

# The UK Bribery Act 2010

*ECBA CONFERENCE BUDAPEST*

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# The UK Bribery Act 2010 - update

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- The UK Bribery Act 2010 will come into force 1 July 2011
- Guidance on what procedures ('adequate procedures') commercial organisations can put in place to prevent persons associated with them from committing an offence under s. 7 was published on 30 March.
- The Guidance can be located at: <http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf>
- Therefore, commercial organisations **must ensure** they have adequate procedures in place before the 1 July 2011

# Bribery Act (UK) vs FCPA (US)

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- Wider than the US Foreign Corrupt Practices Act
- The Bribery Act covers UK and overseas trading
- The Bribery Act covers all trading with all entities/individuals – not just public officials
- Facilitation payments are not permitted
- No carve out for reasonable and bona fide expenditure under the Bribery Act

# Territorial Application and Penalties

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- For individuals the UK courts will have jurisdiction if offence of active or passive bribery or bribing a foreign official (s. 1, 2 or 6) applies if any act or omission takes place in the UK
- If no act or omission occurs in the UK then such conduct is treated as taking place in the UK is that person has a close connection \* with the UK
- For commercial organisations it is fundamental to note that the close connection test does not apply. The test for jurisdiction is whether it is incorporated in the UK or carries on a business or part of a business in the UK
- If a company does business in the UK then an offence of failure to prevent bribery (s.7) can take place irrespective of whether the conduct occurred in the UK or elsewhere
- Up to 10 years imprisonment and unlimited fine

# The offences

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- General Bribery Offences
- Section 1 “Active” bribery
- Section 2 “Passive” bribery
- Section 6 Bribing a foreign public official
- Section 7 Commercial organisation failing to prevent active bribery by employees, agents or subsidiaries

# Issues with the Guidance

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- The guidance has no legal force
- Discretion to prosecute remains with the prosecuting authorities
- Relies upon phrases such as 'Common Sense', 'Reasonable', and 'Proportionate'.
- Hospitality
- Facilitation Payments
- Differences with the FCPA
- Jurisdiction - no level playing field

# s. 1 “Active” bribery

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A person is guilty of an offence if he:

1. Offers, promises or gives a financial or other advantage
2. Directly or indirectly (i.e. through a third party)
3. With the **intent to induce** a person to perform improperly a relevant function or activity or
4. With the **intent to reward** a person for the improper performance of a relevant function or activity

## s.2 “Passive” bribery

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A person is guilty of an offence if

1. He requests, accepts or agrees to receive a financial or other advantage with the intention that **a relevant function will be improperly performed**;
2. The request, agreement or acceptance of that financial or other advantage **constitutes improper performance** of a relevant function;
3. He requests, accepts or agrees to receive a financial or other advantage as a **reward for the improper performance** of a relevant function;
4. He **improperly performs a relevant function in anticipation of or as a consequence of** requesting, agreeing to receive or accepting an advantage

Note that the “relevant function” may be performed by another person



# s.6 Bribing a Foreign Public Official

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A person is guilty of an offence if he:

1. Offers, promises or gives a financial or other advantage
2. To a Foreign Public Official
3. With the intention of influencing the official in the performance of his official functions
4. With the intention of obtaining or retaining business, or an advantage in the conduct of business

# s.6 Bribing a Foreign Public Official

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A Foreign Public Official for the purpose of the Act is any person who:

- holds a **legislative, administrative or judicial position** of any kind, whether elected or appointed of a country outside the UK; and/or
- **exercises a public function** for a country, public agency or enterprise outside the UK or is an Official of a public international organisation
- Active not passive bribery
- No exceptions for **facilitation payments**
- Prosecutors must show that advantage given to the Foreign Public Official is not permitted or required to be written local law
- Belief that local law permits the payment is no defence to s.6

# s.7 Failure to Prevent Bribery

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A Relevant Commercial Organisation is guilty of an offence under this section if a person associated with it:

- **Bribes** another person with
- The **intention of obtaining or retaining business**; or
- The **intention of obtaining or retaining an advantage** in the conduct of business

BUT

- It is a defence for the RCO to **prove** that it had in place **adequate procedures designed to prevent** person associated with it from undertaking such an offence

# Associated Person

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- An associated person is one who carries out or performs services for or on behalf of the RCO
- The capacity in which the person carries out the services does not matter (i.e. they may be employee, agent or subsidiary)
- Performance of services is determined by all the relevant circumstances not merely by reference to the nature of the relationship
- An employee is assumed to be an associated person

# Relevant Commercial Organisation

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- A body which is incorporated under the law of any part of the UK and which carries on a business whether in the UK or elsewhere
- Any other body corporate (**wherever incorporated**) which **carries on a business or part of a business** in any part of the UK
- A partnership which is formed under the law of any part of the UK and which carries on a business whether in the UK or elsewhere
- Any other partnership (**wherever formed**) which **carries on a business or part of a business** in any part of the UK]

# Adequate Procedures Principles (1)

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- The Guidance sets out six principles that should inform the procedures put in place by commercial organisations.
  - The principles are not intended to be prescriptive and bribery prevention procedures should be proportionate to the risk faced.
1. **Proportionate procedures:** procedures should be proportionate to the bribery risk it faces and to the nature, scale and complexity of Intel's activities.
  2. **Top Level Commitment:** establishing a culture across the organisation in which bribery is unacceptable
  3. **Risk assessment:** periodically assessing the nature and extend of commercial organisation's external and internal risks of bribery on its behalf by persons associated with it.

## Adequate Procedures Principles (2)

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4. **Due diligence:** knowing who you do business with, know why, when and to whom you are releasing funds and seeking reciprocal anti-bribery agreements and confident of transparency
4. **Communication (including training):** ensuring that Intel's bribery prevention policies and procedures are embedded and understood throughout the company through internal and external communications, including training
6. **Monitoring & Reviewing:** ensuring all procedures designed to prevent bribery by persons associated with it are monitored and reviewed and improvements are made where necessary.

The Transparency International Checklist provides very useful guidance on this issue

# Adequate Procedures Defence Practical Steps

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- A **senior officer** responsible for compliance

## Policy/Documentation to be considered

- Code of conduct
- Reporting and investigating procedure
- Remuneration policy
- Whistle blowing policy
- Gifts and Hospitality Policy (i.e. dealing with government or public officials)

## Audit and Review

- Due diligence procedure before entering in to any new business relationship or project
- Vetting of employees and contractual obligations (current and new)
- Supply chain management
- Formalised decision making and escalation process
- Financial Controls (i.e. ability of employees to take out cash)
- Payment to 3<sup>rd</sup> parties

Training and implementation is key - paper compliance is **not** sufficient



# Potential Red Flags

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- Country risks
- Transaction risks
- Partnership risks
- Abnormal payments (size, timing, frequency)
- Abnormal time-scales
- Lavish gifts/hospitality
- Missing/incomplete documentation (including minutes of meetings)
- Deviation from bank policy
- Secrecy/abnormal degree of individual control or involvement
- Exceptional travel and expenditure payments

