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Bribery Act 2010 (UK): A Compliance Guide

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Bribery Act 2010 (UK): A Compliance Guide

Executive Summary

- The **Bribery Act 2010** applies to **all partnerships and incorporated organisations** (by whatever means), provided they are engaged in commercial activities, irrespective of the purpose for which profits are made.
- It is a **criminal offence** to **bribe** another person, **receive a bribe**, **bribe a foreign public official** or for commercial organisations **failing to prevent bribery**.
- NGOs should carefully consider acts undertaken by **all associated persons** and **implement adequate policies** and procedures to ensure compliance with the Bribery Act 2010.
- **Recommended policies** and procedures include risk assessment, implementation of procedures to reduce risk, communication (including training), due diligence, planned monitoring/ review and improvement.
- NGOs may not be able to prevent all bribes. **All instances of actual or potential bribery** should be met with **prompt detection, rejection** (note – on occasion this may not be possible due to risk of life or liberty), **investigation, external reporting** (where necessary) and **record keeping**.



Scope

This guide provides an overview of the main principles, processes and requirements under the UK Bribery Act 2010 (UKBA), and how to both prevent and deal with bribery from the perspective of NGOs.

Context and History

Previous anti-corruption legislation

Previous anti-corruption legislation was outdated and not compliant with the Organisation for Economic Co-operation and Development's recommendations for global change

The UKBA consolidated and modernised the law on bribery in the UK, effective from 1 July 2011

The UKBA is considered the toughest anti-corruption legislation in the world:

- wide in scope (in terms of potential geographical and sectoral remit);
- few defences; and
- stiff penalties

International enforcement activities in the investigation and prosecution of corruption are increasing

The provisions of the UKBA are not retrospective

Overview

Offences under the Bribery Act 2019

Receiving Royal Assent on 8 April 2010, which came into force on 1 July 2011, the Bribery Act 2010 (the "Act"), replaces previous legislation, creating four criminal offences in relation to bribery:

- 1. Section 1** – Offences of bribing another person
- 2. Section 2** – Offences relating to being bribed
- 3. Section 6** – Bribery of foreign public officials
- 4. Section 7** – Failure of commercial organisations to prevent bribery



For a number of reasons, the Bribery Act 2010 is being deemed an onerous piece of legislation, mostly due to its widespread application and the, albeit vague, requirements for commercial organisations to implement “adequate provisions” to prevent bribery. Carefully consider the following offences in more detail to clarify scope and guide policy and procedure implementation.

Extra-territorial application

Section 12 of the Act sets out the territorial application of the offences listed above.

In relation to (1), (2) and (3), an offence is committed if:

- (a) any act or omission, which forms part of the offence takes place in the United Kingdom, or
- (b) an act or omission by a person with a close connection to the United Kingdom, done or made outside of the United Kingdom would form part of an offence if done or made in the United Kingdom.

In relation to (4), an offence is committed irrespective of whether the acts or omissions which form part of the offence take place in the United Kingdom or elsewhere.

Close connection test

For the purposes of (b) above, a person is deemed to have a close connection with the United Kingdom if, the person was one of the following at the time the acts or omissions concerned were done or made:

- a British citizen
- a British overseas territories citizen
- a British National (Overseas)
- a British Overseas citizen
- a person who under the British Nationality Act 1981 was a British subject
- a British protected person within the meaning of that Act
- an individual ordinarily resident in the United Kingdom
- a body incorporated under the law of any part of the United Kingdom
- a Scottish partnership

Additionally, Paragraph 35 of the Ministry of Justice’s (MoJ) ‘The Bribery Act 2010 – Guidance’ states that, “*So long as the organisation in question is incorporated (by whatever means), or is a partnership, it does not matter if it pursues primarily charitable or education aims or purely public functions. It will be caught if it engages in commercial activities, irrespective of the purpose for which profits are made.*”



Overview of the offences

Four main offences under the UKBA

Section 1 – Offences of bribing another person

Section 2 – Offences relating to being bribed

Section 6 – Bribery of foreign public officials

Section 7 – Failure of commercial organisations to prevent bribery

Extra-territorial application

Sections 1, 2 & 6 apply to:

- Persons committing the **act in the UK**; **and**
- Persons committing the **act outside of the UK**, provided that:
 - i. it would be an **offence in the UK**; and (ii) the person committing the Act has a **'close connection'** with the UK

Section 7 applies to:

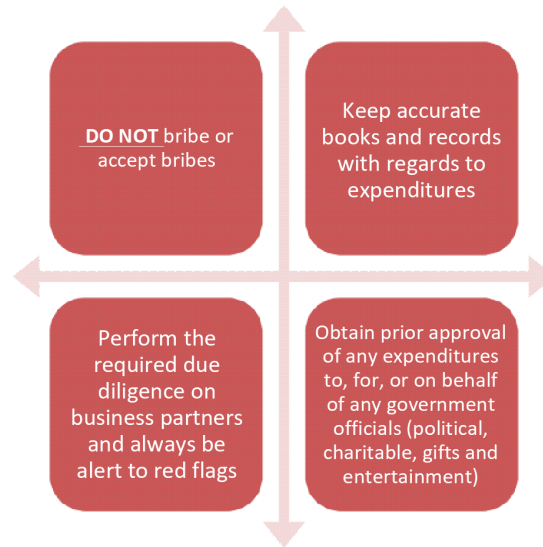
- Commercial organisations incorporated in the UK; or
- Commercial organisations carrying on a business or part of a business in the UK

A particular concern to international organisations with UK presence

- As you will discover, Section 7 holds organisations liable where the bribe is made by any **'associated'** person performing services for **or** on behalf of the organisation (this includes employees, subsidiaries, branches or other third parties in other jurisdictions).
- That person's **actions need not occur in the UK** and **need not have connection with the UK**.



Basic Principles



What is bribery?

The offering, promising, giving, accepting or soliciting of money, gifts or other advantage as an inducement to do something that is illegal or a breach of trust in the course of carrying out an organisation's activities.

Section 1: Offences of bribing another person

Section 1

Section 1 makes it an offence for a person ('P') to offer, promise or give financial or other advantage to another person in one of two cases:

Case 1

Applies where P intends the advantage to induce a person to perform improperly a relevant function or activity, or to reward a person for the improper performance of such a function or activity (whether the person to whom the advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the function or activity concerned)*

Example

Person A gives Person B tickets to the Wimbledon tennis tournament, so that Person B awards Person A a large contract.

Case 2

Applies where P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity*



Example

Person B knows that by accepting tickets to the Wimbledon tennis tournament, it will have to give something to Person A in return.

** It does not matter whether the advantage is offered, promised or given by P directly or through a third party*

Section 2

Section 2: Offences relating to being bribed

Section 2 makes it an offence for a person ('R') if any of the following cases apply:

Case 3: Bribes that intend 'improper performance'

Applies where R requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly (whether by R or another person).

Example

Person A accepts tickets to the Wimbledon tennis tournament from Person B, and in response, offers Person B a large contract.

Case 4: Bribes that constitute 'improper performance'

Applies where R requests, agrees to receive or accepts a financial or other advantage, and the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity.

Example

Person A requests tickets for the Wimbledon tennis tournament from Person B for Person B to be considered in contract tendering process.

Case 5: Bribes that reward 'improper performance'

Applies where R requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance (whether by R or another person) of a relevant function or activity.

Example

Person A accepts tickets to the Wimbledon tennis tournaments from Person B, as a reward for offering Person B a large contract.

Case 6: Bribes accepted in anticipation or in consequence of 'improper performance'

Applies where, in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly by R or by another person at R's request or with R's assent or acquiescence (it does not matter whether that person knows or believes that the performance of the function or activity is improper).



Example

Person A, in anticipation of receiving tickets to Wimbledon tennis tournament from Person B, offers Person B a large contract.

In any of the cases above, it does not matter whether R requests, agrees to receive or accepts (or is to request, agree to receive or accept) the advantage directly or through a third party, or whether the advantage is (or is to be) for the benefit of R or another person.

In cases 4–6 above, it does not matter whether R knows or believes that the performance of the function or activity is improper.

Key definition: *improper performance*

'Improper performance' is defined in Section 3, 4 and 5 of the Act

In summary, this means performance that amounts to a breach of an **expectation** that a person will act in good faith, impartially, or in accordance with a position of trust.

The offence applies to bribery relating to any:

- function of a public nature,
- connection with a business,
- performance in the course of a person's employment, or performance on behalf of a body of persons (whether corporate or unincorporated).

Therefore, covering both private and public sectors

Expectation test

'What a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned'.

Where the performance of the function or activity is not subject to UK law (for example, it takes place in a country outside UK jurisdiction), then any local custom or practice must be disregarded – unless permitted or required by the written law applicable to that particular country.

Section 6: Bribery of foreign public officials

Section 6

Section 6 introduces a standalone offence relating to the bribery of a foreign public official

Case 7

Applies where a person ('P') bribes a foreign public official ('F') if:

- P's intention is to influence F in F's capacity as a foreign public official, **AND**
- P intends to obtain or retain business or an advantage in the conduct of business, **AND**
- P directly or through a third party, offers, promises or gives any financial or other advantage to F or to another person at F's request or with F's assent or acquiescence, **AND**



- F is neither permitted nor required by the written law applicable to F to be influenced in F's capacity as a foreign public official by the offer, promise or gift.

Example

Person A offers Person B, a foreign public official, tickets to Wimbledon tennis tournament intending to receive a large contract which is being tendered from Person B's department.

'Foreign public officials'

- Holds a legislative, administrative or judicial position;
- Exercises a public function for or on behalf of a country or territory outside the United Kingdom;
- Exercises a public function for any public agency or public enterprise of that country or territory; or
- An official or agent of a public international organisation.

Examples

civil servants, professional judges and lay judges, public prosecutors, employees of a public authority (tax office, building authority, Ministry of energy, Immigration and Customs officials), employees of municipal utilities, and ministers, parliamentary state secretaries, data protection supervisors or notary publics.

Offences under sections 1, 2 and 6 by corporate bodies

Offences by corporate bodies

In considering the offences listed above, if the offence is proved to have been committed with consent or connivance of either:

- a senior officer of the body corporate, **OR**
- a person purporting to act in such a capacity,

the senior officer or person (as well as the body corporate) is guilty of the offence and liable to be proceeded against and punished accordingly.

Definitions

"**director**" - in relation to a body corporate whose affairs are managed by its members, means a member of the body corporate

"**senior officer**" - in relation to a body corporate, a director, manager, secretary or other similar officer of the body corporate



Section 7: Failure of commercial organisations to prevent bribery

Section 7

Section 7 introduces an obligation on commercial organisation to prevent bribery.

Case 8

A relevant commercial organisation ('C') is guilty of an offence under this section if a person ('A') associated with C bribes another person intending to either:

- Obtain or retain business for C, **OR**
- Obtain or retain an advantage in the conduct of business for C.

Example

Commercial Organisation C fails to have adequate procedures to prevent bribery, and as a consequence Person A, one of its UK Citizen employees, offers tickets to Wimbledon tennis tournament to Person B in exchange for a large contract in Kenya.

Defence?

It is a defence for C **IF** they can prove that they had in place '**adequate procedures** designed to prevent persons associated with C from undertaking such conduct'.

'Associated persons'

A person is 'associated' if they 'perform services' for **OR** on behalf of the commercial organisation, regardless of the capacity in which they perform services.*

**this person can be an individual or an incorporated or unincorporated body.*

Associated test

The question whether a person is performing services for an organisation is to be '*determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between A and C*'.

'Relevant commercial organisation'

- A body incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), **OR**
- Any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom, **OR**
- A partnership (within the Partnership Act 1890, or limited partnership registered under the Limited Partnerships Act 1907) which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), **OR**
- Any other partnership (whether formed) which carries on a business, or part of a business, in any part of the United Kingdom

* For the purposes of this section, a trade or profession is a business.



'Adequate procedures'

Adequate procedures

The UK MoJ has published official guidance on procedures that relevant commercial organisations can put into place to prevent persons associated with them from bribing (see <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>)

In consideration of what is deemed 'adequate', a Select Committee constituted by the House of Lords in 2018 approached this topic in the appropriately named subsection 'Adequate v reasonable'.

At paragraphs 196-211 of 'The Bribery Act 2010: Post-Legislative Scrutiny' the Committee considered the issue that in events where bribery has taken place within a commercial organisation, the occurrence of the bribery in itself could give rise to a claim that the policies were 'inadequate' to prevent bribery.

The Committee instead moved to amend the statutory Guidance to make clear that "adequate" does not mean, and is not intended to mean, anything more stringent than "reasonable in all the circumstances".

Implementation of anti-bribery policies and procedures

The MoJ guidance advises that all procedures implemented by commercial organisations wishing to prevent bribery should be informed by six principles:

- 1 Proportionate procedures**
"Adequate bribery prevention procedures ought to be proportionate to the bribery risks that the organisation faces."
- 2 Top-level commitment**
"Those at the top of an organisation are in the best position to foster a culture of integrity where bribery is unacceptable."
- 3 Risk assessment**
"To promote the adopting of risk assessment procedures that are proportionate to the organisation's size and structure and to the nature, scale and location of its activities."
- 4 Due diligence**
"A form of bribery risk assessment and a means of mitigating risk."



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Communication (including training)

“Communication and training deters bribery by associated persons by enhancing awareness and understanding of a commercial organisation’s commitment to their proper application.”

6

Monitoring and review

“Commercial organisations will therefore wish to consider how to monitor and evaluate the effectiveness of their bribery prevention procedures and adapt them where necessary.”

Assessment of your company: Procedures

In considering what is deemed ‘adequate’ for your given organisation, the following process should be undertaken to evaluate, implement and improve the policies and procedures required to ensure compliance with the Bribery Act 2010.

Stage 1: Initial assessment

Each NGO will need to assess the level; nature and complexity of the risk involved across the entire organisation and should be informed by an initial risk assessment. All subsequent prevention policies and procedures should be based off these findings.

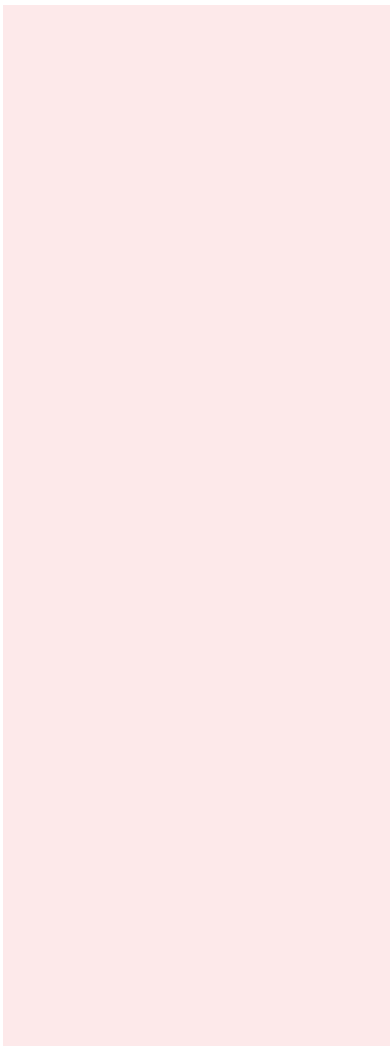
Common encountered risks

External risk factors

- **Geographical** – risks may be higher in certain countries or regions within countries. Activities in urban areas may pose different risks to activities in rural areas.
- **Cultural** – in certain cultures and work environments, bribes may be seen as “business as usual”.
- **Emergency relief** – the time pressure and security context may increase risk.
- **Sector** – the nature of the sector in which an NGO works may pose specific risks (eg. construction, healthcare, water, forestry).

Organisation risk factors

- **Existing policies and procedures** – risk that existing policies and procedures are not adequate or effective.
- **Legal/prosecution** – risks of non-compliance with UK and overseas legislation, and subsequent prosecution.
- **Reputation** – risk of reputational damage following a bribery scandal.



- **Partners** – many NGOs work through partners, who will also need to be assessed for the bribery risk they may bring.
- **Procurement** – increased risk where processes are not fair or transparent. Procurement is a high-risk area for bribery.
- **Transactions** – certain transactions may carry higher risk; for example, payments to government officials, major contracts and payments through third parties.
- **Recruitment** – bribes can be offered or sought as part of recruitment processes.
- **New activities** – there may be increased risk when organisations start new activities in which they have limited experience, such as humanitarian relief in a new country, or commercial operations.
- **Sponsorship/donations** – bribes may be offered through sponsorship of events or upon receipt of donations

Stage 2: Planning and initial implementation

With all potential risks identified, your organisation will need to plan possible actions and the implementation of anti-bribery policies and procedures. We have set out below specific risk for NGOs with their respective actions.

Bribery

Communication your approach - zero tolerance to payment or receiving of bribes
Examples of what constitutes a bribe
Actions when offered/asked for a bribe
Penalties – both internal/external

Communication your approach - zero tolerance of facilitation payments
Resisting demands guidance

Facilitation payments





Stage 3: Full implementation

To complete implementation, we recommend ensuring all staff are trained on the organisations anti-bribery policies and are aware of when and how to action the required procedures. Effective communication, training and understanding of when to carry out due diligence are vital.

Communication (and training)

Acting as a deterrent of bribery through enhancing awareness and understanding of the organisations procedures and their commitment to proper application.

Consider

- **Internal communications** – messaging and providing a platform for internal and external parties to raise concerns about bribery
- **External communications** – statement or code of conduct in relation to bribery prevention policies
- **Annual training** – establishing an anti-bribery culture through education and awareness of threats posed by bribery
- Education surrounding the use of **anti-bribery and anti-corruption clauses** in documentation

Due diligence

Acts as a mean to both assess and mitigate risk.

Consider

- Risks arising from the initial assessment and the **level of due diligence each risk requires**
- **Resourcing** – can be undertaken internally or by external consultants
- Potential **new business relations** – often difficult to extricate from a business relationship once established
- Incorporating due diligence **into recruitment and human resources procedures** – employees are considered ‘associated’ with the commercial organisation therefore mitigating the risks of bribery being undertaken by the workforce

Examples where/when to carry out due diligence

- New and existing partners
 - Relations with suppliers, contractors and other third parties
 - Procurement process
 - Accepting gifts, hospitality and charitable donations
 - Conflicts of interest
-



Stage 4: Evaluation and improvement

As commercial organisations change over time, so too may the nature and scale of the activities and the risks they pose in relation to bribery.

Consider

- Implementing a **regular review of the risks** faced by the organisations – you may wish to seek a form of external verification or assurance in relation to the effectiveness of anti-bribery procedures
- **Evaluating the effectiveness** of current bribery prevention procedures – including through staff questionnaires and feedback
- **Adapting current procedures** where necessary
- **External review mechanisms** to deter, detect and investigate bribery, as well as monitor the ethical quality of transactions

Dealing with bribery

Dealing with bribery

NGOs with a zero-tolerance approach may not be able to prevent all instances of bribery. Adopting a clear procedure for actual or potential occurrences enables a prompt and properly conducted response.

A) Detection and rejection

- NGOs should make clear their stance on rejecting demands for or offers of bribes
- **Duress**
 - In circumstances where payment might not be avoided (i.e. where health or security is seriously at risk)
 - NGOs should plan their operations and have security procedures in place to reduce these risks
- **Useful tool: RESIST: Resisting Extortion and Solicitation in International Transactions** – identifies scenarios and gives suggestions on how to respond (*Transparency International*)¹

B) Investigation

- NGOs may not be able to prevent all bribes. Any instances of actual or potential bribery should be met with a prompt and proper investigation
- **Investigation objectives**

¹ https://www.transparency.org/whatwedo/publication/resist_resisting_extortion_and_solicitation_in_international_transactions



- Confirmation of whether bribe has taken place, and identifying who was responsible
- Assessment of internal controls and procedures
- Identifying required improvements to procedures
- NGOs will also need to consider appropriate subsequent action, depending on the investigation findings. This may include disciplinary procedures and external reporting (see below)

C) External reporting

- NGOs should consider putting in place **policies and procedures for externally reporting** cases of bribery*
- Depending on the case in question this **could include**:
 - Reporting to the **police or other law enforcement agencies** (e.g. in the UK, the Serious Fraud Office has the primary responsibility for enforcement of the Bribery Act)
 - Reporting to a **senior official** or **director** of the external organisation
 - Reporting to an **appropriate government department**, in the country where the incident took place
 - Reporting to the **Charity Commission**, if considered a 'serious incident'
 - Reporting to **professional bodies** (e.g. accountancy bodies) or trade associations

**NGOs should assess the risks involved in reporting incidents on a case-by-case basis*

D) Record keeping

- NGOs should **keep a record of any bribes offered, made, solicited or received**, including attempted and actual bribes, frauds and similar losses and financial irregularities
- Record keeping **allows NGOs to understand the extent and nature of bribery** affecting their organisations - this can be used to inform risk management processes and helps to ensure control measures put in place are proportionate to the risk.

Penalties and sanctions

Penalties and sanctions

Under the Bribery Act 2010, both individuals and companies are liable to penalties. For NGOs, being found guilty of an offence can not only lead to unlimited fines, but also serious implications from reputation damages.



Individuals

Under section 1, 2 or 6

On **summary** conviction, individuals are liable to:

- imprisonment up to 12 months,
- and unlimited fine, **OR**
- both

Conviction on **indictment**, individuals are liable to:

- imprisonment up to 10 years,
- an unlimited fine, **OR**
- both



Companies

Under section 1, 2 or 6

On **summary** conviction, are liable to:

- an unlimited fine

Conviction on **indictment**, liable to:

- an unlimited fine

Under section 7

Conviction on **indictment**, liable to:

- an unlimited fine

Reputation damage

Beyond the possible penalties list above, any NGO linked to bribery in any way can be **extremely damaging to its reputation** and **undermine the trust and support** of beneficiaries, partners, the wide public and donors.

Additionally, an NGO convicted of a bribery offence is likely to be **debarred from participation in future public contracts**.



If you would like more information about the subjects covered in this document or if your organisation is interested in receiving free legal advice by becoming a development partner of A4ID please contact probono@a4id.org.

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