases of this kind to send a message about the necessity for companies to introduce policies and monitor policies which then lead to the prevention of bribery and corruption.”^[16]

Adequate Procedures Defense

A company could have a defense to the Section 7 failure to prevent bribery offense if it can prove it had “adequate procedures” in place to prevent bribery. Adequate procedures are not defined in the Act, but both the MoJ guidance and the joint prosecution guidance give some indications of what adequate procedures might look like.

Criminal Penalties

The potential consequences of being convicted of a bribery offense include criminal penalties for both individuals and companies. As mentioned earlier, individuals can be jailed for up to 10 years. Fines for companies are likely to be substantial. No guidance has been given on the level of fines, but just prior to the Bribery Act 2010

coming into effect, a UK Crown Court judge—in a case against a company that had been found guilty of bribery—said that fines for corruption should be in the tens of millions of pounds or more. While the Airbus DPA is a little unusual in that it was the result of extensive negotiations with the company, and part of an agreed settlement simultaneously with the US and French authorities, it could be a sign of things to come in terms of likely levels of fines.

Senior officers (a term that is broadly defined and includes directors) can also be convicted of an offense where they are deemed to have given their consent or connivance to giving or receiving a bribe. Importantly, it is possible that omitting to do something might be regarded as consent or connivance and lead to prosecutions, fines, and/or imprisonment. A director convicted of a bribery offense is also likely to be disqualified from being a director for up to 15 years. In fact, in a December 2014 case involving Sustainable AgroEnergy plc (discussed later in this article), two directors, Gary Lloyd West and James Brunel Whale, were disqualified for 15 years, with fellow director Stuart John Stone receiving a 10-year ban.

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